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FALL v. STATE BAR OF CALIFORNIA.

L. A. 18882.

Supreme Court of California.

Nov. 6, 1944.

Rehearing Denied Dec. 4, 1944.

1. Attorney and client ⚿57

In disciplinary proceeding against attorney, fact findings of local administrative committee or board of governors of state bar are not binding on Supreme Court, which passes on sufficiency of evidence in reviewing such board's recommendation of attorney's suspension or disbarment.

2. Attorney and client ⚿38

An attorney's commission of any act involving moral turpitude, dishonesty or corruption, whether in course of his relations as attorney or otherwise, constitutes cause for his disbarment or suspension, whether such act is felony or misdemeanor or not. St.1939, p. 357, § 6106.

3. Attorney and client ⚿38

"Moral turpitude", for which attorney may be disbarred or suspended, is, broadly defined, conduct which is contrary to justice, honesty and good morals. St.1939, p. 357, § 6106.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

4. Attorney and client ⚿58

An attorney, endeavoring to sell note and trust deed, assigned to him by executrix, whom he represented in closing estate to which such instruments belonged without notice to her, after she charged him with wrongdoing in obtaining assignment and demanded accounting and failing to make full disclosure concerning note's probable value and pending escrow when executrix' substituted attorney demanded explanation, was suspended from practice of law for one year. St.1939, pp. 355, 357, 359, §§ 6068(a, b, d), 6103, 6106, 6128.

CARTER and SCHAUER, JJ., dissenting.

In Bank.

Proceeding by David A. Fall to review a recommendation of his disbarment from the practice of law by the Board of Governors of the State Bar.

Order suspending petitioner from the practice of law for one year.

Philbrick McCoy of Los Angeles, George K. Ford, of San Francisco, and Robert E. Ford, of Hollywood, for petitioner.

Robert E. Jenson, of San Diego, for respondent.

PER CURIAM.

By writ of review, the petitioner has challenged a recommendation of disbarment made by the Board of Governors of The State Bar after the adoption, with certain modifications, of the findings of fact of a local administrative committee. The petitioner contends that the findings, as amended, are not sustained by the evidence and that they do not support the conclusion of professional misconduct justifying discipline.

The petitioner, admitted to practice in 1928, maintains offices at San Pedro. The charges of The State Bar are based upon acts assertedly done by him as attorney for the executrix of an estate being administered in San Diego County, and which it is alleged, constitute a violation of rule IV of the Rules of Professional Conduct of The State Bar and sections 6068(a), 6068(d), 6103, 6106 and 6128 of the Business and Professions Code, St.1939, pp. 355, 357, 359. The notice to show cause declares that Fall misled his client with respect to the amount of the fee he would charge to represent her in matters of financing and closing the estate, and also that by false representations he obtained an asset of the estate in settlement of his fee. By this means, it is said, Fall acquired an interest in property of the estate adverse to his client. A further accusation against him is that he knowingly misled a judge of the probate court by a false statement of fact. An amended order to show cause states, as an additional ground for discipline, that petitioner gave false testimony in this proceeding.

The original notice to show cause was issued in December, 1941, and hearings before a local administrative committee were commenced early in 1942. But because of injuries sustained by Fall, the proceeding was not concluded until April, 1943. The committee made extensive findings of fact, responsive to practically all of the charges. It concluded, in addition, that petitioner had been guilty of a violation of section 6068(b) of the Business and Professions Code in failing "to maintain the respect due to the courts of justice and judicial officers." Also, said the committee, he had displayed and evidenced a desire to enrich himself at the expense of his client and a disregard for his oath in the facility with which he testified as he thought would best suit his ends. It was also stated that Fall did not recognize any of his acts as unlawful or unethical. As discipline the committee recommended disbarment. The Board of Governors adopted in part the findings of the committee, and after amending them in twenty-three particulars favorable to the petitioner, also recommended disbarment.

The complaining witness against Fall is Laurel Busch Haweis. He is the third attorney who was employed by Mrs. Haweis as the executrix of the estate of her deceased husband. At the time she asked him to undertake the settlement of the estate, two other attorneys had successively failed to satisfy her. Because of asserted refusal to carry out the provisions of the will, a daughter of Mr. Haweis had petitioned the court to remove Mrs. Haweis as executrix and that matter was then pending.

According to the testimony of Mrs. Haweis, Fall told her that he could complete the administration of the estate within two or three months and that his fee would be $200 or $250. Fall insists that the question of fees arose when he told Mrs. Haweis that money would have to be raised to close the estate. At that time, Fall told the committee, he said his fees would be fixed by the court and that he could not then estimate the sum to which he would be entitled because of uncertainty as to the amount of work necessary to close the estate.

Upon this contradictory evidence the committee found that Fall had agreed to negotiate a loan and complete the administration of the estate for $250. But the Board of Governors struck out that finding, and as the record now stands, it shows only that Fall was retained by Mrs. Haweis to represent her as executrix. Presumably, the Board of Governors believed Fall's testimony that he made no agreement as to fees and accepted employment upon the understanding that his compensation would be fixed by the court.

The charge that Fall acquired an interest in property which was adverse to that of his client concerns a note and deed of trust which were assets of the estate. The note was made in 1932 by Samuel A. Shibley and wife for the principal sum of $4,000 with interest at the rate of 8 per cent per annum. At the time of Fall's employment by Mrs. Haweis, the total amount of principal and interest due and unpaid upon the note was approximately $7,000. Although the note was originally appraised as being worth the amount of principal and accrued interest, unquestionably its real value was quite problematical, for the Shibleys were claiming the benefit of the statute of limitations and also asserted that the note had been cancelled by Mr. Haweis. Moreover, the value of the land securing the note had depreciated to the extent that it was very doubtful whether any substantial amount could have been realized upon a trustee's sale. At one time Mrs. Haweis did not intend to make any attempt to enforce the obligation, for the record shows an admission by her that, shortly after her husband's death, she had so advised the debtors.

But within a short time after Fall became the attorney for Mrs. Haweis, she endorsed the note and assigned the deed of trust to him. According to his testimony, these transfers were made to carry out an agreement, reluctantly made by him after much persuasion by Mrs. Haweis, to accept the obligation in payment of his services. The testimony of Mrs. Haweis is directly to the contrary. She declared that when Fall offered to take the note as his attorney's fee, stating that it was worth "but a couple of hundred dollars," she told him it "would remain as part of the estate." The findings of the committee follow the testimony of Mrs. Haweis and include the statement that Fall represented the value of the note as being not to exceed $200, well knowing that at the time the makers were willing to settle "for the sum of $2,500." The value adopted by the committee is based upon the somewhat uncertain testimony of George Shibley, an attorney and son of the debtors, in which he told of negotiations with Fall for a settlement of the matter. Very evidently this testimony did not satisfy the Board of Governors for it modified the findings, substituting for "the sum of $2,-500," the phrase, "a substantial amount."

In her testimony, Mrs. Haweis not only charged Fall with misrepresenting the value of the note but also with securing her endorsement of it by representations that it was necessary for her to do so in order to commence foreclosure proceedings. She also testified that certain words of assignment were not on the instrument at the time she endorsed it. Although Fall at one time declared that no writing had been placed upon the back of the note after Mrs. Haweis wrote her name upon it, he afterwards admitted that he had written the words above the name of Mrs. Haweis on the day after she had signed the note, and also added an acceptance of the assignment by him.

The committee found that Fall had secured the endorsement of Mrs. Haweis upon the representation that "it was necessary that this assignment be made in order to have the trust deed foreclosed"; that at the time there was no writing by petitioner either above or below her signature, but that later, petitioner wrote in the language of assignment and an acceptance of it which he signed. The Board of Governors struck out the statement concerning the representations as to the purpose of the assignment, leaving no express finding as to whether the note had been transferred to Fall in payment of his fee. The committee also found that at the time petitioner wrote in the language above and below the signature of Mrs. Haweis, he knew that the note "was worth far in excess of the fee of $250.00 he had agreed to take as his fee to close the said estate, and knew * * * that he had an offer from the makers * * * to settle the same for a sum of $2500.00." As modified by the Board of Governors, this finding states that petitioner knew at the time he wrote in the language above and below the signature of Mrs. Haweis that the note was worth "far in excess of $200.00" and knew that the makers of the note "had indicated a willingness to settle the same for a sum substantially in excess of $250.00."

After Fall had obtained the assignment of the note and deed of trust, he continued negotiations with Shibley for the purpose of obtaining a settlement of the indebtedness. Whether Fall then disclosed to Shibley that the obligation had been transferred to him is uncertain. But a month after Mrs. Haweis had made the assignments, Fall requested the trustee under the deed of trust to execute and record a notice of default, describing the instrument as being an asset of the Haweis estate. He also prepared and mailed to the debtors a proposed agreement providing that $4,500 should be paid in full settlement of the matter.

Another month passed and Fall then filed in the probate court a reappraisement of the note and deed of trust showing the instruments, valued at $2,800, to be owned by the estate. Soon afterward he was advised by Shibley that the debtors had received an offer to sell the property secured by the deed of trust to one Foulks, and that an escrow had been opened to consummate the transaction. But, Shibley added, the estate would have to be closed in order to pass title to the property. Fall then agreed to obtain a reconveyance of the land by the trustee for which he demanded $4,000 less expenses. He admitted to the committee that he did not tell Mrs. Haweis "anything regarding having finally effected a deal with the Shibleys."

Fall then filed a petition for distribution in which the Shibley note was listed as property of the estate. There was no reference to the assignments made by the executrix and attorney's fees were not mentioned. At the time the petition came on for hearing, the negotiations with the Shibleys were still in progress.

Fall testified that when the matter was called, to his complete surprise, B. Kenneth Goodman, an attorney, stated to the court that he represented the executrix and objected to a distribution of the estate upon the ground that no provision had been made for attorney's fees. It appears that Mrs. Haweis had consulted Goodman without Fall's knowledge. According to Fall, he told the court that his fees had been settled, and the petition was thereupon granted.

Fall left the courtroom and in the hallway met Mrs. Haweis. She and Fall and

Goodman then had a conversation. The testimony of Goodman is that he said, "Mrs. Haweis tells me she did not assign that trust deed and note," to which petitioner replied, "She did, I believe I have them here." Goodman asked for copies and petitioner replied, "First of all I don't see why you should have them but I will send you copies of them."

In its finding with respect to these occurrences, the committee found that Fall's representations to the probate court were not true in that it was not a fact that his fees had been satisfactorily taken care of, but, as petitioner knew, he had agreed in accepting the employment to close the estate for $250 and Mrs. Haweis had not agreed to give him the Shibley note. The Board of Governors struck out this finding and it appears to be without substantial evidentiary support.

The testimony of Goodman is that at the time of the hearing upon the petition for distribution, Fall stated that the note was not worth more than $400 or $500 and that it would take one or more years to work out a settlement with the makers. But on the following day, said Goodman, he talked with Fall and requested a full explanation as to the escrow. Fall then told him of its condition, stating that he expected to receive $3,200. Goodman thereupon demanded that these facts be disclosed to the court. He also told Fall that he had advised Mrs. Haweis that there was no necessity for a substitution of attorneys in the estate, the administration having been completed except for the matter of fees.

Upon the insistence of Goodman, Fall filed a petition to have his fees determined and the assignment to him of the note and of the trust deed approved by the probate court. When the matter was heard the court made an order allowing petitioner an ordinary fee of $957.96, extraordinary fees of $1,100, $25 for toll charges advanced, and $521.78 for taxes paid, a total of $2,604.74. A confirmation of the assignment of the Shibley note was denied, but petitioner was given a lien upon it for the moneys due him. On the same day Fall wrote Goodman, Mrs. Haweis, and the court, requesting that a substitution of attorneys be filed and that an order be made staying distribution until the amount due him had been paid. In response to this request the court made an order staying distribution.

Meanwhile, Fall and Goodman had further conversations but they do not agree as to what was said by them. According to Fall, he delivered the files of the Haweis estate to Goodman and asked him if he would advise Mrs. Haweis to go through with the Shibley-Foulks deal. Goodman refused to do so and Fall explained that he saw no other way of getting his fee. Goodman said that he would try to arrange for payment in installments from rental of the Beacon Inn, but that was not satisfactory to Fall.

In relating his version of what occurred, Goodman admitted that he told Fall there was no possibility of raising money for the fee from any source other than the pending sale, but claimed that Fall threatened to cite Mrs. Haweis for contempt. He also testified that Fall told him and, in fact, made the statement in the presence of the court, that the sale had fallen through; that Goodman's "meddling had thrown a monkey wrench in the deal, that it had fallen through and the purchasers had backed out." Goodman asked for their names so that he might see if the transaction could be concluded but Fall refused to give him any information concerning the buyers.

Unquestionably Fall represented to Goodman that the Shibley-Foulks escrow could not be closed but the asserted falsity of the statement is not satisfactorily shown by the record. On the contrary, there is substantial evidence which would justify Fall's assertion. Apparently for some time Shibley was quite uncertain as to whether the sale could be concluded and he testified that "We had quite a good deal of confusion and argument over his [Fall's] apparent failure to fulfill his part of the agreement under the escrow." He stated that Foulks "had been very apprehensive of the deal going through"; that the agent "told me and my mother that the Foulks were pulling out of the deal," and that Fall was so advised.

With the escrow still pending Fall decided to have a writ of execution issued upon the order allowing and fixing his fees. He claims that in doing this he acted upon the advice of the then presiding judge of the superior court. Whether a writ of execution may properly issue upon an order in probate fixing counsel fees appears to be an unsettled question. See Zogaren v. Hall, 122 Cal.App. 460, 10 P.2d 202. In any event, Fall procured such a writ and directed the Sheriff of Los Angeles County to levy upon the note and deed of trust, which were then in his possession, and to sell "all right, title and interest" of the Haweis estate. The sale was set for Monday, February 3d. Fall did not personally notify either Mrs. Haweis or Goodman of his actions; neither did he give the clerk in the sheriff's office the address of Mrs. Haweis. He stated it did not enter his mind to do so, and she did not request it. The clerk, however, testified to the contrary. She said that she asked for the address of the executrix, so she might send notice of sale, and Fall told her that he did not have it with him, but would look it up and notify her of it.

Upon hearing this testimony Fall stated that it refreshed his memory and then said his reason for not giving the address of Mrs. Haweis was because he thought he would receive a substitution of attorneys from Goodman by mail. But, it will be recalled, Goodman testified that he had told Fall of his advice to Mrs. Haweis against such a substitution.

On January 28th the sheriff's office mailed a notice of sale in an envelope addressed to "Laurel Busch Haweis, Executrix, Estate of Emil J. Haweis, decd., C/O Clerk of Superior Court, San Diego, California." The clerk handling the writ told Fall that she was going to do this, and he agreed with her assumption that it was a sufficient address, saying, "It undoubtedly will reach her because by the time that gets down there the substitution of attorneys will be filed and the letter will be sent over to Mr. Goodman's office."

But no substitution of attorneys was filed, and the letter was forwarded to Fall's office. It arrived on Friday, January 31st, and the sale was set for the following Monday. Fall was in Los Angeles and found the letter when he returned to his office on Saturday morning. He readdressed it to Mrs. Haweis at "Beacon Inn, Cardiff by the Sea, Solano Beach, California" and mailed it about 1 o'clock in the afternoon of February 1st. Fall testified that he sent the notice to Mrs. Haweis at Solano Beach rather than to Goodman because he "knew there had been a mail delivery at Solano Beach on Sunday, that is the mail would arrive there and they posted the mail in the boxes on Sunday; that Mrs. Haweis had a habit of going to the post office on Sundays. I figured she would receive it on Sunday. Whereas, if it was sent to Mr. Goodman he couldn't possibly receive it until Monday."

The sale was held on Monday, February 3d, at the sheriff's office in Long Beach. Fall made no effort to reach Mrs. Haweis by telephone and ascertain whether she had received the notice. He explained that he was under no obligation to her; he had ceased on January 27th to be her attorney when Goodman announced in open court that he represented Mrs. Haweis, as executrix; also, said Fall, his interest was adverse to that of Mrs. Haweis for she had said that she would see him "in hell" before she would pay him any of the money awarded by the court.

There was no bidder at the sale other than an agent of Fall who bought the note and deed of trust for $750. At about the same time that this was taking place, Mrs. Haweis received the notice which Fall had forwarded to her. She took it to Goodman who secured an order requiring petitioner to show cause why the writ of execution should not be recalled and the sale set aside. Fall filed an opposition wherein he averred that the offer to purchase the property was withdrawn because of the refusal of Mrs. Haweis and her attorney to co-operate; that be had paid obligations of the estate which made it necessary for him to realize immediately upon the order for the payment of his fees and advancements. The failure of Mrs. Haweis to receive timely notice of sale, he alleged, was due to Goodman's neglect to file the substitution of attorneys.

Upon a hearing, Fall was ordered to deliver the note and trust deed to Mrs. Haweis; upon compliance with the order a charge of contempt would be dismissed. The court also recalled the execution and declared the sale thereunder to be void. Some months later the controversy was settled by an agreement under which Fall received approximately $2,700 from the escrow and Mrs. Haweis was paid $900.

The findings of fact made by the committee, as approved and adopted by the board, after numerous amendments, declare that Fall's statement concerning the note he had taken for his fee being worth not more than $400 or $500 was made at a time when he knew that Foulks had agreed to buy the Shibley property for the sum of $5,750. Fall also knew that an escrow was then pending for the purpose of concluding the sale, and in this escrow he had filed a demand for $4,000. But some days later, Fall told Goodman that he was to receive $3,200 from the escrow as his fees. Fall permitted the notice of the execution sale to be addressed to the County Clerk at San Diego for the purpose of concealing from Mrs. Haweis the fact that the sale was to be held and in order to secure an advantage over her and the estate. And when the bid was made, Fall well knew that the note was worth in excess of $3,500.

Upon these findings, the committee concluded that the petitioner had violated rule IV of the Rules of Professional Conduct, and the provisions of sections 6068 (a), 6068(b), 6068(d), 6103, and 6106 of the Business and Professions Code. In connection with its recommendation of disbarment, the committee declared that Fall "even now does not recognize any of his acts herein found to have been committed by him to be unlawful and unethical and that throughout his dealings with his client, he displayed and evidenced a desire on his part to enrich himself at the expense of his client and throughout his dealings, evidenced a scheme to possess himself of the property of the estate of the said Emil J. Haweis, to his own enrichment and further displayed to this committee a disregard for his oath in the facility with which he testified as he thought would best suit his ends, * * *."

[1] In a disciplinary proceeding the findings of fact made by a local administrative committee or by the Board of Governors are not binding upon this court, which upon reviewing the recommendation for suspension or disbarment may, and always does, pass upon the sufficiency of the evidence. Light v. State Bar, 14 Cal. 2d 328, 94 P.2d 35; Furman v. State Bar, 12 Cal.2d 212, 83 P.2d 12. But assuming that the evidence requires findings that Fall made no misrepresentations to Mrs. Haweis either as to the value of the Shibley note or the purpose of assigning it to him, the record conclusively shows that when his client charged him with wrongdoing and demanded an accounting, without notice and in violation of the plainest principles of fair dealing, he endeavored to conclude a sale of the property which he had acquired from her. The evidence concerning the conduct of Mrs. Haweis reflects no credit upon her. Unquestionably she was a difficult and unappreciative client who had no scruples against obtaining legal services without paying an adequate amount for them.

[2-4] However, after the court made its order withholding the confirmation of the assignments but giving Fall a lien upon the note for the amount of his fees and advancements, he had no right to deal with the instrument without regard to the interests of the estate, nor to deprive Mrs. Haweis of the opportunity of protecting that interest. In fairness to the estate and in submission to the order of the probate court, he was duty bound to collect upon the note only the amount of his lien.

Also, when Goodman, on behalf of Mrs. Haweis, demanded an explanation of his acts, concerning the Shibley note, Fall should have made a full disclosure concerning its probable value and the facts concerning the pending escrow. Having undertaken to justify his actions in connection with the property he had obtained from the estate, he was bound to give truthful information. Moreover, passing the question as to whether Fall was entitled to execution upon the order fixing the amount due to him as fees and advancements, having obtained the writ and levied upon the note, although he was not required to give Mrs. Haweis notice of the execution sale, his actions in concealing her address from the sheriff when it was requested by that officer evidences a total disregard of her rights and an intention to circumvent her by fair means or foul. Mailing a notice to her on a date so late that it was doubtful whether she would receive it, much less have time to act upon it for the protection of her interests prior to the sale, was contrary to the plainest principles of honesty and fair dealing. If the execution sale had not been set aside. Fall would have received about $900 more than the amount which the court had determined was due to him, and the order quashing the execution and setting aside the sale brands his actions as inequitable and unjustified.

"The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or a misdemeanor or not, constitutes a cause for disbarment or suspension." Bus. & Prof. Code, § 6106. Moral turpitude, broadly defined, is conduct which is contrary to justice, honesty and good morals. Bryant v. State Bar, 21 Cal.2d 285, 131 P.2d 523;

Stanford v. State Bar, 15 Cal.2d 721, 104 P.2d 635; In re Hatch, 10 Cal.2d 147, 73 P.2d 885. One ground of defense urged by Fall is that he ceased to be the attorney for Mrs. Haweis when, at the time of the hearing upon the petition for distribution, Goodman appeared for her and objected to the making of a decree in the form proposed. But an attorney may be disciplined for conduct which involves moral turpitude committed outside of the professional relation, and Fall's actions clearly come within that category.

It is therefore ordered that David A. Fall be suspended from the practice of law for the period of one year, commencing thirty days after the date of the filing of this opinion.

CARTER, Justice.

I dissent. In my opinion the petitioner is "a man more sinn'd against than sinning," and if "moral turpitude" consists of something "contrary to justice," the majority decision of this court in this case is a literal exemplification of that definition.

The majority opinion apparently concedes that petitioner's dealings with Mrs. Haweis up to the time of her employment of Goodman as her attorney were entirely proper and that he made no misrepresentations to her in regard to the Shibley note and trust deed. The testimony of Mrs. Haweis that petitioner agreed to handle the financing problems and close up the estate for a fee of $200 or $250 is apparently disbelieved, as is her testimony with reference to representations which she claimed he made to her in regard to the trust deed and note.

The majority opinion states: "But assuming that the evidence requires findings that Fall made no misrepresentations to Mrs. Haweis either as to the value of the Shibley note or the purpose of assigning it to him, the record conclusively shows that when his client charged him with wrongdoing and demanded an accounting, without notice and in violation of the plainest principles of fair dealing, he endeavored to conclude a sale of the property which he had acquired from her. The evidence concerning the conduct of Mrs. Haweis reflects no credit upon her. Unquestionably she was a difficult and unappreciative client who had no scruples against obtaining legal services without paying an adequate amount for them."

It therefore appears that the principal criticism of the petitioner by the majority opinion relates to his conduct with respect to the sale of the note and trust deed under execution to satisfy his lien thereon without giving notice thereof to Mrs. Haweis or Goodman. However, the majority opinion also criticizes petitioner relative to his statements to Goodman in regard to the sale to Foulks of the property covered by the Shibley note and trust deed. In this regard the majority opinion states: "*Unquestionably Fall represented to Goodman that the Shibley-Foulks escrow could not be closed but the asserted falsity of the statement is not satisfactorily shown by the record. On the contrary, there is substantial evidence which would justify Fall's assertion.* Apparently for some time Shibley was quite uncertain as to whether the sale could be concluded and he testified that 'We had quite a good deal of confusion and argument over his [Fall's] apparent failure to fulfill his part of the agreement under the escrow.' He stated that Foulks 'had been very apprehensive of the deal going through'; that the agent 'told me and my mother that the Foulks were pulling out of the deal,' and that Fall was so advised."

The majority must have resorted to the art of clairvoyance in making the foregoing deduction, that while there is substantial evidence in the record to support the truth of Fall's testimony, and there is no satisfactory evidence to the contrary, he nevertheless, *"unquestionably * * * represented to Goodman that the Shibley-Foulks escrow could not be closed."*

But as I read the majority opinion the sole ground upon which it predicates its order that petitioner be disciplined is, that he caused execution to be levied upon the Shibley note and trust deed and had the same sold at execution sale without giving notice to either Mrs. Haweis or Goodman. This conclusion is reached notwithstanding the statement in the majority opinion that petitioner "was not required to give Mrs. Haweis notice of the execution sale." This, the majority opinion classifies as "moral turpitude" and justifies its order suspending the petitioner from practice for the period of one year.

I have made a careful examination of the record in this case, and the picture I get therefrom amply justifies the statement I made at the beginning of this opinion that petitioner is "a man more sinn'd against than sinning," and I can see no justification whatever for disciplining him for any conduct in connection with the Haweis estate or his dealings with Mrs. Haweis or Goodman.

The record discloses, and the majority opinion concedes, that petitioner undertook and performed services of substantial value in connection with the closing of the Haweis estate. No funds were available to pay for his services and he agreed to accept the Shibley note and trust deed which was of doubtful value, as full compensation for the services rendered by him. After these services had been rendered, Mrs. Haweis repudiated her agreement with him and attempted to prevent him from receiving the compensation to which he was entitled. Notwithstanding her testimony that he agreed to perform all of the services required in connection with the financing and closing of the estate for a fee of $200 or $250, the trial court allowed petitioner an ordinary fee of $957.96 and an extraordinary fee of $1,100, or a total of $2,057.96, approximately ten times the amount Mrs. Haweis said he had agreed to accept in full for his services. In addition to this allowance as fees, the trial court also allowed petitioner $25 for toll charges advanced and $521.78 for taxes paid by him, making a total of $2,604.74. Notwithstanding this order of the trial court, Mrs. Haweis exerted every effort to prevent petitioner from receiving the amount so awarded and employed attorney Goodman to assist her in preventing petitioner from obtaining the amount to which he was entitled. After attorney Goodman was employed by Mrs. Haweis, petitioner requested that he be substituted in petitioner's place as Mrs. Haweis' attorney, but Goodman refused.

The majority opinion concedes that petitioner had a legal right to levy execution upon the Shibley note and trust deed to satisfy his lien for attorney's fees and money advanced in connection with his handling of the Haweis' estate. The majority opinion likewise concedes that there is no law which required him to give Mrs. Haweis notice of the execution sale of said documents. In other words, the majority opinion concedes that when he proceeded to have execution issued and the Shibley note and trust deed sold to satisfy his lien thereon, he was doing what he had a legal right to do, and there can be no question but that this was his unassailable right. It is plainly obvious, and the majority opinion does not assert to the contrary, that from the time Goodman was employed by Mrs. Haweis as her attorney, the relation of attorney and client between her and petitioner terminated, and he was under no obligation to treat her as his client or extend to her any professional courtesy that should not be extended to an adverse party; in other words, from the time he undertook to collect from Mrs. Haweis his fee and the money which he had advanced, she was as to him an adverse party, and he was justified in treating her as such. Certainly, an attorney is under no obligation to notify an adverse party that he intends to levy execution on his property to satisfy a judgment against him, and the majority opinion does not assert the contrary.

I have always advocated and am a firm believer in high ethical standards in all professions, particularly in the legal profession, but I likewise believe that a professional man, including a lawyer, has some rights and that he is not required to yield to the avariciousness of a client who not only refuses to pay just and fair compensation for the services rendered by his attorney, but attempts to discredit him without justification when the lawyer attempts to collect his fee. In the case at bar, the majority opinion states with respect to Mrs. Haweis: "Unquestionably she was a difficult and unappreciative client who had no scruples against obtaining legal services without paying an adequate amount for them." And further, that she said: "That she would see him (Fall) 'in hell' before she would pay him any of the money awarded by the court." To say that an attorney dealing with such a former client, after she has hired another attorney to represent her, is required to treat her differently than any other adverse party, is to my mind, placing a burden upon an attorney that was never contemplated by the State Bar Act or any rules of professional conduct ever promulgated by any responsible organization of lawyers or laymen. The majority opinion resorts to some fancy language in attempting to discredit the conduct of petitioner in connection with the execution sale of the Shibley note and trust deed. It states: "Moreover, passing the question as to whether Fall was entitled to execution upon the order fixing the amount due to him as fees and advancements, having obtained the writ and levied upon the note, although he was not required to give

Mrs. Haweis notice of the execution sale, his actions in concealing her address from the sheriff when it was requested by that officer evidences a total disregard of her rights and an intention to circumvent her by fair means or foul. Mailing a notice to her on a date so late that it was doubtful whether she would receive it, much less have time to act upon it for the protection of her interests prior to the sale, was contrary to the plainest principles of honesty and fair dealing."

A complete answer to the foregoing chastisement is, that if petitioner was not required to give Mrs. Haweis notice of the execution sale, he did not disregard her rights in failing to do so. If she was not entitled to notice of the sale, as the majority opinion concedes, petitioner was under no obligation to give her such notice. Having been discharged as her attorney, and she having employed an attorney in his stead, petitioner was no longer interested in the protection of her interests; in fact, he was attempting to protect his own interests which he had a legal and moral right to do. In view of the factual and legal situation which existed at that time it it impossible for me to understand how it can be said that his conduct in connection with the execution sale "was contrary to the plainest principles of honesty and fair dealing." There is no claim or suggestion that he violated any trust or confidence reposed in him or used confidential information obtained while acting as her attorney.

The conclusion reached in the majority opinion is to my mind fanciful, unrealistic, unjust and in utter disregard of the facts and legal principles which the majority opinion concedes to be involved in this case.

I have some apprehension that lawyers who have had experience with clients of the type of Mrs. Haweis will feel, after reading the majority opinion, that it is the the view of a majority of this court, that regardless of the conduct of the client, a lawyer has no rights which the client need respect. I do not agree with this view.

I am firmly convinced that there is no foundation whatever in either fact or law for the conclusion reached in the majority opinion and that the proceeding against the petitioner should be dismissed.

SCHAUER, J., concurred in the conclusion stated by CARTER, J.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

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25 Cal.2d 108

PEOPLE v. PAY LESS DRUG STORE et al.

S. F. 16665.

Supreme Court of California.

Nov. 1, 1944.

1. Trade-marks and trade-names and unfair competition ⚷93(3)

Evidence in injunction action under Unfair Practices Act authorized finding that defendant sold items below cost for purpose of destroying business of competitors and that such acts were causing injury to competitors and destroying competition and authorized an injunction. Gen.Laws 1937, Act 8781, §§ 3, 5, 6, 10, 12, 13.

2. Trade-marks and trade-names and unfair competition ⚷68(2)

The purpose and policy of Legislature in enacting Unfair Practices Act and the means employed to subserve legislative purpose by prohibiting sales below cost made with intent to injure competitors or destroy competition is constitutional as a valid exercise of police power. Gen.Laws 1937, Act 8781.

3. Trade-marks and trade-names and unfair competition ⚷68(2)

An injury to a competitor or destruction of competition is an "injurious effect" within meaning of provision of Unfair Practices Act declaring that proof of sales below cost with injurious effect shall be presumptive evidence of prohibited intent to injure competitors or destroy competition. Gen.Laws 1937, Act 8781, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Injurious Effect".

4. Trade-marks and trade-names and unfair competition ⚷68(2)

The provision of section 5 of the Unfair Practices Act that proof of one or more acts of selling below cost together with proof of the injurious effect of such acts shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition within the prohibition of the Act, when construed together with the prohibitive language of section 3 and the declaratory language of section 13, is sufficiently explicit to inform merchant as to what is prohibited, and is valid. Gen. Laws 1937, Act 8781, §§ 3, 5, 13.

5. Trade-marks and trade-names and unfair competition ⚷68(2)

A violation of the Unfair Practices Act is complete when below cost sales, which are not excepted from the Act, are made with requisite intent to injure competitors or destroy competition without the necessity of proof of an injurious effect. Gen.Laws 1937, Act 8781, §§ 3, 5, 13.

6. Trade-marks and trade-names and unfair competition ⚷93(1)

The effect of provision of Unfair Practices Act permitting proof of injurious effect to be shown with proof of below cost sales as presumptive or prima facie evidence of requisite intent to injure competitors or destroy competition is to require defendant to go forward with such proof as would bring them within one of the exceptions or would negative the prima facie showing of wrongful intent. Gen.Laws 1937, Act 8781, §§ 3, 5, 13.

7. Constitutional law ⚷311

A statutory requirement that a defendant go forward with the evidence to rebut a prima facie showing of guilty intent from proof of specified facts is permissible when result has some rational relation to those facts and defendant is given a fair opportunity to meet it by evidence.

8. Trade-marks and trade-names and unfair competition ⚷93(1)

The provision of Unfair Practices Act that proof of one or more acts of selling below cost, together with proof of the injurious effect of such acts, shall be presumptive evidence of intent to injure competitors or destroy competition is valid, in view of disparity in convenience of proof and opportunity for knowledge as between plaintiff and defendants as to intent and purpose of defendants' conduct. Gen. Laws 1937, Act 8781, § 5.

9. Statutes ⚷47

The phrase "locality or trade area" in provision of Unfair Practices Act excepting from prohibition thereof sales below cost in good faith endeavor to meet legal prices of competitors selling same articles in same locality or trade area is not invalid as uncertain. Gen.Laws 1937, Act 8781, § 6(d).

10. Statutes ⚷49

Mere difficulty of application of statute in process of litigation is insufficient to enable court to declare statute unconstitutional.

11. Trade-marks and trade-names and unfair competition ⚷68(2)

Provision of Unfair Practices Act excepting from prohibition thereof sales below cost in good faith endeavor to meet legal prices of competitors selling same article in same locality or trade area does not require as an absolute prerequisite that defendants ascertain the "legal prices" of their competitors but merely requires that defendants shall have endeavored "in good faith" to meet legal prices of a competitor. Gen.Laws 1937, Act 8781, § 6(d).

12. Trade-marks and trade-names and unfair competition ⚷93(3)

Where evidence disclosed that defendants, in suit to enjoin violation of Unfair Practices Act, long continued course of selling below cost after lowered prices were abandoned by competitors, court was justified in concluding that defendants did not act in good faith in initial lowering of prices below cost and were not within exception authorizing sales below cost in a good faith endeavor to meet legal prices of competitors selling same articles in same locality or trade area. Gen.Laws 1937, Act 8781, § 6(d).

13. Trade-marks and trade-names and unfair competition ⚷100

Where judgment enjoined defendants from sales of articles as "loss leaders" in violation of Unfair Practices Act only when they diverted from or otherwise injured competitors, defendants could not complain that provision defining "loss leaders" was indefinite for failure to require the intent to injure competitors or destroy competition in all cases. Gen.Laws 1937, Act 8781, § 3.

14. Appeal and error ⚷673(2)

In suit to enjoin below cost sales in violation of Unfair Practices Act, where defendants conceded that sales in some cases were made even below invoice cost, contention that definition of cost of doing business in the Act was uncertain was not available to defendants on appeal, since there was a want of factual background for ascertaining whether provisions for discovery of costs were too uncertain to be susceptible of reasonable application. Gen.Laws 1937, Act 8781, § 3.

15. Appeal and error 🔑843(2)

Where defendants in action to enjoin below cost sales in violation of Unfair Practices Act could not claim an immunity privilege under provisions of Act, Supreme Court would not determine question of whether immunity provided in act was commensurate with that granted by state and federal Constitutions. Gen.Laws 1937, Act 8781, § 10.

16. Appeal and error 🔑1047(3)

In action to enjoin below cost selling in violation of Unfair Practices Act, where trial court had before it defendants' records and exhibits of advertisements of competitors from which it ascertained the facts and which supported trial court's findings against defendants, any error in refusal to strike out alleged hearsay testimony that defendants' store was first to cut price on one item was not prejudicial. Gen.Laws 1937, Act 8781, §§ 3, 5, 6, 10, 12, 13.

17. Trade-marks and trade-names and unfair competition 🔑100

Judgment enjoining defendants from offering for sale or selling contrary to section 3 of the Unfair Practices Act any article at less than cost for the purpose of injuring competitors or destroying competition and from using a product as a loss leader, except as to sales made under provisions of paragraphs a, b, c or d of section 6 was not invalid as uncertain. Gen. Laws 1937, Act 8781, §§ 3, 6; Gen.Laws Supp.1939, Act 8781, § 10.

EDMONDS and CARTER, JJ., dissenting.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the People against the Pay Less Drug Store, a copartnership, and others, to enjoin violation of the Unfair Practices Act. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion 143 P.2d 762.

Appelbaum & Mitchell, W. R. Griswold, and Lewis N. Mitchell, all of Oakland, for appellants.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and J. D. Cooper, Deputy Dist. Atty., all of Oakland, for respondent.

SHENK, Justice.

An injunction was sought by the plaintiff to restrain the defendants from violating certain provisions of the Unfair Practices Act, Stats.1913, p. 508, as amended by Stats. 1937, p. 2395, Deering's Gen.Laws 1937, p. 4157, Act 8781. The defendants appealed from the judgment which decreed the plaintiff's right to the writ of injunction.

The defendants conduct a cash and carry grocery business at 19th Street and Telegraph Avenue in Oakland. The complaint, filed in April 1940, charged them with selling approximately 400 specified items below cost, and with offering for sale and selling other items as "loss leaders," with the intent of injuring competitors or destroying competition in violation of the act. The defendants admitted the sales below cost, but denied the charge of intent to injure competitors or destroy competition. They alleged that such sales were made in good faith to meet the "legal" prices of competitors. They also charged that certain sections of the act are unconstitutional.

[1] There was evidence that merchants found by the trial court to be competitors of the defendants were injured by the admitted price cutting below cost. On the issue of their intent, the defendants introduced evidence to the effect that when they opened for business on a specified day they lowered the marked prices on a large number of items to meet the prices on similar items as advertised for that day by their competitors, and that whenever an item was marked below cost it was for the purpose of meeting competitive prices and for no other reason. There was evidence, however, that after the competitors' prices were raised the defendants continued for periods of weeks or months to sell the items at the below cost prices and at prices lower than the prices of their competitors for similar articles or commodities, and that in many instances the sales below cost were not begun until weeks or months after the similar advertised price of a competitor had been discontinued. The trial court found on sufficient evidence that the defendants did not offer and sell the items below cost in an endeavor in good faith to meet the legal prices of competitors, but that they sold the items below cost for the purpose of destroying the

business of competitors, and that the acts of the defendants were causing injury to those competitors and destroying competition. The court also found that the defendants had sold certain articles as "loss leaders."

Section 3 of the Unfair Practices Act makes it unlawful to sell any article or product at less than cost as defined, for the purpose of injuring competitors or destroying competition, and subjects the violator to certain penalties. That section also prohibits the sale of "loss leaders," as defined. Section 5 provides that in all actions brought under the provisions of the statute the proof of one or more acts of selling below cost, together with proof of the injurious effect of such acts, "shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition." Section 6 provides that the prohibitive provisions shall not apply (a) when the owner in good faith is closing out his stock or is discontinuing a certain article or product, or in sales of seasonal or perishable goods to prevent loss or depreciation, and appropriate notice is given to the public; (b) in the sale of damaged or deteriorated goods, and notice is given; (c) by an officer acting pursuant to judicial order; (d) in an endeavor made in good faith to meet the legal prices of a competitor selling similar articles in the same locality or trade area in the ordinary channels of trade.

Section 10 permits an action to enjoin acts in violation of the statute. Section 12 contains the usual severalbility clause relating to judicial pronouncements of unconstitutionality.

By section 13 the Legislature declares "that the purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved."

[2] The constitutionality of the purpose and policy of the Legislature in enacting the Unfair Practices Act and of the means employed to subserve the legislative purpose by prohibiting sales below cost made with the intent to injure competitors or destroy competition was upheld generally as a valid exercise of the police power by the decisions of this court in Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; and People v. Black's Food Store, 16 Cal.2d 59, 105 P.2d 361. See, also, People v. Kahn, 19 Cal.App.2d Supp. 758, 60 P.2d 596; Dunnell v. Shelley, 38 Cal.App.2d 118, 100 P.2d 830; Green v. Grimes-Stassforth S. Co., 39 Cal.App.2d 52, 102 P.2d 452.

[3-6] In the present case the defendant attacks specific provisions of the act. It is contended that the provision of section 5 that proof of sales below cost with "injurious effect" shall be "presumptive evidence" of the prohibited intent is vague and unconstitutional. It is argued that since the statute was enacted for the protection of the public against monopolies, doubt arises as to whether injury to competitors or to the public was intended by the words "injurious effect." The language of that provision, together with the prohibitive language of section 3 and the declaratory language of section 13, makes it sufficiently clear that the Legislature deemed that injury to a competitor or destruction of competition was an "injurious effect," and therefore within the ban of the act; and that it was not necessary to await success in the monopolistic effort before the measures provided to safeguard the public interest and welfare could be invoked. These provisions are sufficiently explicit to inform the merchant as to what is prohibited. He is not relegated to conjecture to determine his lawful conduct. There is no uncertainty in the provisions now complained of which could be said to hamper the defendants' intelligent choice of the course which may lawfully be pursued. Furthermore, an injurious effect is not an essential element of the violation. The violation is complete when sales below cost are made with the requisite intent and not within any of the exceptions. Proof of injurious effect is permitted to be shown with the proof of sales below cost as presumptive or prima facie evidence that the requisite intent existed. The obvious and only effect of this provision is to require the defendants to go forward with such proof as would bring them within one of the exceptions or which would negative the prima facie showing of wrongful intent. They may present facts showing that they were within the express exceptions regardless of actual intent; or they may introduce evidence of another

necessity not expressly included to show that sales were made in good faith and not for the purpose of injuring competitors or destroying competition.

It is unnecessary here to consider the defendants' suggestions of circumstances other than the expressly designated exceptions, which would justify sales below cost and negative the prima facie showing of unlawful intent. The defendants introduced evidence solely in an attempt to bring themselves within exception (d), which permitted them to make sales below cost in an endeavor in good faith to meet the legal prices of their competitors.

[7, 8] A statutory requirement that the defendant go forward with evidence to rebut a prima facie showing of guilty intent from proof of specified facts is permissible when the result has some rational relation to those facts and the defendant is given a fair opportunity to meet it by evidence. Morrison v. California, 291 U.S. 82, 88, 54 S.Ct. 281, 284, 78 L.Ed. 664. That case designates as the test of permissibility that "the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Our statute does not withdraw from the accuser the burden of proving a violation, nor does it deprive the defendant of the benefit of the presumption of innocence. Here there was a manifest disparity in convenience of proof and opportunity for knowledge as between the plaintiff and the defendants. The defendants were in the better position to know the intent and purpose of their conduct, which it might be difficult for the plaintiff to prove. The Legislature merely enacted into law what is common in human experience, that when a person causes injury by his acts he should be deemed to intend such consequences unless he can excuse or explain his conduct by facts showing that he had an innocent intent. It was so enacted to avoid the possible conclusion that the accuser, from whom the defendants' purpose is generally concealed, must produce affirmative evidence of guilty intent in every situation in order to make out a prima facie case of violation of the act. After proof of the sales below cost and injury resulting therefrom, there is no undue hardship cast upon the defendants to require them to come forward with evidence of their true intent as against the prima facie showing, or with evidence which will bring them within a specified exception in the act. The power to enact such a provision in appropriate cases has been upheld in this state. People v. Osaki, 209 Cal. 169, 286 P. 1025; People v. Associated Oil Co., 211 Cal. 93, 109, 294 P. 717; People v. Scott, 24 Cal.2d 774, 151 P.2d 517; People v. Morrison, 125 Cal.App. 282, 13 P.2d 800, appeal dismissed 288 U.S. 591, 53 S.Ct. 401, 77 L.Ed. 970. In People v. Osaki, supra, this court reviewed the question fully and recognized, in accord with the decisions of the United States Supreme Court, that to place upon the defendant the duty of introducing facts peculiarly within his knowledge, and hidden from discovery by others, was not inconsistent with the presumption of innocence and was consistent with all the constitutional protections including the right of an accused not to be a witness against himself.

The case of Great Atlantic & Pacific Tea Co. v. Ervin, D.C., 23 F.Supp. 70, relied on by the defendants, does not avail them. That case involved a section in a Minnesota statute providing that sales by a retailer at less than 10 per cent above manufacturers' published list prices less published discounts should be prima facie evidence of a violation of the act. It was held that such sales could not be presumptive evidence of guilty intent because guilty intent did not rationally follow merely from the fact of sales under 10 per cent above list, and that the proof required of the defendant placed upon him a hardship which was regarded as outweighing the advantage to the state. That case did not involve a provision comparable to that contained in our statute. There the prima facie showing resulted where sales were made below an arbitrary percentage above list, regardless of actual cost or injurious effect. The conclusion in that case would probably have been otherwise if the Minnesota statute had been similar to the California act. That assumption is justified in view of the fact that the Minnesota statute was subsequently amended to cure the manifest defects and as amended was upheld in McElhone v. Geror, 207 Minn. 580, 292 N.W. 414.

[9, 10] The defendants contend that the language of subdivision (d) of section 6 is also so indefinite and uncertain as not

to permit a person to understand its meaning and that the subdivision is for that reason invalid. They say that no one can tell what territory is embraced in "the same locality or trade area." They rely on State v. Standard Oil Co., 195 S.C. 267, 10 S.E.2d 778, 785. That case is not in point. There a statutory provision, Code 1932, § 6626, prohibited the sale of a "commodity at a lower rate to one purchaser in the same city * * * than is charged for said commodity * * * in another section of said city, * * *". The court pointed out that discrimination in the same section of the city was not prohibited, and since "section" was not defined it would be impossible to know when the provision was being violated. There is no such difficulty here. In the present case the trial court found the trade area; found that the defendants knew what was their "locality or trade area" within the meaning of the act, and that the complaining competitors were within that locality or trade area. The court thus found that the defendants knew who were their competitors. It is safe to assume that merchants generally know who are their competitors, and from what locality or trade area they draw their customers. The language complained of is shown in this case to be susceptible of practical application without more particular definition. Empirical surmises are not to be substituted for pragmatical results. Until a case is presented which demonstrates the practical unworkability of the language we would not be inclined to accord much weight to arguments based on theory which is contrary to the facts and the court's findings. Furthermore, if in some cases the "locality or trade area" may be difficult of ascertainment, that fact alone would not render the provision invalid. McElhone v. Geror, supra, 292 N.W. at page 419. Nor is this case like Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322, where it was held that the word "locality" was open to uncertain application. Here we have the word "locality" followed by the words "or trade area," and from the factual background presented we cannot say that the phrase "locality or trade area" has a connotation difficult of ascertainment by the court or parties. Such a situation distinguishes this from the Connally case.

[11, 12] The defendants contend that they should not be compelled to ascertain the "legal prices" of their competitors before invoking the exception provided by subdivision (d) of section 6 for the reason that it is impossible to ascertain the legal prices of competitors' goods without an audit of their books. The defendants have assumed an absolute prerequisite. The requirement is not absolute. It is merely that the defendants shall have endeavored "in good faith" to meet the legal prices of a competitor. A similar provision was upheld in State v. Sears, 4 Wash.2d 200, 103 P.2d 337, 345, the court saying "that if a merchant in good faith reduces his prices to meet those of a competitor, who he in good faith believes has a legal price, he will not be violating either the intent or the wording of the act." The provision therefore is not like that involved in Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120 (see, also, State v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A.2d 291), holding invalid a provision which exempted the merchant if the price was made "to meet the legal price of a competitor" as an absolute requirement without according him the opportunity of showing his good faith. Here the trial court was justified in concluding that the defendants' long continued course of selling below cost after the lowered prices were abandoned by their competitors negatived any possible inference of good faith to be accorded them by their initial lowering of prices below cost.

[13, 14] The defendants contend that the provision defining "loss leader" is indefinite in that it appears not to require the intent to injure competitors or destroy competition in all cases. Inasmuch as the judgment enjoined sales of articles as "loss leaders" only when they diverted trade from or otherwise injured competitors, the defendants are not in a position to complain.

The defendants assert that the requirement that they ascertain their own cost of doing business is grossly impracticable. But here again it must be said that the record does not support the assertion. The trial court found that the defendants' cost of doing business was 8.03 per cent, and that the ascertainment of its cost of doing business was not impossible. In any event, the defendants conceded that sales of commodities in some cases were made even below invoice cost. Here, as in Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., supra, 11 Cal.2d at page 662, 82 P.2d at pages 18, 19, 118 A.L.R.

486, where the same contention was made, the factual background for ascertaining whether the provisions for discovery of cost are too uncertain to be susceptible of reasonable application has not been presented, and in the absence of such presentation the issue should not be determined. Also, as pointed out in State v. Sears, supra, 103 P.2d at page 343, with reliance on People v. Kahn, supra, any difficulty in computing cost is a factual one, and statutes are not to be declared invalid because in their application factual difficulties may arise.

[15] Section 10 of the act provides immunity of a defendant or witness brought into court to testify in any action under the statute. The immunity expressly extends to prosecutions for violation of the provisions of the act. The defendants contend that the immunity provided is not commensurate with that granted by the state and federal Constitutions. It is not necessary to determine that question inasmuch as the defendants are not now in a position to claim an immunity privilege.

[16] The defendants contend that the trial court erroneously refused to strike out the hearsay testimony of one witness, given on cross-examination by the defendants, that "Pay Less" was the first to cut the price on one item, and that the failure to strike the testimony was prejudicial. The ruling, if error, did no harm inasmuch as the trial court had before it the defendants' records and exhibits of advertisements of competitors from which it ascertained the facts and which support its findings.

[17] Finally the defendants contend that the judgment is void for uncertainty. The defendants were enjoined "from offering for sale or selling, contrary to the provisions of section 3 of the Unfair Practices Act, any article or product at less than the cost thereof to the vendor, as cost * * * is defined in the Unfair Practices Act, for the purpose of injuring competitors or destroying competition, and further from using any article or product as a 'loss leader' as 'loss leader' is defined in said Unfair Practices Act, and which diverts trade from or otherwise injures competitors; provided, however," that the restraint should not apply to sales "made under and pursuant to the provisions of paragraphs (a), (b), (c), (d), or any of them, of section 6" of the act.

Section 10 of the act, as amended in 1939, Stats.1939, p. 1424, Deering's Gen. Laws, 1939 Supp.Act 8781, authorizes an action to enjoin any violation of the provisions of the act, and, in addition, for the recovery of damages. The section, as so amended, further provides that if the court in any such action shall find that the defendant is violating any provision of the act, it shall enjoin him from doing all acts prohibited by the section or sections found to have been violated, and may include any other restraint deemed expedient to insure against the defendant's committing a future violation of any such section or sections, and the injunction shall cover every article or product and not merely the particular article or product involved in the action.

Prior to the 1939 amendment, section 10, added by Statutes of 1935, page 1549, provided merely that an action might be maintained to enjoin a continuance of any act or acts in violation of any of the provisions of sections 1 to 7.

Had the language of 1935 remained unchanged defendants' argument might be persuasive to the effect that the injunction couched in the language of the prohibitive provisions involved was too broad and therefore violative of the principles announced in New York, N. H. & H. R. Co. v. Interstate Commerce Comm., 200 U.S. 361, 26 S.Ct. 272, 50 L.Ed. 515; Rust v. Griggs, 172 Tenn. 565, 113 S.W.2d 733, 738; and Johnson v. Farmer, 41 Cal.App. 2d 874, 881, 107 P.2d 959, 108 P.2d 945. However, the defendants do not maintain that upon the commission of unlawful acts the courts may not provide for restraint of all such and related acts. See National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 435, 436, 61 S.Ct. 693, 85 L.Ed. 930. The language of the judgment is not couched in terms restraining violation of the act generally. It contemplates restraint of those acts only which are prohibited by the particular sections found by the court to have been violated by the defendants. In view of the scope of the injunction required by section 10 as amended, the court was constrained to follow the legislative mandate and did so properly in the language employed. The restraint applies only to acts in violation of the sections here involved.

Other contentions do not require discussion.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

Regardless of the question of constitutionality which is presented by the presumption of guilty intent declared by section 5 of the Unfair Practices Act, Stats. 1913, p. 508, as amended by Stats.1937, p. 2395, Deering's Gen.Laws, 1937, p. 4157, Act 8781, I am of the opinion that the judgment should be reversed upon the ground that it is not supported by any substantial evidence. For although the record includes the testimony of merchants that the practices of Pay Less caused injury to them, the conclusions of these witnesses have no evidentiary basis whatever. Certainly responsibility for what the Legislature has defined as an unfair trade practice should rest upon something more than the ipse dixit of a complaining merchant where the record shows that he is surrounded by other business establishments which sold the same goods at the same prices as the one charged with the statutory dereliction.

The Unfair Practices Act requires a merchant, at his peril, to make a number of determinations upon which, as shown in the present case, reasonable minds may differ because the act provides no definite and certain standards. He encounters risk in determining whether he is in good faith endeavoring to meet competition, § 6, subd. d, who are his competitors, §§ 3, 5 and 6, subd. d, and whether he is injuring alleged competitors, §§ 3, 5. For these reasons, the courts should require a clear and unmistakable showing of price cutting contrary to the statute, coupled with evidence of injury to a competitor before imposing the sanctions specified by the Legislature. Such a requirement is particularly essential because liability may be, and in the present case was, based wholly upon the presumption of guilty intent.

Violation of the act may be shown by sales under cost, for the purpose of injuring competitors or destroying competition, § 3. The appellants concede they made some sales below cost but the complainant must also prove that this was done with the purpose to injure competitors. The only direct evidence upon that issue was the testimony of the officers and employees of Pay Less. Prices were lowered, they declared, for the sole purpose of meeting competition and with no intention to injure competitors. The trial judge based his finding to the contrary upon proof which, according to the act, constitutes "presumptive evidence of the purpose or intent to injure competitors or destroy competition," § 5. The presumption rests upon evidence of (a) one or more acts of selling below cost, and (b) the injurious effect of such acts.

But there is no substantial evidence that, in selling below cost, the appellants caused injury to any one of its competitors. The Pay Less store commenced business in downtown Oakland, in direct competition with a number of chain stores and other established grocers, approximately six months prior to the basic period named in the complaint as constituting the period of sale violations. It was a highly competitive location and, soon after Pay Less commenced operations its neighbors proceeded to lower prices on certain staples, principally coffee. Pay Less had to hold its customers. But on no occasion did Pay Less lower its prices prior to the appearance of advertising by one or more of its downtown competitors or, in a few instances, when Pay Less checkers found that its competitors had lowered prices.

These nearby stores constituted the competitors of Pay Less but none was called to testify by the prosecution, nor does it appear that they made any complaint concerning the trade practices of Pay Less. The persons called as witnesses by the People operated stores in outlying districts and, with two exceptions, were members or officers in a rival grocery association which has been recently convicted of violations of the Sherman Antitrust Act for price fixing. But there is no standard stated in the Unfair Practices Act by which a merchant may determine who his competitors are for the purpose of compliance with the legislation. Certainly a finding that one person is a competitor of another should rest upon more than the mere opinion of a witness. Yet in the present case, although Pay Less was doing business in a downtown location of a large city, the court found that certain merchants having small stores miles away were competitors of Pay Less and injured by its trade practices.

In contradiction of the declaration of these merchants that Pay Less was its competitor stands evidence which directly disproves such a conclusion unless the act makes every merchant a competitor of every other merchant in the same line of business within an area nowhere defined. But modern business is built upon the principle that there is no certain and limited demand for goods; on the contrary it recognizes that individual enterprise may greatly enlarge consumer demand and bring general benefit to a particular industry. Certainly the Unfair Practices Act must be interpreted as requiring a clear and unmistakable showing of injury to a competitor; under any other construction, the presumption of guilty intent stated in section 5 of the act would be unconstitutional (Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664; Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519), for a presumed intent to injure competitors would have no reasonable relation to sales below cost by merchants not in competition. Furthermore, if the statute may be enforced against one not in competition with the complainant, the legislation is invalid. Fundamental is the proposition that a criminal statute must define an offense with a certainty that affords fair and reasonable notice of the conduct prohibited. 7 Cal.Jur. 843; 22 C.J.S., Criminal Law, § 24, pp. 70-74; 14 Am.Jur. 773, 774. As presently interpreted, in my opinion the act is void for uncertainty.

There is no evidence whatever that any customer of the complaining merchants ever made a purchase at the Pay Less store. The evidence that Pay Less sold coffee below cost includes the explanation that this was done for the purpose of meeting the competition of others who had broken the price. Upon this evidence and the testimony of five persons having small stores far away from Pay Less, the court found the presumed intent to injure those competitors. And this finding was made notwithstanding the admission of each of the complaining merchants that his establishment was situated within a short distance from one or more chain stores charging prices corresponding to those of Pay Less upon the items involved.

The testimony of Henry J. Jacobs, secretary of the Retail Grocers Association, is not relevant to the issue because he was not in business during the basic period specified in the complaint. The store owned by the witness Julias Martioli, a past president of the Retail Grocers Association, was located over a mile and one-half from Pay Less, but a Safeway store, which sold coffee at prices corresponding to those of Pay Less, was within one block of the Martioli store and another chain store was near by. Harvey Jessiman was in the business approximately four miles distant from Pay Less. Alvin Smith, treasurer of the Retail Grocers Association, who had been located in Piedmont for about thirteen months prior to the trial, was over a mile from the Pay Less store. He admitted that two large chain stores were situated near his grocery. James Zahas, procured by the Retail Grocers Association as a witness, and who "imagined" he was in competition with Pay Less, was located over a mile from that store, but near a Safeway and within six blocks from a shopping center containing a number of chain stores. William J. Souza, an active member of the Retail Grocers Association, had a store located three miles from Pay Less, but a block from a Safeway and a Lucky store.

This testimony, in my opinion, does not amount to substantial evidence that any one of the witnesses was a competitor of Pay Less, or show any causal connection between the appellants' price reductions and the loss of gross volume which the five grocers testified they sustained during the basic period. Accordingly, any testimony concerning gross business volume during the basic period (January through March) as compared to the preceding three months, which include the holiday period, would not be relevant to the issue concerning whether Pay Less had injured competitors. In this connection, moreover, it may be observed that although testimony of a loss of business volume allows an inference of a corresponding loss of profits, not one of the complaining grocers testified that his net profits were unusually decreased after the first of the year, as compared to the preceding holiday period. If these five merchants sustained a loss of volume during the basic period, numerous responsible causes might be found but, according to well settled principles of proximate cause, the Pay Less policy of meeting competition would appear to be remote, uncertain and speculative as a cause of the effect claimed.

In order to raise the presumption of criminal intent, the prosecution had the burden of proving that Pay Less proximately caused a loss of profits to its competitors. But in this case there is no evidence whatever upon that issue, for no merchant testified that customers were drawn away from him with a resulting loss of profits as the direct and proximate consequence of the appellants' trade practices.

For these reasons, in my opinion, the judgment should be reversed.

CARTER, Justice (dissenting).

I dissent. The statute involved in this case provides that proof of sales below cost plus proof of injury to a competitor, is *presumptive evidence* of intent to injure competitors or destroy competition. In order to have a violation of the act there must be an intent to injure. There is no rational or probable conclusion that may be drawn from general experience that the concurrence of selling below cost and injury to competitors points to an intent to injure competitors. The majority opinion proceeds upon the theory that the *vital test* of the validity of a presumption is whether it is too much of a burden to require the defendant to rebut that presumption in the light of the asserted balance of convenience in favor of requiring the defendant rather than the prosecution to go forward with the proof. For illustration it is said, after citing Morrison v. California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664: "That case designates *as the test* of permissibility that 'the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.'" (Italics added.) Whatever may have been the test set forth in the Morrison case it can no longer be said to be the law. *The issue of convenience is not the test.* The primary question, which involves the issue of due process of law, is whether there is a rational connection between the fact proved and the presumption. In the latest discussion of the subject by the Supreme Court of the United States, that is made clear. It is said in Tot v. United States, 319 U.S. 463, 467, 63 S.Ct. 1241, 1245, 87 L.Ed. 1519:

"The Government seems to argue that there are *two alternative tests of the validity of a presumption created by statute.* The first is that there be a rational connection between the facts proved and the fact presumed; the second that of comparative convenience of producing evidence of the ultimate fact. We are of opinion that *these are not independent tests* but that *the first is controlling and the second but a corollary.* Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than that a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts. * * *

"*Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption.* In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.

"Whether the statute in question be treated as expressing the normal balance of probability, or as laying down a rule of comparative convenience in the production of evidence, it leaves the jury free to act on the presumption alone once the specified facts are proved, unless the defendant comes forward with opposing evidence. And this we think enough to vitiate the statutory provision.

"Doubtless the defendants in these cases knew better than anyone else whether they acquired the firearms or ammunition in interstate commerce. It would, therefore, be a convenience to the Government to rely upon the presumption and cast on the defendants the burden of coming forward with evidence to rebut it. But, as we have shown, it is not permissible thus to shift the burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. *The argument from convenience is admissible only where the inference is a permissible one,* where the defendant has more convenient access to the proof, and where requiring him to go forward with proof will not subject him to unfairness or hardship." (Italics added.)

The presumption in the instant case has no rational connection between it and the fact proved. It has been held that a statute which raises a presumption of intent to defraud from the circumstance that a laborer accepts property pursuant to a contract of employment and then fails to perform the services is invalid. Bailey v. Alabama, 219 U.S. 219, 31 S.Ct. 145, 55 L.Ed. 191. McFarland v. American Sugar Ref. Co., 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed 899, involved a statute making it crime for engaging in a monopoly in the sugar refining business. It was presumed that a monopoly existed if the person systematically paid a less price for sugar in Louisiana than he did in other states. The statute in Manley v. Georgia, 279 U.S. 1, 49 S.Ct. 215, 73 L.Ed. 575, denounced as a crime the fraudulent insolvency of a bank and declared the presumption that a bank which became insolvent was deemed to have become so fraudulently. It was held invalid. Western & Atlantic R. R. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884, dealt with a state statute which declared a presumption of negligence on the part of a railroad company when a collision occurred at a highway crossing between a train and a vehicle. Morrison v. California 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664, involved the prohibition of the occupation of lands by aliens and that the state need only prove that the defendant possessed the land and allege in the indictment or information that he was an alien or ineligible for naturalization. The defendant must prove his citizenship. The court said at page 90 of 291 U.S., at page 285 of 54 S.Ct., 78 L.Ed. 664:

"*Possession of agricultural land by one not shown to be ineligible for citizenship is an act that carries with it not even a hint of criminality.* To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation. * * * Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify the others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance. * * *

"We turn to this statute and endeavor to assign it to its class. In the law of California there is no general prohibition of the use of agricultural lands by aliens, with special or limited provisos or exceptions. To the contrary, it is the privilege that is general, and only the prohibition that is limited and special. Without preliminary proof of race, occupation of the land is not even a suspicious circumstance." (Italics added.) Paraphrasing the quotation from the Morrison case, "selling below cost followed by injury to a competitor 'is an act that carries with it not even a hint at criminality,'" no probability of wrongdoing arises.

When the constitutionality of the statute in question was considered by this court the requirement of intent to injure competitors was believed to be necessary to its validity. In Wholesale Tobacco Dealers Bureau v. National Candy & Tobacco Co., 11 Cal.2d 634, 658, 82 P.2d 3, 17, 118 A.L.R. 486, the court stated:

"It is next urged by appellant that every sale below cost, except as provided in section 6, is made unlawful by section 3 regardless of intent, and that so construed the act in unconstitutional. It would certainly add to the weight of appellant's argument on the main issue if the statute omitted intent as an integral part of the act prohibited. *It is one thing, from a legal standpoint, to prohibit sales below cost engaged in for the purpose of injuring competitors and destroying competition, and quite another to merely prohibit all such sales regardless of intent. It may well be that an absolute prohibition regardless of intent would be unreasonable.* See Fairmont Creamery Co. v. Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163." (Italics added.)

Other cases have held that the lack of the requirement of a wrongful intent renders such statutes invalid. State v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A. 2d 291; Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120.

An analogous presumption under unfair competition statutes has been held invalid. Great Atlantic & Pacific Tea Co. v. Ervin, D.C., 23 F.Supp. 70.

If the presumption is not available there is no evidence of any intent to injure competitors or destroy competition. There are present only two things: (1) Sale below cost, and (2) that defendant sold below cost for some time after the appearance of the last advertisement of his competitors of items below cost. These acts do not give rise to an inference that defendant intended to injure its competitors or destroy competition. On the contrary, the continuance of sales below cost after the last advertisement showed that it was ignoring competition and its competitors. It was endeavoring to build up its own business, a wholly legitimate purpose. Common experience and propensities of man indicate that when a merchant sells below cost he has no thought or intent to injure his competitors. He is merely attempting to develop or preserve his own business, with the thought that his rivals will also prosper. To determine otherwise is to destroy completely the presumption of innocence. It is said in Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67, 70, 128 A.L.R. 1120:

"Price cutting in itself is not an evil; on the contrary, the more intense the competition the greater the likely advantage to the purchasing public. Indeed there is no reason why a merchant should not make an absolute gift of merchandise to his customers if he desires to be benevolent or thereby to advertise his business. *There are many other conceivable and wholly proper reasons which might induce him to make sales without profit,* as, for example, a necessity of paying importunate creditors. It is only when the object of price cutting is *sinister,—to destroy a competitor by suffering a temporary loss in order to gain an ultimate monopoly* (Mogul Steamship Co., Ltd., v. McGregor, Gow & Co., 23 Q.B., L.R. 598), or to defraud the public by seducing them into the purchase of other goods at an exorbitant price—that the selling of goods at less than cost may constitute an economic or social evil. The Pennsylvania act, therefore, is arbitrary, and the means which it employs are grossly out of proportion to the object which it seeks to attain.

"There are certain businesses which at one time or another have been regarded by the community as so inherently and generally vicious that the courts have recognized the power of the legislature to suppress them altogether; for example, the manufacture and sale of intoxicating liquors * * * the manufacture of oleomargarine * * * the sale of futures in grain or of stocks on margin * * * and several other types of business referred to in Nebbia v. New York, 291 U.S. 502, 528, 54 S.Ct. 505, 512, 78 L.Ed. 940, 89 A.L.R. 1469 * * *. *But the selling of merchandise below cost is, in general, an innocent and legitimate practice,* and subject to abuse only in occasional instances. Under such circumstances it has been uniformly held to be beyond the power of the legislature to effect an absolute prohibition." (Italics added.)

It should be noted that in the instant case the statute requires a *specific intent,* as distinguished from a general criminal intent, that is, an intent to injure competitors or destroy competition. *Where a specific intent is required by the statute it may not be inferred merely from the commission of an unlawful act, and the rule that a person knowingly committing an unlawful act shall be presumed to have intended the consequences naturally flowing therefrom is not applicable.* It is said in 8 Cal. Jur. 26: "Except in cases of murder, in which a contrary rule is established by statute, wherever a specific intent is an element of an offense, the existence of that intent must be established as a fact by such evidence as will warrant a conclusion to that effect by the jury. *It is not to be presumed from the commission of the unlawful act,* though the jury may infer it from the acts and conduct of the defendant. This is true wherever the crime falls short of homicide, even if it be the crime of assault with intent to commit murder."

The record discloses that the trial court found: "That the offering for sale, advertising by posters for sale, and selling below cost by [defendant] was done for the purpose of injuring competitors of [defendant] or for the purpose of destroying competition of other merchants." No evidence was offered which can be said to even remotely support such a finding, and the trial court must have based its conclusion upon the presumption provided for in section 5 of the Unfair Practices Act to the effect that selling below cost is presumptive evidence of intent to injure competitors or destroy competition. In view of my conclusion that the presumption is not available as evidence to support such a finding, it cannot stand. I am therefore forced to the conclusion that in the absence of proof of intent there is no evidence to sustain the findings of the trial court on this issue, and the judgment should therefore be reversed.

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25 Cal.2d 59

PEOPLE v. HOLT.

Cr. 4526.

Supreme Court of California.

Oct. 31, 1944.

1. **Homicide** 🔑118(2)

One who without fault is exposed to a sudden felonious attack need not retreat, but may in the exercise of his right of self-defense stand his ground and slay his assailant.

2. **Homicide** 🔑340(1)

Where evidence overwhelmingly established that defendant invited encounter and that he was not warranted in believing that he was in such imminent danger as to justify homicide, instruction on law of self-defense was not prejudicial because of statement that it must also appear to one as a reasonable man that to avoid death or great bodily harm, it was absolutely necessary for him to do what he did do.

3. **Criminal law** 🔑1038(3)

In prosecution for murder, defendant could question on appeal the accuracy of instruction on self-defense, though defendant had requested no special instruction on such matter.

4. **Criminal law** 🔑769

It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts, and the court is not relieved of the duty to give instructions whose necessity is developed through the evidence introduced at the trial, and an instruction is necessary if it is vital to a proper consideration of the evidence by the jury.

5. **Homicide** 🔑341

Where evidence overwhelmingly established that defendant was not without fault, that he invited the encounter, and that as a reasonable man he was not warranted in believing that he was in such imminent danger of great bodily injury as to justify the commission of homicide, it was not prejudicial error to fail to tell jury that self-defense could be established even though a person feloniously assaulted did not retreat but stood his ground. Pen. Code, § 197, subd. 3; § 198.

6. **Homicide** 🔑116(4)

The apprehension of danger to life or limb which justifies a man in taking the life of another must be an honest one, that is well-grounded, and arise out of a reasonable cause, but a cause which originates in the fault of the person himself, in a quarrel which he has provoked or in a danger which he has voluntarily brought on himself by his own misconduct, cannot be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person. Pen.Code, § 197, subd. 3; § 198.

7. **Homicide** 🔑112(1), 113

A person accused of crime may show in justification that although he brought upon himself an imminent danger, he in the presence of that necessity changed his mind and conduct and honestly endeavored to escape from it, but could not without striking the mortal blow, and in the absence of such circumstances, where a defendant seeks and brings upon himself a difficulty with the deceased in which he willingly continues until he involves himself in the necessity of killing, the law will not hold him guiltless. Pen.Code, § 197, subd. 3; § 198.

8. **Homicide** 🔑113

When a defendant seeks or induces a quarrel which leads to the necessity of killing his adversary, the right to stand his ground is not immediately available to him, but instead he must first decline to carry on the affray, and must honestly endeavor to escape from it, and only when he has done so will the law justify him in thereafter standing his ground and killing his antagonist. Pen.Code, § 197, subd. 3; § 198.

9. Criminal law 🔑1159(2)

Implicit in Supreme Court's duty to determine the legal sufficiency of evidence to sustain a verdict is the obligation in a proper case to appraise the sufficiency and effect of admitted or otherwise established facts as precluding or overcoming as a matter of law inconsistent inferences sought to be derived from weak and inconclusive sources.

10. Homicide 🔑22(1)

A verdict of guilty of "murder in the first degree" depends upon proof not only of a malicious intent unlawfully to take life, but also that such malicious intent was willful, deliberate and premeditated, and that the homicide was of equal cruelty and aggravation with those enumerated in the Code. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in the First Degree".

11. Homicide 🔑22(2), 23(2)

"Malicious intent" as used in the definition of murder in the first degree is not synonymous with "willful, deliberate and premeditated intent" and proof of malicious intent without the further proof that it was willful, deliberate and premeditated would establish "second degree murder" but not first degree murder. Pen. Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Malicious Intent" and "Second Degree Murder".

12. Homicide 🔑21

In determining the degree of murder by means of inferences from acts of the defendant and the surrounding circumstances, the statements of the defendant and his acts must be appraised in the fullest legally available light of all the related facts and circumstances. Pen.Code, § 189.

13. Homicide 🔑332(2)

In prosecution for murder, it was the function of the jury to appraise the weight of the evidence and the function of the Supreme Court on appeal to appraise its legal adequacy, and in the performance of such functions, material facts established by prosecution witnesses could not be disregarded. Pen.Code, § 189.

14. Homicide 🔑230

In prosecution for murder, implied finding of jury that intoxicated defendant was capable of forming a malicious intent was sustained by the evidence. Pen.Code, § 189.

15. Homicide 🔑332(2)

In determining sufficiency of evidence to support verdict of first degree murder, all reasonable inferences must be drawn in favor of verdict. Pen.Code, §§ 187, 189.

16. Criminal law 🔑857(1), 1134(1)

To the extent that the character of a particular homicide is established by the facts in evidence, both the jury and the Supreme Court on appeal are bound to apply the standards fixed by law. Pen. Code, §§ 187, 189.

17. Homicide 🔑22(1)

A provision in Penal Code that any other kind of willful, deliberate and premeditated killing constitutes murder in the first degree contemplates that the field of jury discretion shall be wide, but the jury cannot change the statutory standards. Pen.Code, § 189.

18. Homicide 🔑22(2)

To be "murder of the first degree" under the statute, the killing must be premeditated except when done in the perpetration of certain felonies, or in other words the unlawful killing must be accompanied with a deliberate and clear intent to take life. Pen.Code, § 189.

19. Homicide 🔑253(3), 347

Evidence that deceased was advancing toward defendant who fired one shot not aimed at deceased and warned him to stay back, that deceased continued to advance and was shot by defendant, that defendant with eight loaded cartridges remaining in his rifle stopped firing when deceased stopped advancing and then permitted deceased to proceed without further molestation, was not sufficient to sustain verdict of first degree murder, and required modification of judgment of trial court to "murder of the second degree." Pen.Code, §§ 187, 189.

20. Homicide 🔑253(7)

Defendant's extravagant threat against decedent more than an hour before killing which witness testifying to threat did not believe was serious, was insufficient to constitute a conflict with other evidence showing only murder in the second degree. Pen.Code, §§ 187, 189.

21. Homicide ⚷230

Evidence that defendant before shooting said that he was engaged in "telling off" deceased did not amount to a declaration that defendant was in course of carrying out an intentional homicide, since to "tell off" is a colloquialism which means to reprimand, denounce.

See Words and Phrases, Permanent Edition, for all other definitions of "Tell Off".

22. Homicide ⚷253(3, 4)

In prosecution for murder, evidence was insufficient to establish that the killing was accompanied with a deliberate and clear intent to take life or to support the conclusion that the homicide was of equal cruelty and aggravation with those enumerated in the statute defining murder in the first degree. Pen.Code, § 189.

CURTIS, SHENK, and EDMONDS, JJ., dissenting in part.

◆

In Bank.

Appeal from Superior Court, Lassen County; Ben V. Curler, Judge.

Henry Harding Holt was convicted of murder in the first degree, and was sentenced to death, and he appeals.

Judgment modified by reducing it to murder of the second degree, and as so modified affirmed, and cause remanded with directions.

Ward Sullivan and Jerry Giesler, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Arthur J. Anderson, Dist. Atty., of Susanville, for respondent.

SCHAUER, Justice.

The defendant was charged with the murder of Romie L. Riley. He pleaded not guilty and not guilty by reason of insanity. A jury found him guilty of murder of the first degree and made no recommendation as to penalty. The issue of defendant's sanity was then tried and the jury found that he was sane at the time of the commission of the crime charged. The trial court denied the defendant's motion for a new trial and sentenced him to death. This appeal from the judgment is automatic. Pen.Code, § 1239(b).

The defendant attacks the judgment upon two grounds. He contends: (1) that the trial court failed to instruct the jury adequately upon the law as to self-defense; (2) that the evidence is insufficient to sustain a judgment of murder in the first degree, at most establishes murder in the second degree, and that the judgment, accordingly, pursuant to the power vested in us by section 1181 of the Penal Code, should be reduced from death to imprisonment for the term prescribed by law for murder of the second degree. We conclude that the first point cannot be sustained but that the second one is meritorious.

The contention that the jury was inadequately instructed as to the law of self-defense is based on the fact that the jurors were not told that the defense could be established even though a person, being feloniously assaulted, did not retreat but stood his ground. The commission of the homicide was admitted by defendant and the only issue as to its unlawfulness was the claim that he acted in self-defense.

The defendant testified, as hereinafter related in more detail, that immediately preceding the shooting the decedent, Riley, advanced toward him, coming around the end of a flat-car, which had been between them, picked up a club and continued advancing after being told by defendant to stand back. Defendant fired one shot into the ground and then, as Riley continued to advance, when at a distance of about fifteen feet, defendant fired again, wounding the decedent in the abdomen. Riley stopped advancing and defendant ceased shooting. Under cross-examination of defendant it was brought out that he did not at any time seek to retreat, go on his way, or otherwise decline the encounter.

The only instruction given as to self-defense was "that the mere apprehension of danger is insufficient to justify a homicide. The fear, if any, must have been produced by circumstances such as would be sufficient to excite the fears of a reasonable person. The law of self-defense is founded on necessity, and in order to justify the taking of life upon that ground, it must not only appear to the slayer as a reasonable man, that he had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to his comprehension, as a reasonable man, that to avoid such danger, it was *absolutely necessary* for him to do the act which he in fact did do." (Italics added.)

[1] It is the settled law of this state that one who without fault is exposed to a sudden, felonious attack need not retreat; he may in the exercise of his right of self-defense stand his ground and slay his assailant. (People v. Orosco (1925), 73 Cal.App. 580, 598, 239 P. 82; People v. Kinowaki (1940), 39 Cal.App.2d 376, 379, 103 P.2d 203; People v. Campanella (1940), 39 Cal.App.2d 384, 387, 103 P.2d 193; People v. Zuckerman (1942), 56 Cal. App.2d 366, 373, 132 P.2d 545; 13 Cal. Jur. 649–651, § 49, and cases there cited.) "The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense." (People v. Hecker, 1895, 109 Cal. 451, 467, 42 P. 307, 313, 30 L. R.A. 403.)

The use of the phrase "absolutely necessary" as it is employed in the instruction given, although it has been often upheld under the circumstances of particular cases, has been condemned. In People v. Carmichael (1926), 198 Cal. 534, 549, 246 P. 62, 68, this court criticized an instruction that "to justify a person in killing another in self-defense, it must appear that the danger, either real or apparent, was so urgent and pressing that, in order to save his own life * * * or to prevent himself * * * receiving great bodily harm, the killing of the other was *absolutely* necessary." Such use of the word "absolutely," it was said, "might have the effect of leading jurors to believe that, to bring it within the right of self-defense, the act of killing must have actually been necessary. Such an impression of the law would, of course, be erroneous, since there may be a justifiable homicide where the actual necessity for killing is not present. * * * [T]he elimination of the word 'absolutely' in the connection in which it is used in the instruction under review is recommended."

[2] The instruction given herein, however, is less open to such criticism than the instruction there disapproved. As stated in People v. Acosta (1937), 21 Cal. App.2d 57, 61, 68 P.2d 298, 300, where an instruction similar to that in the present case was under consideration, "Preceding the use of the word 'absolutely' there is a clear and direct statement that it must so appear to the appellant as a reasonable man, and that he had reason to believe, and did believe, etc., and that it appeared to his comprehension as a reasonable man that to avoid such danger it was absolutely necessary to take the life of the deceased. It is all based upon the reasonable appearance, not upon the absolute fact of such a necessity existing." Under the circumstances of this case we are satisfied that the inclusion of the words "absolutely necessary" in the instruction as given did not prejudice the defendant.

[3, 4] The attorney general calls attention to the fact that no special instruction on the law of self-defense was requested by the defendant but we consider that fact immaterial. It has been said (People v. Scofield (1928), 203 Cal. 703, 709, 265 P. 914, 917) that the following statement appearing in 8 California Jurisprudence at page 309 "is conceded to be the general rule": "It is the duty of the court in criminal cases to give, of its own motion, instructions on the general principles of law pertinent to such cases, when they are not proposed or presented in writing by the parties themselves. But it is not its duty to give instructions upon specific points developed through the evidence introduced at the trial, unless such instructions are requested by the party desiring them." The People contend that the right of an accused to stand his ground is a special issue raised during the trial and that an instruction thereon need not be given unless requested by the defendant. The quoted language, however, does not represent a complete statement of the applicable rule. As stated in People v. Putnam (1942), 20 Cal.2d 885, 890, 129 P. 2d 367, 369, "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. [Citations.] The court is not relieved of the duty to give instructions whose necessity is 'developed through the evidence introduced at the trial.' [Citation.] An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.]" We therefore consider the question on the same basis as though an instruction on the sub-

ject had been specially requested by the defendant.

[5] It is urged that on defendant's version of the matter, which the jury had a right to believe, he had a right to stand his ground, and as previously noted, that it was error not to so instruct the jury. But other evidence in the case, hereinafter related, overwhelmingly establishes that defendant was not without fault, that he himself invited the encounter, and that as a reasonable man he was not warranted in believing that he was in such imminent danger of great bodily injury as to justify the commission of homicide. Under those circumstances it was not prejudicial error to fail to instruct on the phase of the matter in question.

The basic law of self-defense is set forth in sections 197 and 198 of our Penal Code. So far as pertinent here section 197 provides that "Homicide is * * * justifiable when committed by any person in either of the following cases:

* * * * * *

"3. When committed in the lawful defense of such person * * *, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person * * * if he was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed * * *."

Section 198 reads as follows: "A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

[6, 7] The pertinent principles governing the right of self-defense are explained in People v. Westlake (1882), 62 Cal. 303, 307: "The apprehension of danger to life or limb which justifies a man for taking the life of another must be an honest one —one that is well grounded, and must arise out of a reasonable cause; but a cause which originates in the fault of the person himself—in a quarrel which he has provoked, or in a danger which he has voluntarily brought upon himself, by his own misconduct, can not be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person. * * * Hence a real or apparent necessity brought about by the design, contrivance, or fault of the defendant, can not be availed of as a defense for the commission of a crime. * * * Yet it is not to be doubted that a person accused of crime may show, in justification, that although he brought upon himself an imminent danger, he, in the presence of that necessity, changed his mind and conduct, and honestly endeavored to escape from it, but could not without striking the mortal blow. * * * And, in the absence of such circumstances, it must be true, as a legal proposition, that where a defendant seeks and brings upon himself a difficulty with the deceased, in which he willingly continues until he involves himself in the necessity to kill, the law will not hold him guiltless. The right of self-defense, which justifies a homicide, does not include the right of attack."

[8] In other words, when a defendant seeks or induces the quarrel which leads to the necessity for killing his adversary, the right to stand his ground is not immediately available to him, but, instead, he must first decline to carry on the affray and must honestly endeavor to escape from it. Only when he has done so will the law justify him in thereafter standing his ground and killing his antagonist. (People v. Soules (1940), 41 Cal.App.2d 298, 314, 106 P.2d 639.) The rule is expressed in 1 Wharton's Criminal Law 828-832, sections 614 and 615, in the following manner: "If the defendant in any way challenged the fight, and went to it armed, he cannot afterward maintain that in taking his assailant's life he acted in self-defense. 'A man has not * * * the right to provoke a quarrel and take advantage of it, and then justify the homicide.' Self-defense may be resorted to in order to repel force, but not to inflict vengeance. * * * 'There is certainly no law to justify the proposition that a man may be the assailant and bring on an attack, and then claim exemption from the consequence of killing his adversary on the ground of self-defense. * * *' But though the defendant may have thus provoked the conflict, yet if he withdraws from it in good faith, and clearly announces his desire for peace, then if

he be pursued his rights of self-defense revive. Of course, there must be a real and bona fide surrender and withdrawal on his part; for if there be not, then he will still continue to be regarded as the aggressor. * * *" (See, also, 13 Cal.Jur. 633, § 40.)

The overwhelming weight of the evidence, including defendant's own testimony and extrajudicial statements, establishes that defendant was not an innocent person suddenly confronted with imminent danger of great bodily harm. On the contrary, the evidence shows that he was the "first wrongdoer" in that by his quarrelsome and challenging attitude, not only toward deceased but others in touch with him a short time prior to the homicide, he had created an atmosphere of antagonism that might naturally lead to physical combat if he continued, as he did, in his quarrelsome pursuit of trouble. Defendant, therefore, was not without substantial fault, a condition essential under the authorities to permit an accused to stand his ground and slay his adversary without first having sought to retire from the combat. Under all the circumstances, it cannot be said that the trial court erred to defendant's prejudice by failing to give an instruction on the right to stand one's ground and slay an adversary.

Defendant's second contention—that the evidence is insufficient to sustain a verdict of murder in the first degree and at most establishes murder in the second degree—requires a critical examination of substantially all the evidence in the record. The following narration of such evidence also furnishes the basis for the previously announced conclusion that it overwhelmingly establishes that defendant was not without fault and that he himself invited the encounter with decedent. The defendant's own account of the shooting is included, not as material to our consideration of the degree of the offense, but solely in reference to the showing that the failure to give the above discussed instruction was not prejudicial error.

The killing occurred on Monday, April 19, 1943, at Hall's Flat, a small station of the Western Pacific Railroad at its junction, in Lassen County, with the private line of the Red River Lumber Company. The defendant Holt was a railroad telegraph operator; he possessed a .22 calibre bolt action repeater rifle, a 12 gauge shotgun, and two or more dogs. It was his custom to take walks, hunting small game, carrying a gun, and accompanied by his dogs. Romie L. Riley, the deceased, was a brakeman on a logger train. The principal prosecution witnesses were also railroad employees. The defendant and his crippled wife lived in a cabin near the station. The evidence establishes that defendant was an affable and industrious man when sober, but quarrelsome and irresponsible when he had been drinking; aside from this change of disposition he manifested few, if any, signs of intoxication.

On Sunday morning, April 18, 1943, the defendant engaged in the first of a series of unprovoked disputes with other employees. He apparently had been drinking heavily. (The facts as to his *drinking* are established by both prosecution and defense witnesses but the state of the evidence in this regard, as hereinafter shown, is not such as to require a finding that, at the time of the homicide, he was so under the influence of intoxicating liquor as to have been incapable of forming the malicious intent essential as an element of murder. Hence the fact of his drinking is narrated as being pertinent to his quarrelsome mood but in reaching our conclusion as to the degree of the offense proved we assume, in conformity with the jury's verdict, that the defendant was fully capable, mentally, of the intent essential to the crime of which he stands convicted.) He instructed a fellow telegrapher to stay out of the telegraph office during his (Holt's) shift. Until shortly before his arrest on Monday afternoon, when (after, but not before, the homicide) he had reached a stage of stupefaction, the defendant continued to drink from time to time, substantially depleting the supply of whiskey which he kept in his cabin. On Sunday evening he had left his job "unprotected"; i. e., had absented himself without procuring anyone to take his place. It was customary among the operators to "watch out for" one another in such a situation, but because of the earlier dispute no one substituted for the defendant on this occasion. Sunday night he was notified that he would have to stand an investigation of his absence from the job or resign. Monday morning he was in and out of the station several times with a "chip on his shoulder for anybody that would argue with him." He was, on this day, morose and quarrelsome toward and concerning everyone he encountered.

Prosecution witness Hilton, a train engineer, testified he was in the station at

Hall's Flat on the morning of April 19, when defendant came in and refused to accept a telegram from telegrapher Shields. Defendant threw the message on the floor and left the door open as he departed. The witness closed the door and defendant returned, demanding to know who closed the door and stating, "Well, I am running things around here and I want you to understand none of you trainmen are going to have anything to do with it."

The engineer of the train on which deceased was brakeman testified that at approximately 10:30 o'clock on the morning of the shooting defendant walked from the station to the train with a message blank in his hand and the witness, thinking it contained instructions for him, stopped the train, got out on the ground, and asked defendant "what he had for us." Defendant asked, "What is the matter with Riley [deceased], is he trying to get tough around here." The witness replied there was "nothing the matter with Riley, for him to leave Riley alone, and Riley wouldn't bother him," whereupon defendant said "he was going to go home and get his gun, and shoot his [Riley's] God damn heart out and wipe it across his mouth." The witness said the train then left the station, with Riley aboard, and returned about one hour and twenty minutes later; he did not consider the threat to be seriously meant although, he said, the defendant "did sound serious" and he communicated it to Riley. It was after return from the mentioned trip that the shooting occurred.

The quoted remarks, coupled with the subsequent acts of defendant in actually getting his gun—a .22 calibre rifle—and shooting decedent, may seem by themselves, at first impression, to establish a willful, deliberate, and premeditated intent to commit murder. Viewing that evidence superficially, it would appear possible to so hold and so dispose of this appeal. But in determining whether the life of the defendant legally is forfeit in expiation of his crime the jury was not free to isolate such specifically mentioned items of evidence from all the other related facts and circumstances. Particularly, the jury was bound to give consideration to certain material facts, hereinafter detailed. If such other facts merely create a substantial conflict in the evidence the determination by the jury is controlling but if those facts are indisputably established and if they are such as legally disprove, or overcome the efficacy of the basis for, the inference of existence of the essential intent, then it becomes our duty to hold that such intent has not been proved.

[9] Implicit in our duty to determine the legal sufficiency of evidence to sustain a verdict is our obligation, in a proper case, to appraise the sufficiency and effect of admitted or otherwise indubitably established facts as precluding or overcoming, as a matter of law, inconsistent inferences sought to be derived from weak and inconclusive sources. Not every surface conflict of evidence remains substantial in the light of other facts. For example, we may assume a prosecution for robbery. The complaining witness establishes the corpus delicti and testifies that in his belief and from his observation the defendant is the person who committed the crime. This evidence standing alone would support a verdict of guilty. But if in addition it was *indisputably* proven by prosecution witnesses that at the time of the offense the complaining witness was totally blind and that the defendant was in the military service on duty in a foreign land, we should be bound, notwithstanding the legal sufficiency of the isolated statements, to view the related facts and circumstances (irrefragably proven) and hold that such evidence in the light of all the established circumstances was insufficient, as a matter of law, to sustain a verdict of guilty.

[10-12] Here the verdict of guilty of murder of the first degree depends upon proof not only of a malicious intent unlawfully to take life but also that such malicious intent was *willful, deliberate, and premeditated,* and that the homicide was of equal cruelty and aggravation with those enumerated in the statute (Pen.Code, § 189, hereinafter quoted.) As hereinafter discussed more fully, the phrase "malicious intent" is not synonymous with "willful, deliberate, and premeditated" intent. The proof of malicious intent without the further proof that it was "willful, deliberate, and premeditated" would establish second degree murder but not first degree murder. And since that proof depends at best upon the not infallible processes of reasoning, and is to be derived only by way of inferences from the acts of the defendant and the surrounding circumstances, fairness demands of us, as it did of the jury, that the statements of the defendant and his acts be appraised in the fullest legally available

light of all the related facts and circumstances.

[13] The function of the jury was to appraise the weight of the evidence; ours is to appraise its legal adequacy; and in the performance of these functions the jury could not lawfully, nor may we, disregard certain material facts which are indisputably established by prosecution witnesses.

As previously indicated the decedent was not the only person toward and concerning whom the defendant manifested his disturbed mood. The witness Walter F. Damaske, a brakeman, testified to a conversation with the defendant which occurred a few minutes before the shooting. The defendant was walking along the track with his rifle and his dogs. Damaske met him and the following conversation took place: "I said, 'Hello, Mr. Holt.' He said, 'Some of these old sons-of-bitches around here had better mind their own damned business.' And I said, 'What do you mean, and who do you mean?' And he said, 'Shields and Cleveland.' [Shields and Cleveland were fellow telegraphers.] And I said, 'Are they giving you trouble? Are you in a jam? Did you get fired, or did you blow up? And he said, 'Blow up, what do you mean, blow up?' I said, 'Oh, nothing, but if I wanted to stay on the job, I would stay on it. I wouldn't let anyone run me off.' That ended the conversation."

The witness Ferguson, conductor of the train of which Riley and Damaske were brakemen, testified that defendant told him that he did not like the Western Pacific Railroad or its employees and "didn't want anything to do with any of them." He said, "I am all through with the Western Pacific and the Red River Lumber Company, and anybody that works for them." The witness continued, "Well, I said, 'Say, I hope you don't mean me on that.' He said, 'Yes, you are working for them.'" About an hour later Ferguson again encountered defendant and concerning that meeting testified, "just as I was going, I didn't stop, he tried to tell me to go over by a big tree and pull it up and get in the hole."

The only evidence of any prior ill feeling between the defendant and Riley concerns the defendant's vexation over Riley's taking of coal which the railroad company furnished for the telegraphers' use and Riley's annoyance because the defendant once refused to entrust him with train orders when Riley assertedly had been drinking. The defendant denied having had any feeling of enmity toward the deceased or any intention to do him harm, and apparently no rational ground existed for the defendant to have ill feeling either toward Riley or any other of the several persons mentioned above.

Concerning the coal-taking incident the prosecution witness Shields testified that at some prior time "there was a little dispute over some coal. * * * It didn't amount to much. * * * Mr. Riley was getting coal [out of the telegraphers' bin] for his caboose, and when the coal got a little low, we ordered more, and the second supply wasn't so good. * * * [The coal was kept there for the] telegraphers' use; however, when the loggers run short I permitted them to take coal. * * * [The coal belonged to the Western Pacific Railroad.] He [Holt] seemed to think it [the new supply] wasn't good for any purpose, heating or cooking. * * * He said if Riley had left the coal alone we would have had sufficient coal to run us over the winter. * * * He didn't say that angrily." Specifically as to Holt's attitude on the matter the following questions were asked and answers given:

"Q. Was there anything in the statements that would indicate that Holt was in any wise peeved or perturbed over the fact that the coal had been taken? A. Yes, like he was a little peeved at Riley for taking the coal.

"Q. He didn't indicate by his actions or by anything that he said that he was inclined to do any harm to anybody for having taken the coal? A. No, he never."

The testimony of the witness also established that the new supply of coal was in truth of a definitely inferior grade. Just how long it was before the shooting that the coal incident occurred is not shown but it does appear that at that time Riley was employed as conductor of the logging train, whereas at the time of the shooting he was serving as a brakeman.

About 11:30 a. m. on Monday, April 19, the defendant went for his customary walk with his dogs and his gun. As he passed the station he remembered that there was a blanket there which he wished to pick up. He went in to get it and, as he testified, "I didn't intend getting but one. They say I had two." He stopped in the telegraph office and sent a message. He then walked toward his cabin along a road parallel to the railroad track. At a switch stand about 120 feet from the station he came upon Riley and the unfortunate tragedy occurred. The only eyewitness to it (other than defendant) was George M. Keever, locomotive fireman. His testimony is the most crucial in the case and hence is quoted in part. The questions and answers are as follows:

"Q. Where was Mr. Holt standing? A. Mr. Holt was standing, I should say, in this wheel track; no question about that, he was in that wheel track.

"Q. By 'wheel-track,' you mean this smooth part on the dirt road? A. Yes, and close by the switch-stand here, a few feet more or less to one side, but in the close vicinity of that switch-stand.

"Q. And definitely, you say, in the wheel-track? A. Oh, yes, no question about that.

"Q. What did Mr. Holt have with him at that time? A. Mr. Holt had what it looked to be two good-quality wool blankets under his left arm.

"Q. Did he have anything else in his hand? A. Yes, he had a 22 rifle in the other hand.

"Q. You stated you had some conversation there, just what was the conversation? A. I said, 'Hello, Jack.' That was what we called Mr. Holt. I says, 'Hello, Jack.' I says, 'How is everything going?' He said, 'O.K., but right now I am telling this brakeman off.' * * *

"Q. Where was Mr. Riley at that time? A. Mr. Riley was standing on the opposite side of the track, on the end of the ties.

"Q. That would be on the side of the track away from Mr. Holt? A. Yes.

"Q. And where was he in relation to the end of the train? A. He was leaning against the rear car with his elbows in a relaxed position, as one would lean on something of that nature.

"Q. And after Mr. Holt said to you, 'O.K., but right now I am telling this brakeman off,' what happened then? A. I started walking on in the direction of Hall's Flat station south, and just before I got out of hearing distance I heard Mr. Riley tell him to take his gun and his dogs and go on about his business, that he didn't have time to be bothered with him. *And by that time I was out of hearing distance,* and neither of them right at that particular moment had their voice raised, and their conversation was of no interest to me; so I didn't pay any particular attention to it. I just went on about my business.

"Q. Did you then proceed down the dirt road in the general direction of Hall's Flat station? A. Yes.

"Q. What was the next thing that happened? A. I heard the rifle crack.

"Q. About how far had you proceeded along that road before you heard the rifle? A. Oh, something like 50 or 60 feet.

"Q. You heard the rifle, report of the rifle? A. Yes.

"Q. What did you do at that time? A. I turned quickly to see what Mr. Holt was firing at.

"Q. And what did you see at that time? A. I seen Mr. Holt standing with both hands on the gun, the blankets laying on the ground, *and Mr. Riley was going in his direction across the track, and just about in the act of stepping down off the end of the tie, or had stepped down off the end of the tie, in the direction of Mr. Holt; and Mr. Holt raised the gun up again to a firing position, and says, 'Stay back, don't come any closer, or I will kill you,'* and fired again.

"Q. *Where was Mr. Riley with relation to the switch-stand at that time?* A. *He was close enough to say that he was right at it.*

"Q. In other words, when you saw him with his arms on the car, he was on the west side of the track? A. Yes.

"Q. And between the first and second shot you saw him come from behind the end of the car? A. Yes, I did.

"Q. And across towards the switch-stand, is that it? A. Yes.

"Q. And is that when Mr. Holt made the remark that you stated? A. Yes.

"Q. And what was it that Holt said again at that time? A. Do you want me to repeat it?

"Q. Yes. A. He says, 'Stay back, don't come any closer, or God damn you, I will kill you,' and punctuated his command with the firing of the gun.

"Q. At that time, if I understand you correctly, Mr. Riley was at the edge of the ties? A. Yes, he had not gone beyond the switch-stand. The switch-stand was still between he and Mr. Holt. He had not passed it.

"Q. That would be the east side of the track? A. Yes.

"Q. Were you looking directly at Mr. Holt when he fired? A. I was looking directly at him. There was absolutely nothing between he and I, whatsoever.

"Q. From what position, Mr. Keever, did he fire the rifle? From the shoulder, from the hip, or how? A. From the shoulder.

"Q. Did you see him raise the gun to his shoulder? A. I did.

"Q. And in which direction were you looking when the gun went off the second time? A. I was looking in a northerly direction, straight at Mr. Holt and Mr. Riley. The whole scene was being acted out right there before my eyes.

"Q. What, if anything, did Mr. Riley have in his hand at that time? A. Nothing, other than his gloves. He had his gloves on.

"Q. When the second shot was fired, what happened? A. Right on the report of the gun, Mr. Riley said, 'Uh,' like that, and grabbed himself across the stomach,—

"Mr. Anderson: He indicates with his hands across his stomach.

"The Witness: (Continuing) A. As though one would hold a place where they were injured, or where a severe pain was.

"Q. You indicate that by folding your arms across the front of his chest, so to speak? A. He said 'Uh,' like that.

"Q. A little lower than his chest? A. Just about the lower ribs. And he was facing me, more or less, in the act of turning, and he continued the turn—about faced completely, and went back the way he had came, and around the car and down the opposite side of the train toward the station, still holding himself across the stomach.

"Q. Did you say that he had started to turn at the time the shot was fired? A. Yes, he was in the act of turning.

"Q. In the act of turning? A. Yes, and he was turning in my direction.

"Q. What did you do then? A. I climbed through the train, between the other logging cars, over the draw-bar, and dropped down on the other side, and seen that *Mr. Riley was still on his feet and coming toward the station,* and apparently I could be of no assistance to him, and I went on to the station just ahead of Mr. Riley and went inside. * * *

"Q. What was the last you saw of Mr. Holt at that time? A. It was immediately following the firing of the second shot. He turned as Mr. Riley turned, and went around the train. *Mr. Holt turned and went north towards his cabin. He had dropped the blankets in the road—throwed them down—and he completely disregarded them. Left them laying in the road.*

"Q. How about the gun? A. *He still had it in his hands when I saw him last.* * * *

"Q. Now, what did you say was Mr. Holt's condition as to intoxication, or sobriety? A. Well, the best I can give you is my opinion.

"Q. Certainly? A. *I should say that he was intoxicated.*

"Q. Just slightly, or highly? A. *Highly,* and that is based strictly on his actions and his conduct. I didn't see him take a drink.

"Q. And when he was asking you into his cabin, did he mention anything about coming in and having a drink? A. Yes, he did. He invited me into his house to have a drink.

"Q. And this opinion as to his intoxication was gained from the first meeting with him, when you walked up the road with him to his cabin? A. Yes.

"Q. That is correct, is it? And how did his condition appear to compare with when you saw him the second time immediately before the shooting, with what it was early in the morning? A. Well, it was— It was hard to judge or observe, and say definitely as to his condition, but as regards the shortness of time— the interval of time when I walked up the track with him early in the morning, and at the time I seen him the last time, there couldn't have been a great deal of change in him.

"Q. There was a short interval of time, and a high state of intoxication, and you didn't figure he had had time to sober up very much, is that correct? A. Yes, there was only about two and a half hours to three-quarters hours difference, and if he had had no more to drink, there wouldn't have been a reasonable time to sober up in, we will say." (Italics added.)

According to the testimony of the wife of defendant, which is not disputed, he returned to his cabin, set the rifle in its usual place, sat down on a cot, "picked up a bottle and took a real big drink and lay back and went to sleep * * * almost before his head was down, he was out." This, apparently, was shortly after 11:30 in the morning. He roused once, took another drink, and remained apparently stupefied until the sheriff came and arrested him at about 2:15 or 2:30 p. m.

The sheriff found the rifle in the cabin, apparently in its customary location. He described it as "a bolt action repeater, tubular type of magazine" of .22 calibre, "adapted to the 22 short, long, and long rifle cartridges." He said that he found *"one loaded cartridge in the barrel and seven in the magazine."* The defendant was still on the cot. Concerning his condition at that time, the sheriff's testimony is as follows:

"Q. What was his condition at that time? A. Well, he didn't respond. Mrs. Holt answered the door, and I immediately asked if Mr. Holt was there, and she responded, 'Yes.' I immediately saw Jack, and I went right on directly in over to where Mr. Holt was. The gun was standing just to the right, possibly six feet, and I stepped between Mr. Holt and the gun, and spoke to him, and he didn't respond.

"Q. Could you tell whether he was asleep, or passed out, or drunk at that time? A. At that time I couldn't tell whether he was asleep. He had his arm up over his head. Whether he was watching me, or what, I wasn't certain.

"Q. *How long did it take you to get him aroused?* A. *I went over and took hold of his arm and I got him on his feet, and I had spoken to him two or three times, and about the—possibly the third time I spoke, he spoke a sentence or two, or talked to Mrs. Holt, rather.*

"Q. Was he dressed or undressed at the time? A. Fully dressed.

"Q. Fully dressed. Was he covered up, or lying on top? A. On top of the covers, to the best of my recollection. * * *

"Q. Now, after you had got Mr. Holt away, after you had gone into his cabin and had a little trouble arousing him, what would you say as to his condition as being drunk or sober? A. When I first—You just want an opinion?

"Q. That is all you can give. A. I would say that he was moderately intoxicated. That would be my opinion.

"Q. That was at the time you arrived there, along in the neighborhood of 2:30? A. Yes.

"Q. Did you make any investigation to see whether he had any supply of liquor in the house at that time? A. I did.

"Q. What did you find? A. I found a quart bottle of whiskey, I would say, possibly half or a third of a bottle of liquor left in the bottle. I would say half of it, or a little over a pint of liquor left in the bottle.

"Q. That was a quart bottle? A. Yes.

"Q. Was that a plain bottle, or was it some kind of bonded goods? A. It was bonded goods." (Italics added.)

Apparently before the defendant had fully recovered from his intoxication and before Riley had died, the sheriff asked some questions and in reply the defendant said, according to the sheriff's testimony, "I shot him, because he called me dirty names. * * * He had it coming * * * Sheriff, I would shoot you if you called me dirty names. * * * I didn't want to kill him. I didn't want to kill anybody. I wouldn't shoot anybody in the back. That would not be sportsmanlike."

Defendant took the stand in his own defense and testified that he had voluntarily imbibed intoxicants both before and after the homicide, which, he asserted, caused his memory to be hazy, if not a blank, as to some of the events. Defendant did recollect and admit, however, that he had ordered a fellow telegrapher to stay out of the station during his (defendant's) shift. He also admitted having refused to accept the telegram from the telegrapher on the morning of the homicide and also recollected going back to inquire who had closed the station door after he had departed leaving it open. After relating a story which tended to establish that cordial relations existed between him and deceased—the described relationship being such that on several occasions he had treated deceased to a drink—defendant testified that on the morning of the homicide deceased, after assertedly saying he was glad defendant lost his job, and without apparent provocation, advanced toward him with a brake stick or club. At no time, however, according to defendant's own testimony, was deceased close enough to strike defendant with the stick. Defendant admitted firing two shots. He claimed that the *first* was preceded by a verbal warning to Riley to stay back and that *both* were aimed at the ground. The course of the bullet through Riley's body, however, seems to establish that the second shot was aimed directly at him. The testimony of the prosecution witness Keever, previously quoted, establishes that the warning "stay back, don't come any closer," was given, but he places such warning as immediately preceding the *second* shot. The testimonies of both Keever and defendant unite in showing that *both* shots were fired without defendant's having made any attempt to back up or to otherwise avoid the shooting.

The defendant's own account of the shooting and the events immediately preceding it is as follows:

"Q. Where was Mr. Riley when he first spoke to you? A. Well, he was on the other side. May I show the jury where Mr. Riley was? (Goes to map and indicates on map.) He was on this side of the track.

"Q. That would be on the west side of the track? A. On the west side of the track, yes, sir. Now, it wouldn't be, either—the east side. Yes, the west side of the track.

"Q. That was where you first saw him? A. Yes, sir, when I first saw him.

"Q. Was that where he was, you say, when he spoke to you and you couldn't understand him? A. Yes.

"Q. What did you do after he spoke to you? A. Well, I asked him what he said, and then he said, 'You don't like me, do you?' I said, 'I don't see how you figure that.' And instead of commenting further, he said, 'You lost your damn job, didn't you?' I said, 'Well, maybe so, but,' I says, 'what difference does that make as far as you are concerned?' He said, 'Well, I am glad you lost your job.' I said, 'I don't know why you feel like that. You are wrong, Riley, I helped save your job.'

"Q. What did he say? A. He said, 'You S——t.' And I said, 'That is exactly what happened. I helped save your job.' That was the answer I gave to him.

"Q. Did he say anything to you, or make any demonstration or any threat? A. No, he didn't say nothing. He didn't say anything, but the expression on his face,—you could see he was awfully peeved, just right immediately afterwards.

"Q. What did he do then? A. He started towards me.

"Q. Did you see anything when he started toward you? A. Yes, as he got near the rail, that is the furtherest rail from me, he reached down and picked up something.

"Q. What did he pick up? A. Picked up a club.

"Q. What kind of a club was it? A. I would say it was a hickory stick about that long—I didn't mark it or pay any attention to it. It looked like a hickory stick, something like that.

"Q. What did he say to you at that time? A. He said, 'Well, I will beat hell out of you, and that damned crippled wife of yours, too.' He kept coming, and I told him to stay back.

"Q. Do you know what that is (Exhibiting stick to witness)? A. Yes, sir.

"Q. What is it? A. It is just a hickory stick that some of the boys picked up some place, maybe. They buy them and use them for brake sticks on the cars.

"Q. What is a brake stick? A. It is a stick of hard material and they run it into the brake-wheel and they set up the brake on the car to tighten up this wheel. And they give it a good pull around that way to set the brake tighter with it.

"Q. Is that the way the brakes are operated manually? A. Nothing manual about them. It is the brake setup on the car, and if empty cars are switched into a siding there might be a little bit of grade there, and then they have to set up those brakes, in order to keep the cars from going down-grade. That is what you call a brake-stick.

"Q. Was it something similar to that that Riley picked up at that time? A. Yes.

"Q. What did he do then? Did he come toward you? A. Yes, he did.

"Q. What, if anything, did he say, other than what you have just said? A. That was all he said.

"Q. What did you say to him? A. I told him to stand back.

"Q. What did you do then? A. And when he come further, why, I shot with this 22 rifle.

"Q. And in what direction did you shoot? A. Well, I was shooting toward the ground. I was holding the rifle this way and shooting toward the ground and

I am pretty sure I was shooting to the left of him at that time.

"Q. What had become of the roll of blankets? A. I guess I dropped them. I don't know.

"Q. You don't know. After you had shot the first time, what did Riley do? A. He kept coming.

"Q. Did he say anything further to you? A. No, he didn't.

"Q. What did you say to him? A. I just told him that one time to stop.

"Q. What did you think he was intending to do when he came toward you? A. He wasn't going to play with me, not with that stick in his hand.

"Q. You know that he had a club similar to this in his hand at the time? A. Yes, sir.

"Q. Just what was his position? Where was he when you fired the first shot? A. Well, he was—he had stepped over that first rail, and was still coming. He was getting pretty close to the second rail, I would say.

"Q. Do you know what position he was in when you fired the second shot? A. Still coming towards me, straight towards me.

"Q. You didn't say anything further to him? A. No, sir.

"Q. What position did you have the gun in when you fired the second shot? A. I was holding it like this.

"Q. Did you have it up to your shoulder? A. No, sir, I certainly did not.

"Q. After the second shot was fired, what, if anything, was said by either you or Riley? A. After the second shot was fired Riley grabbed himself in the stomach, something like this, and then the expression changed on his face and he said, 'You shot me.'

"Q. What, if anything, did you say? A. I said, 'Riley, if I did, I am sorry.'

"Q. Had you deliberately pointed the gun at him with the intention of shooting him? A. No, sir."

(It is to be noted, in connection with the defendant's claim of error in the trial court's failing to instruct the jury relative to his asserted right to stand his ground and shoot in self-defense, that the defendant's above-quoted testimony, taken literally, tends to establish involuntary homicide rather than intentional killing in self-defense.)

Defendant's wife testified that after the shooting she was walking in the general vicinity of the switch stand and picked up a "stick" which she used as a cane. The "stick" was introduced in evidence though defendant was unable to identify it as the "club" assertedly held by deceased. The wife stated that when defendant came into the cabin immediately after the shooting he did not mention that deceased had a stick or club in his hands. Defendant and his wife were the only witnesses called by the defense.

The prosecution called the following several witnesses in rebuttal: The sheriff testified he had searched the vicinity of the shooting (which was prior to the time defendant's wife said she found the stick) and that he did not see there a stick or club resembling the one placed in evidence. Damaske, the brakeman, testified that at no time during the switching operation which immediately preceded the shooting did he see a stick or club in deceased's hands and that he did not notice a stick on the ground resembling the one in evidence. One of the other trainmen also testified that at no time did he see a stick or club in deceased's hands. The witness Keever testified that between the first and second shots he had a full view of deceased and he did not have a stick or club in his hands. This witness said, "I am telling you I seen both hands and if that stick, or any other stick like it, had been in his hands I would have seen it. * * * No, sir, it wouldn't have been possible for him to have that stick in his hands and I not seen it." As to the weight of such testimony, however, it is but fair to the defendant to note that the witness on his preceding cross-examination had testified as follows:

"Q. Now, you didn't, after you passed the switch, you didn't turn and look back until you heard the shot fired, did you? A. That is right.

"Q. So if, in the meantime, between that and the other shot that was fired immediately before, whether he had something in his hands besides his gloves, you wouldn't have known it, would you? A. He could have had something in his hands without my seeing it, after he passed beyond my range of vision and going on in that direction towards the station."

The superior court reporter, who had reported a statement made by defendant to the district attorney and others on the evening of the day of the shooting, testified that defendant, when asked if he was intoxicated at the time of the shooting, replied, "No, hell, no"; and that when asked if deceased had anything in his hands, he responded, "I don't know whether he had a brake club or not; but I know when he said so-and-so, and started towards me, I guess that is when I blowed my top. * * * He said some bad words that wasn't nice for him to say."

[14, 15] Some of the evidence above quoted may seem to establish that the defendant, at the time of the homicide, was so deeply under the influence of intoxicating liquor as to have been incapable of forming in his mind that "malice aforethought" which is an essential element of the crime of murder of either degree. Of course, if he had been so intoxicated as to be wholly incapable of a malicious intent we should be confronted with a problem as to whether any offense higher than manslaughter was established. (Cf. People v. Kelley (1929), 208 Cal. 387, 281 P. 609, wherein a judgment for murder of the first degree was reduced to one for manslaughter.) But, as previously stated, we do not regard the evidence as requiring a finding that he was so intoxicated. Support for this conclusion appears in the testimonies of several witnesses who stated their opinions as to defendant's condition as follows: Dorithy, "didn't think he was drunk"; Ferguson, "didn't seem as though he was under the influence of liquor"; Keever, "no indication as regards his intoxication"; Hilton, "able to walk around and talk coherently"; Damaske, "walked and everything else, just like he always did." We therefore regard the implied finding of the jury that the defendant was capable of forming a malicious intent as being conclusive of that fact. Hence, the crucial question on this phase of the appeal is whether all the above narrated evidence is sufficient, upon any fair interpretation of it, resolving all reasonable inferences in favor of the judgment, to establish that the homicide was murder of the first degree *as distinguished from murder of the second degree.* To differentiate the two degrees intelligently it is essential that we have a definitive understanding of each.

Murder, and this, of course, includes murder of the *second* degree as well as murder of the first degree, is defined as "the unlawful killing of a human being, with malice aforethought." (Pen.Code, § 187.) The cognizable and practical differences between murder of the first degree and that of the second degree are difficult to delineate because in all the legal history of California that of the second degree appears never to have been the subject of an authoritative definition that is fully conceptual and substantive.

The legislative definition of the degrees of murder leaves much to the discretion of the jury in many cases. That discretion, however, must have a sound factual basis for its exercise, as hereinafter is more particularly discussed. The Penal Code section 189 declares that "All murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree; and all other kinds of murders are of the second degree." It is noteworthy that murder perpetrated by gunshot is not, as such, classed as murder of the first degree. It has been held that the existence of a deliberate purpose to kill may be inferred from the character of the weapon used, the circumstances surrounding and showing the relationship of the parties, and the acts and conduct of the accused. (People v. Cook (1940), 15 Cal.2d 507, 514, 102 P.2d 752; People v. Smith (1940), 15 Cal.2d 640, 647, 104 P.2d 510; 13 Cal.Jur. 597, § 14.) And it has been held that the act of killing may follow the intent to kill as quickly as follow successive thoughts of the mind. (People v. Garcia (1935), 2 Cal.2d 673, 683, 42 P.2d 1013; People v. Aranda (1938), 12 Cal.2d 307, 310, 83 P.2d 928; People v. French (1939) 12 Cal.2d 720, 745, 87 P.2d 1014.)

Obviously the homicide in this case was not perpetrated by means of poison, or lying in wait, or torture, nor was it committed in the perpetration of or attempt to perpetrate any of the enumerated felonies. Hence, if it is first degree murder it must come within the classification of "any other kind of willful, deliberate, and premeditated killing." But homicide to amount to even second degree murder must be "the unlawful killing of a human being, with malice aforethought." The malice which is one of the two essential elements of the offense—whether of the first or of the second degree—is defined by section 188 of the Penal Code. "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

Writing on the subject "What is Second Degree Murder in California?" Mr. James A. Pike in Southern California Law Review (1936, vol. IX, p. 112) declares: "Felonious homicide involves such grave implications that, from the standpoint of society, the law relating thereto is doubtless the most important branch of criminal jurisprudence. Due, on the one hand, to the great interest society has in protecting itself from such acts, and, on the other, to the gravity of the penal sanctions threatening the accused, this field should be one of the greatest clarity. But, unfortunately, this is not the case. In fact, there probably is no field of the law in which there is greater obfuscation, no field in which the courts are more guilty of saying one thing, meaning another—and doing a third!

"The chief difficulty seems to lie in ascertaining the exact lines of division between the various types of homicide recognized as felonious. Due perhaps to the long recognition that the distinction has had at common law, the meanings of murder and manslaughter are relatively clear, although the terms themselves can not clearly be defined. A common statement of the distinction is that 'malice aforethought, either express or implied, is presumed to be wanting in manslaughter.' (1 Mitchie, Homicide (1914), 130, § 21.) Although 'malice aforethought' is a rather confusing term in defining murder—and, *a fortiori,* is confusing where it is sought to distinguish the degrees of murder, nevertheless it appears to be more convenient than any other term in the legal vocabulary as an expression of the distinction between murder and manslaughter. *Intention* will not do: 'voluntary manslaughter'—killing in the heat of passion upon sufficient provocation—is intentional but, nonetheless, manslaughter. Of course, from a strictly realistic point of view, such a killing is likewise *malicious;* but, according to common law tradition, the malice is presumed to be wanting in such a situation, the act 'being rather imputed to the infirmity of human nature.' (1 Mitchie, Homicide (1914), 130, § 21.)

"It can readily be seen that the chief difficulty in distinguishing murder from manslaughter is a question of suitable and accurate terminology. However, the task of drawing with precision the exact line dividing first and second degree murder is fraught with difficulties of a more fundamental nature. It brings one face to face with the question of what the courts really mean by the terms familiar in the jargon of homicide, such as 'deliberation,' 'malice' and 'intent'; and, further, what fact-situations actually exist in cases where convictions for second degree murder are sustained. * * *

"[P. 120] In the first California case involving the distinction between first and second degree murder (People v. Bealoba (1861), 17 Cal. 389), the trial court had instructed the jury that 'intent to kill' was the criterion. The trial judge had said:

"'The first inquiry, therefore, of a California jury, after a felonious and malicious homicide is established, and not committed by means of poison or lying in wait, is to determine whether the mortal shot was fired with intent to take life; or merely to do bodily harm; if with intent to take life, it is murder in the first degree; if merely to inflict bodily harm, it is only murder in the second degree.'

"The trial court seemed to wish to convey the idea that premeditation could be inferred from intent and, in support of this proposition, it cites this example:

"'Let it be supposed that a man without uttering a word should strike another on the head with an ax, it must, on every principle by which we can judge of human actions, be deemed a premeditated act.'

"The supreme court affirmed the decision, thus sustaining the instruction. Mr. Justice Baldwin said, in support of the judgment:

"'These terms "deliberate—willful—premeditated," are used in the English books, and were well known to the framers of our act; and they have the same meaning.'

"The effect of this decision, if it had been followed in this State, would have been to emasculate the distinction between the two degrees of murder. Leaving out of consideration for the moment killings in the perpetration of felonies, intent to kill or seriously injure is an element of the crime of murder. True, this intent need not be specific, but the intent must be present. But if, as the Bealoba case holds, deliberation is identical with intent, then what room is there for an 'intended murder without deliberation'? What mental state would constitute second degree murder? It was not necessary for the court to decide this issue in the Bealoba case, since in fact the defendant was convicted of first degree murder.

"However, four years later, the supreme court was faced with the necessity of deciding this very issue. The trial judge had instructed the jury that 'murder is divided by our law into two degrees—the first includes every unlawful killing of a human being done maliciously or intentionally.' The instruction corresponds closely to the analysis made by the supreme court in the Bealoba case. If '"deliberate—willful—premeditated," * * * have the same meaning,' and 'every intentional act is necessarily a willful one,' then it is correct to say that first degree murder 'includes every unlawful killing of a human being done maliciously or intentionally.' Thus, on the authority of the Bealoba case, the instruction should have been sustained. But it was not. When the court was brought face to face with the logical result of its own language it refused to recognize it. Hence the Bealoba case was overruled *sub silentio.* The court made it clear that intent and deliberation were *not* synonymous; that something more than intent was necessary to constitute first degree murder; that intent to kill is not enough but that 'the intent to kill must be the result of deliberate premeditation.' (People v. Sanchez (1864), 24 Cal. 17, 30.)

"This decision seems to have settled the California law on the question. Stated simply, the result of the decision is that in California (prescinding for the moment from killings in the commission of felonies) *intentional* and *deliberate* homicide is murder in the first degree; *intentional* homicide *without deliberation* is, in the absence of mitigating and exonerating circumstances, murder in the second degree. * * *

"[P. 134] Following the enumeration of specific means the use of which determines the degree of the crime, the statute adds 'or any other kind of wilful, deliberate, and premeditated killing.' This language clearly calls for the application of the familiar *ejusdem generis* rule of statutory construction: where more general words follow words of a specific and particular meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to things of the same general kind as those specifically mentioned. This rule of interpretation is applied with particular stringency where penal statutes are involved.

"Further, the use of 'wilful, deliberate, and premeditated' in conjunction would seem to indicate that the legislature meant, by reiteration, to emphasize its intent to require, as an element of first degree murder, considerably more reflection than the mere amount of thought necessary to form the intention."

The lack of clarity and consistency in concept commented upon by Mr. Pike also appears in cases in which the appellate courts have considered their power (Pen. Code, § 1181 (6)) to reduce the judgment to a lower degree or lesser offense. In People v. Wells (1938), 10 Cal.2d 610, 626, 76 P.2d 493, 502, this court declared that "from a consideration of the cases to which reference has been had, it is apparent that in first degree murder cases the authority conferred by the provisions of the statute [Pen. Code, § 1181 (6)] should be exercised only where the evidence either clearly is insufficient to show anything other than that the defendant therein unlawfully killed 'a human being (presumptively) with malice aforethought,' that is wilfully, deliberately and premeditatively, or, possibly, that with respect to whether such a condition in the mind of the defendant existed, as was indirectly suggested in the latter case [People v. Howard (1930), 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385], when this court entertains 'a doubt as to its (the evidence) showing murder of the first degree.'"

Such quoted statement, although uncertain in meaning, appears to imply that killing with malice aforethought is synonymous with killing "wilfully, deliberately and premeditatively." This view, it is obvious, substantially emasculates the difference between murder of the first degree and that of the second degree, and is not warranted by the statute.

Another phase of the lack of conceptual consistency is manifest in the varying bases upon which the reviewing courts have predicated exercise of the power to reduce judgments to a lower degree or lesser crime. Such reductions have been grounded on "a doubt" of the court as to the sufficiency of the evidence to establish the higher degree (People v. Howard (1930), supra, 211 Cal. 322, 330, 295 P. 333, 71 A.L.R. 1385; cf. People v. Wells (1938), supra, 10 Cal.2d 610, 627, 76 P.2d 493); on the statement that "there is nothing in the record from which it may with reason be argued" that the "disgusting, bestial, and shocking [injuries]" which caused death "were inflicted with that intent or that malice aforethought which is a necessary ingredient of the crime of murder. Nor can we bring ourselves to believe that there was a willful, deliberate, and premeditated killing" (People v. Kelley (1929), 208 Cal. 387, 389, 281 P. 609, 611); on the declared proposition that "where evidence is open to two equally reasonable constructions, one of which points to the guilt of the defendant of a higher degree of a crime, and the other to his guilt only of a lesser degree thereof, the court must adopt that theory pointing to guilt of the lesser degree" (People v. Golembiewski (1938), 25 Cal. App.2d 115, 118, 76 P.2d 717, 719); on the declaration that "Taken as a whole, the evidence presented falls short of the modicum required for a conviction of murder of the first degree, in that it fails to show that the injuries which decedent suffered were inflicted by appellant 'with that intent or that malice aforethought which is a necessary ingredient of the crime of murder'" (People v. Castro (1940), 37 Cal.App.2d 311, 315, 99 P.2d 374, 375); on the ground that the reviewing court "failed to find satisfactory evidence of premeditation in the killing" (People v. Cowan (1940), 38 Cal. App.2d 231, 248, 101 P.2d 125, 135); on the statement that "The evidence * * * was hardly sufficient to support a verdict of murder of the first degree, when reviewed in the light of all the surrounding circumstances shown by the record, and taking into consideration the decisions of the Supreme Court in the cases of People v. Howard, 211 Cal. 322, 295 P. 333, 71 A. L.R. 1385, and People v. Kelley, 208 Cal. 387, 281 P. 609" (People v. La Fleur (1940), 42 Cal.App.2d 50, 57, 108 P.2d 99, 103); and on the conclusion that "After viewing the case in the light of all the surrounding circumstances * * * we are not satisfied that the evidence establishes any greater degree of crime than manslaughter" (People v. Slater (1943), 60 Cal. App.2d 358, 371, 140 P.2d 846, 853). See, also, People v. Daniel (1944), 65 Cal.App. 2d 622, 151 P.2d 275.

[16] Regardless of imperfections of academic concept either in the statutory law as enacted or in some of the decisions interpreting it, we are faced with the task of making practical application of that law to actual facts. In such application certain principles are entitled to recognition. Dividing intentional homicides into murder and voluntary manslaughter was a recognition of the infirmity of human nature. Again dividing the offense of murder into two degrees is a further recognition of that infirmity and of difference in the quantum of personal turpitude of the offenders. The difference is basically in the offenders but is to be measured by the character of the particular homicide. The victim of manslaughter or second degree murder is just as dead as is the victim of first degree murder. The law has fixed standards by which such personal depravity of the offender; i. e., the character of the particular homicide, is to be measured. When the homicide is perpetrated by means of poison, or lying in wait, or torture, or in the perpetration of or attempt to perpetrate the enumerated felonies the standard is definite and no difficulty in fixing the degree ensues. But when it is claimed that the homicide is by "any other kind of willful, deliberate, and premeditated killing" there is necessity for an appraisal which involves something more than the ascertainment of objective facts. This appraisal is primarily a jury function and within a wide field of discretion its determination is final. But as is true as to all factual issues resolved by a jury, the evidence upon which the determination is made is subject to review on the question of its legal sufficiency to support the verdict. To the extent that the character of a particular homicide is established by the facts in evidence the jury is bound, as we are, to apply the standards fixed by law. "The discretion of jurors in considering the effect of evidence as proof is not absolute. It is their duty to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion." (People v. Elmore (1914), 167 Cal. 205, 211, 138 P. 989, 991.)

[17] As to the specific probative facts which must be proved in order to meet the standard of first degree murder under the classification of "any other kind of willful, deliberate, and premeditated killing" it is apparent, as previously indicated, that the statute contemplates—and probably wisely so—that the field of jury discretion shall be wide. But that there are limits to that field cannot be disputed. The statute does establish a reasonably definite conceptual standard and the very fact that the

law fixes that standard imposes it on the jury and likewise imposes on us the duty of ascertaining whether the evidence legally admits of the classification which the jury applies. While the jury is given the function of determining the facts upon the evidence it does not have the power of changing the standard.

Probably the most frequently cited and copied enunciation (in the courts of California) of differences between first and second degree murder is that of Chief Justice Sanderson in People v. Sanchez (1864), supra, 24 Cal. 17, 28-30. At the very outset of his definitive statement he says, *"In order to constitute murder of the first degree there must be something more than a malicious or intentional killing.* There must be a killing within one of the three classes of cases described in the statute as constituting murder of the first degree." He continues (page 29 of 24 Cal.): "In dividing murder into two degrees, the Legislature intended to assign to the first, as deserving of greater punishment, all murders of a *cruel and aggravated character;* and to the second all other kinds of murder * * *; and to establish a test by which the degree of every case of murder may be readily ascertained." After referring to those two classes of first degree murder cases which are positively identified, in the first class by the means used (perpetrated by means of poison, lying in wait, or torture), and in the second class by the felony in the perpetration of (or attempt to perpetrate) which the homicide occurs, the Chief Justice's statement proceeds: "But there is another and much larger class of cases included in the definition of murder in the first degree, *which are of equal cruelty and aggravation with those enumerated,* and which, owing to the different and countless forms which murder assumes, it is impossible to describe [enumerate] in the statute. In this class the Legislature leaves to the jury to determine, from all the evidence before them, the degree of the crime, *but prescribes, for the government of their deliberations, the same test which has been used by itself in determining the degree of the other two classes*—to wit: the deliberate and preconceived intent to kill. Thus the three classes of cases which constitute murder of the first degree are made to stand upon the same principle." (Italics added.)

In People v. Cox (1888), 76 Cal. 281, 286, 18 P. 332, 334, in approving certain jury instructions it was said: "The general idea of the charge is that if it is clearly proved the defendant killed the deceased, and the evidence does not show (it is unnecessary here to speak of the quantum of evidence necessary to show it) either that the killing was justifiable or excusable, or that the offense was manslaughter, *the crime is murder of the second degree, unless the evidence manifests beyond reasonable doubt that the defendant deliberately and premeditatedly formed the intent to kill the deceased, and killed him to carry out that intent,* in which case it is murder of the first degree." (Italics added.)

[18] In the more recent case of People v. Howard (1930) supra, 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385, the applicable rule was succinctly stated: "To be murder of the first degree, under our statute, the killing must be premeditated, except when done in the perpetration of certain felonies; that is to say, *the unlawful killing must be accompanied with a deliberate and clear intent to take life."* (Italics added.)

Is the evidence in this record sufficient to establish that the unlawful killing was accompanied with a deliberate and clear intent to take life? That the homicide is of equal cruelty and aggravation with those enumerated in the statute? It does show that defendant acted without any reasonable necessity of self-defense. It fails to show sufficient provocation or suddenness of hot passion to reduce the homicide to manslaughter. It also indubitably establishes that the deceased was advancing toward the defendant; that the latter at close range fired one shot apparently not aimed at and which did not strike the deceased; that defendant then shouted a further warning, "Stay back, don't come any closer, or I will kill you"; that after the first shot was fired the deceased continued to advance although he apparently was in the act of stopping or turning at the precise moment the second shot was fired; that the second shot was fired and that the bullet, of small calibre, struck the deceased; that the deceased then stopped, turned, and walked around the train and to the station; *that defendant with eight loaded cartridges remaining in his rifle stopped firing when the deceased stopped advancing and that he then permitted the deceased to proceed to the station without further molestation.*

[19-21] These last recited facts, established beyond question by prosecution witnesses, are, in the light of all the circumstances shown, overwhelmingly inconsistent with a deliberate, premeditated, and clear intent to take life. It is contended that they but create a conflict with the declaration of the defendant one hour and twenty minutes earlier that he was going "to shoot his [Riley's] God damn heart out and wipe it across his mouth." Of this threat, as previously noted, the prosecution witness who related it testified that he had not considered it serious. There was no reason for supposing that the first part of the threat was any more serious than the last part. And we cannot survey all the evidence in this record without the strong conviction that the witness was correct in his appraisal of the threat. It is certain that defendant did not literally carry out any part of his threat. He did not say that he intended to kill Riley. He said that he "was going to * * * shoot his * * * heart out and wipe it across his mouth." The very extravagance of that statement makes its value as proof of a deliberately conceived and premeditated intent questionable. The defendant did neither of those things, nor did he make any effort literally to carry out such extravagant statement. It has also been suggested that the statement of the defendant made to the witness Keever a few minutes before the shooting that "right now I am telling this brakeman off" amounted to a declaration that he was even then in the course of carrying out an intentional homicide. On the contrary, such statement is apparently devoid of any value as proof of a deliberate, fixed design to take life. The expression "tell off" is a colloquialism meaning "To reprimand, denounce" (Webster's New International Dictionary, 1943 ed.) and is simply consistent with the defendant's rude and crabbed mood manifested throughout the day. As to the events immediately surrounding the shooting it is also certain that defendant warned decedent not to approach him and that he fired but one shot of small calibre into the body of deceased and then permitted him to walk away.

[22] The above recited unquestioned facts we are as bound to reckon with as was the jury. As a matter of law the evidence, in the light of such facts, is insufficient to establish that the killing "was accompanied with a deliberate and clear intent to take life." Likewise, surveying all of the evidence in the record, and construing it favorable to supporting the judgment, we are unable to hold that it is sufficient as a matter of law, to support the essentially implied conclusion that the homicide here was of "equal cruelty and aggravation with those enumerated" in the statute. It follows that the judgment of death for first degree murder cannot be sustained. We are satisfied, however, that such evidence warrants a judgment for murder of the second degree.

The defendant assigns and our examination of the record discloses no prejudicial error in the trial of the issue of his sanity.

The judgment of the trial court is modified by reducing it to murder of the second degree and as so modified is affirmed. The cause is remanded to that court with directions to pronounce judgment upon defendant sentencing him to be imprisoned in a state prison for the term prescribed by law for murder of the second degree.

GIBSON, C. J., and CARTER and TRAYNOR, JJ., concurred.

CURTIS, Justice.

I dissent from that portion of the opinion which reduces the degree of the crime. In so reducing the degree of the crime, the majority disregards substantial prosecution evidence from which the jury, in my opinion, could reasonably infer, as it did, that the homicide was both intentional and premeditated. Prior to a discussion of the law governing the case, a chronological narrative of the evidence introduced will assist in determining the propriety of the jury's verdict finding the murder to be of the first degree.

The homicide occurred on Monday, April 19, 1943, at a small railway station in Lassen County. Defendant was one of three telegraphers employed at the station. Deceased was a brakeman on a logger train. The evidence shows and the majority concedes, that preceding the homicide defendant had engaged in a series of disputes with other employees. He had ordered a fellow-telegrapher to stay out of the office when he (defendant) was on duty. On the afternoon preceding the homicide defendant had abandoned his telegraph station and as a result, was told he would have to resign or stand a formal investigation. This undoubtedly served to irritate him further. On the following morning defendant refused to accept a telegram from telegrapher Shields, who was then on duty, and called Shields a ——— — ———. Defendant then stalked out of the office, leaving the door open. It was closed by a third person and defendant challengingly returned to find out who had closed the door. As he stood in the doorway a train on which deceased was brakeman backed in. Defendant called to deceased, who came over to find out what he had said. The prosecution witness Shields said he could not hear the conversation but it "looked like they may have exchanged a few words," and that he heard defendant say to deceased "he would say anything he wanted to to his face." Deceased returned to his train. Shields further testified that about an hour later defendant again came into the station and took a bundle of bedding. He had a gun with him at the time. The witness testified that the next time he saw deceased that morning he came into the station holding his stomach. He had been shot. Shields also testified to a prior disagreement between defendant and deceased based on the latter's use of coal from a bin near the station, and in reply to a query whether he ever heard defendant "make any statements with relation to anyone other than Riley," the witness replied, "Not that I know of" and that defendant's statements indicated "he was a little peeved at Riley for taking the coal."

Prosecution witness Hilton, a train engineer, testified he was in the station at Hall Flat on the morning of April 19th, when defendant came in and refused to accept the telegram from telegrapher Shields. Defendant threw the message on the floor and left the door open as he departed. The witness closed the door and defendant returned, demanding to know who closed the door, and stating "Well, I am running things around here and I want you to understand none of you trainmen are going to have anything to do with it." The witness saw defendant in the station a little later in the morning and he had a rifle. When questioned as to defendant's sobriety and whether he was "able to walk around and talk coherently," the witness replied, "Absolutely all right." Shortly after defendant left the station, deceased was shot.

Witness Ferguson, who was conductor of the train on which deceased was brakeman, testified that he came into the Hall Flat station to register-in his train when he saw and heard defendant angrily refuse to accept the telegram from the telegrapher on duty. Defendant told the witness in a hostile tone that he was all through with the railroad "and anybody that works for them." About an hour or so later as the witness left his train to again enter the station he saw defendant standing by the tracks holding a rifle. Defendant told Ferguson "to go over by a big tree and pull it up and get in the hole." When he came out of the station defendant was gone but the witness learned defendant had just shot the deceased who had come in on the train. The shooting occurred within three or four minutes after defendant had told the witness to jump in a hole in the ground. The witness also related that prior to the shooting, defendant was "pretty peeved" at all the trainmen, *and particularly deceased,* because they had used coal (as they had a right to do) from the bin near the station, which coal was also used to heat the station. When interrogated on cross-examination as to defendant's sobriety the witness replied, "Well, he just seemed to be angry. * * * Didn't seem as though he was under the influence of liquor, * * * He was just cranky, and looked like he had a chip on his shoulder for anybody that would argue with him, or talk to him. * * *"

Dorithy, the engineer of the train on which deceased was brakeman, testified that at approximately 10:30 o'clock on the morning of the shooting, defendant walked from the station to the train with a message blank in his hand and the witness thinking it contained instructions for them stopped the train, got out on the ground and asked defendant "what he had for us." Defendant asked, "What is the matter with Riley [deceased], is he trying to get tough around here." The witness replied there was "nothing the matter with Riley, for him to leave Riley alone, and Riley wouldn't bother him," whereupon defendant said "he was going to go home and get his gun, and shoot his [Riley's] God damn heart out and wipe it across his mouth." The witness said the train then left the station, with deceased aboard, and returned about one hour and twenty minutes later, when defendant shot deceased. On cross-examination the witness stated that when defendant said he was going to get his gun and shoot Riley's heart out, "he did sound serious" and the witness "didn't think he was drunk." In fact, the witness said defendant's mannerism was no different than on other occasions, that defendant was changeable—being affable at times and "moody" and "quarrelsome" at other times.

The witness Damaske, a brakeman on the train, testified that after he had thrown the switch for the train he met defendant on the tracks coming toward the train and carrying a rifle. In response to the witness' salutation, defendant said, "Some of these old ——— — ——— around here had better mind their own damned business." It was deceased's duty to realign the switch and the witness added he did not see either the deceased or defendant again until after the shooting. At the time, defendant "walked and everything else, just like he always did."

Cox, the fireman on the train, testified he saw defendant near the switch-stand holding a rifle. Deceased was at the switch-stand to realign the switch. When the train rounded a curve the witness lost sight of the parties but within a few minutes he learned that defendant had shot deceased. The witness was never close enough to defendant on the morning of the shooting to form an opinion as to his sobriety.

The witness Keever, also a locomotive fireman, testified that as he was walking to work he saw defendant standing in the dirt road near the switch holding a rifle and deceased was on the opposite side of the track leaning on the rear car of the train; that in response to the witness' inquiry as to how everything was going, defendant replied "O.K., but right now I am telling this brakeman off." *The witness heard deceased tell defendant "to take his gun and his dogs and go on about his business, that he didn't have time to be bothered with him."* When the witness had walked about 50 feet he heard "the rifle crack," turning he saw defendant holding the gun in both hands and heard him say to deceased who was then at the switch-stand, "Stay back, don't come any closer, or God damn you, I will kill you," whereupon "practically instantaneous" he fired a second shot at deceased who grunted and held his stomach. At the time of the shooting deceased was approximately fifteen feet from defendant. The witness stated deceased had nothing in his hands at the time "other than his gloves. He had his gloves on." On cross-examination the witness stated that *previous* to the firing of the second shot deceased "was facing in the direction of Mr. Holt [defendant] and going in that direction *as well as in the direction of the switch-stand*" where, as shown, he was to realign the switch. The witness further testified that when the second and fatal shot was fired deceased "was right in the *very act of turning * * * towards me * * ** and he was in a rather bent-over position, slightly, as though he was dodging something, or trying to duck * * *"—a perfectly natural reaction following the firing of the first shot by defendant. As to defendant's sobriety, the witness stated that when he first saw defendant on the morning of the homicide, which was some two and one-half hours *before* the shooting, defendant "was intoxicated" but the witness added, *"it was hard to judge or observe and say definitely as to his condition" at the time of the shooting,* though the witness was of the *opinion* that the intervening period "wouldn't have been a reasonable time to sober up in." On the redirect examination of the witness, however, the following appears:

"Q. Before recess for the noon hour you gave an opinion as to the sobriety or intoxication of Mr. Holt, did you not? A. I believe I did.

"Q. And you stated that you based that opinion entirely upon your seeing Mr. Holt *earlier* in the morning? A. Yes.

"Q. *Was there anything in Mr. Holt's actions or appearance while he was there in the road, immediately before the shooting that would indicate that he was intoxicated?* A. *No, I can't say there was, because there was no indication as regards his intoxication.*

"Q. *Your opinion is based on events that transpired—your seeing him earlier in the day?* A. *Entirely.*

"Q. Are you a drinking man yourself? A. I have nothing to do with it.

"Q. I would like to ask you this question. *What did you see or what did you hear that caused you to think that Mr. Holt was intoxicated when you saw him in the morning?* You talked to him in the morning, did you? A. Yes.

"Q. And walked up to his cabin with him? A. Yes.

"Q. And you were present when these events took place between Shields and Mr. Holt and between Hilton and Holt? A. Yes, I was in the station, right in the very room at the time it occurred.

"Q. *Did you notice any impediment in his manner of speaking?* A. *No.*

"Q. *When he walked up the road with you did he stagger?* A. *No, there was no —it was purely his attitude, his antagonistic attitude that I based that statement on. I didn't see him take a drink, and he walked about as straight as I did.*

"Q. *Did you smell liquor on him at that time?* A. *No.*" (Italics added.)

The sheriff who took defendant into custody testified that defendant said he shot deceased "because he called me dirty names. * * * He had it coming. * * * Sheriff, I would shoot you if you called me dirty names." Defendant did not tell the witness that deceased approached him with a stick or any other weapon. On cross-examination, the witness stated that when he arrested defendant at 2:30 o'clock in the afternoon, *several hours after the shooting,* defendant "was moderately intoxicated." (But, as will later appear, defendant and his wife testified he had consumed some whiskey *after* the shooting and before the arrest by the sheriff.)

Defendant took the stand in his own defense and testified that he had voluntarily imbibed intoxicants both before and after the homicide, which condition, he asserted, caused his memory to be hazy, if not a blank, as to some of the events. (The evidence of the prosecution witnesses, already stated and as later developed in rebuttal, definitely tends to establish that defendant was not intoxicated at the times and places covered by their testimony.) Defendant did recollect and admit, however, that he had ordered a fellow-telegrapher to stay out of the station during his (defendant's) shift. He also admitted having refused to accept the telegram from the telegrapher on the morning of the homicide and also recollected going back to inquire who had closed the station door after he had departed leaving it open. After relating a story which tended to establish that the most cordial relations existed between him and deceased, defendant testified that on the morning of the homicide deceased, after assertedly saying he was glad defendant lost his job, and without apparent provocation, advanced toward him with a brake-stick or club. At no time, however, according to defendant's own testimony, had deceased wielded the stick in defendant's direction nor was he at any time close enough to strike him with the stick. In fact, while deceased was still some 15 feet from him, defendant fired two shots, one of which killed deceased. While admitting that deceased had not struck at him and was at no time close enough to hit him, defendant also admitted that he fired the gun without making any attempt to back up or to otherwise avoid the shooting. After the shooting, defendant admittedly made no effort to look for or retrieve the stick or club assertedly held by deceased. The only attempted refutation of the many incidents and statements testified to by the long array of prosecution witnesses was offered by the defendant himself. The jury by its verdict rejected his testimony insofar as it conflicted with the prosecution showing. It is not within the power of an appellate court to overturn the jury's implied findings based on substantial evidence and the inferences reasonably deducible therefrom.

Defendant's wife testified that after the shooting she was walking in the general vicinity and picked up a "stick" which she used as a cane. The "stick" was introduced in evidence though defendant was unable to identify it as the "club" assertedly held by deceased. The wife stated that when defendant came into the cabin immediately after the shooting he did not mention that deceased had a stick or club in his hands. She also testified that he drank some whiskey after returning to the cabin following the shooting—such drinking *subsequent* to the shooting might well account for the "moderately intoxicated" condition of defendant testified to by the sheriff when he arrested defendant several hours later. The wife further testified that when defendant left the cabin with the gun she "didn't feel that he was so intoxicated that he wouldn't be able to handle the gun."

The prosecution called the following several witnesses in rebuttal: The sheriff testified he had searched the vicinity of the shooting (which was prior to the time defendant's wife said she found the stick) and that he did not see there a stick or club resembling the one placed in evidence. Damaske, the brakeman, testified that at no time during the switching operation which immediately preceded the shooting did he see a stick or club in deceased's hands and that he did not notice a stick on the ground resembling the one in evidence. One of the other trainmen also testified that at no time did he see a stick or club in deceased's hands. Keever, recalled in rebuttal, testified that between the first and second shots he had a full view of deceased who was never out of his sight and he did not have a stick or club in his hands. This witness said, "I am telling you I seen both hands and if that stick, or any other stick like it, had been in his hands I would have seen it. * * * No, sir, it wouldn't have been possible for him to have that stick in his hands and I not seen it."

The superior court reporter, who had reported a statement made by defendant to the district attorney and others, testified that defendant, when asked if he was intoxicated at the time of the shooting, replied "No, hell, no"; and that when asked if deceased had anything in his hands, he responded, "I don't know whether he had a brake club or not; but I know when he said so-and-so, and started towards me, I guess that is when I blowed my top. * * * He said some bad words that wasn't nice for him to say."

Section 189 of the Penal Code declares that "All murder which is perpetrated by means of poison, or lying in wait, torture, *or by any other kind of willful, deliberate, and premeditated killing,* or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, *is murder of the first degree;* and all other kinds of murders are of the second degree." The evidence, briefly outlined above, is sufficient to support the jury's implied finding that the killing of Riley by the defendant was "willful, deliberate, and premeditated" and therefore murder of the first degree as defined in the code section. The existence of a deliberate purpose to kill may be inferred from the character of the weapon used, the circumstances surrounding and showing the relationship of the parties, and the acts and conduct of the accused. (People v. Cook, 15 Cal.2d 507, 514, 102 P.2d 752; People v. Smith, 15 Cal.2d 640, 647, 104 P.2d 510; 13 Cal.Jur. 597, § 14.)

In People v. Mahatch, 148 Cal. 200, 202, 203, 82 P. 779, 780, it is stated that defendant "assumes that it was necessary that there should have been express evidence of a deliberate purpose to kill in order to warrant the verdict as returned. But this was not necessary. It could be inferred from proof of such facts and circumstances in the case as would reasonably warrant an inference of its existence. The defendant did not deny that he killed Confaglia. He claimed on the trial that he was so intoxicated as to know nothing about the killing. * * * The jury, having found that the only extenuating circumstance which he interposed had no existence in fact, and no claim of any circumstances of mitigation, justification, or excuse for the killing being advanced, had a right to infer from the character of the weapon used, the nature of the wound inflicted, and the acts and conduct of the accused, the existence of a deliberate purpose on his part to kill the deceased when the fatal blow was struck, and, so inferring, were warranted in returning a verdict therefrom for murder in the first degree. This is the general, it may be said the universal, rule. If a different one prevailed, secret murders could rarely be punished by the infliction of the highest penalty. It is exclusively the province of a jury to determine the degree of crime when there is any evidence in the case which will support the determination. We are satisfied that in the case at bar there was sufficient evidence to warrant the jury, within the rule we have stated, in inferring the existence of a deliberate intent to kill. They so found and awarded the highest penalty, and their finding was approved by the trial judge on the motion for a new trial. This is conclusive upon the subject and upon us, as we can only disturb a finding when we can say, as matter of law, that there was no evidence to support it."

People v. Machuca, 158 Cal. 62, 64, 109 P. 886, 887, states that "There was also evidence that the defendant had, on the day prior to the killing, made a statement that the jury might fairly have interpreted as constituting a threat against the life of the deceased. This court has repeatedly declared that the question of the degree of crime is exclusively for the jury, and that their determination will not be disturbed when there is any evidence to support it. People v. Bowman, 81 Cal. 566, 22 P. 917; People v. Bruggy, 93 Cal. 476, 29 P. 26; People v. Worthington, 122 Cal. 583, 55 P. 396; People v. Mahatch, 148 Cal. 200, 82 P. 779. * * * It is not necessary that there should be express evidence of a deliberate purpose to kill. 'It could be inferred from proof of such facts and circumstances in the case as would reasonably warrant an inference of its existence.' People v. Mahatch [148 Cal. 200, 82 P. 779]. That the deliberation which must precede the killing in order to make the murder one of the first degree need not have existed for any given length of time is thoroughly settled. People v. Bealoba, 17 Cal. 389; People v. Sanchez, 24 Cal. 17; People v. Hunt, 59 Cal. 430; People v. Mahatch [148 Cal. 200, 82 P. 779]. This being so, it cannot be doubted that the evidence here introduced fully justified the jury in finding the killing to have been deliberate and premeditated. There was to be sure, the testimony of the defendant and other witnesses contradicting the showing made by the prosecution, but it cannot be necessary to cite any authority to the effect that the action of the jury in accepting as true either of two conflicting statements presents no ground for the reviewing power of the appellate court." This language is quoted with approval in People v. Bellon, 180 Cal. 706, 710, 182 P. 420. That no appreciable time need elapse between the intention to kill and the act of killing and that they may be as instantaneous as successive thoughts of the mind, see, also, People v. Cook, 15 Cal.2d 507, 514, 102 P.2d 752; People v. Aranda, 12 Cal.2d 307, 310, 83 P.2d 928; People v. French, 12 Cal.2d 720, 745, 87 P.2d 1014; People v. Patubo, 9 Cal.2d 537, 540, 71 P. 2d 270, 113 A.L.R. 1303; People v. Dale, 7 Cal.2d 156, 159, 160, 59 P.2d 1014; People v. Garcia, 2 Cal.2d 673, 683, 42 P.2d 1013; People v. Fleming, 218 Cal. 300, 310, 311, 23 P.2d 28, 31.

The following appears in the case last cited:

"Under the contention that the evidence fails to show premeditation or deliberation on the part of the defendant in the killing of the deceased, appellant in his brief says, 'there is an entire lack of evidence either direct or circumstantial in nature consisting of facts proven from which the jury might have reasonably or logically inferred that the killing was wilful, deliberate or premeditated.' With this statement we cannot agree. It is true that no great interval of time elapsed from the time the deceased pushed the defendant through the door until the defendant drew his gun and shot the deceased. But this court has said on innumerable occasions that in order to prove premeditation in one charged with murder it is not necessary to show that any appreciable space of time elapsed between the intention to kill and the act of killing. It is only necessary to quote from People v. Hunt, 59 Cal. 430, 435, the following statement of the law on this subject: 'There need be no appreciable space of time between the intention to kill and the act of killing; they may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case, the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.' The precise language of this decision has been repeated on numerous occasions by this court, and the principle there enunciated is irrevocably established as a part of the law of this state. People v. Bellon, 180 Cal. 706, 710, 182 P. 420. In the instant case, while the testimony, already quoted shows that the defendant shot almost, if not immediately, after the two men went through the door, still there was time for the defendant to think before he acted, to deliberate between the intention to kill and the act of killing. Defendant had time to draw his gun and fire the shots. He formed the intention to draw his gun, and then acted upon that intention. He drew his gun with some intention—either to defend himself, to frighten the deceased, or to kill the deceased. After forming the intention, whatever it was, he acted upon it by firing his gun. He thus had time to think and to act. This is all that is necessary in order to show premeditation."

The majority opinion recognizes that the overwhelming weight of the evidence, including defendant's own testimony and extrajudicial statements, demonstrates that he was not an innocent person suddenly confronted with imminent danger of bodily harm. On the contrary, it is admitted he had been going about with a "chip on his shoulder" for at least a day prior to the homicide. By his quarrelsome and challenging attitude defendant thus created an atmosphere of antagonism, the majority concedes, that "might naturally lead to physical combat if he continued, as he did, in his quarrelsome pursuit of trouble." By his objectionable and challenging attitude he thus set the stage for the shooting which he ultimately perpetrated. In view of the conflict in the evidence, the majority opinion also recognizes, as it must, that defendant's account of the shooting is not presently material to a consideration of the degree of the offense. By its verdict the jury resolved all conflicts against the defendant and accepted the strong prosecution showing as to the circumstances and conditions which prevailed both before and at the time of the shooting. Under the settled rule, this court may not therefore disregard the jury's verdict. Yet, in the face of this fundamental principle and *despite the existence of prosecution evidence to the contrary,* the majority opinion states that on the day preceding the homicide defendant "apparently had been drinking heavily" and "had reached a stage of stupefaction" when arrested a few hours after the shooting. The prosecution evidence, quoted herein, and apparently accepted by the jury, absolutely refutes both statements. To illustrate briefly: The majority opinion in narrating the evidence of engineer Hilton as to defendant's quarrelsome attitude on the day preceding the homicide, fails to mention that the witness when interrogated as to defendant's sobriety at the time testified he was "absolutely all right." In refutation of defendant's asserted condition of "stupefaction" at any time of the day of the homicide, reference may be had to the testimony of conductor Ferguson who said defendant "just seemed to be angry * * * didn't seem as though he was under the influence of liquor." Engineer Dorithy testified that when defendant said he was going to get his gun and shoot deceased's heart out, "he did sound serious" and the witness "didn't think he was drunk." Brakeman Damaske testified that when he met defendant coming toward the switch with the gun defendant "walked and everything else, just like he always did." Fireman Keever on redirect examination testified that immediately before the shooting "there was no indication as regards his [defendant's] intoxication," that he did not stagger, that there was no impediment in his speech and no smell of "liquor on him at that time." The sheriff testified that when he arrested defendant a few hours after the homicide he was only "moderately intoxicated"—caused undoubtedly by his admitted consumption of whiskey *after* the shooting. In the face of this positive prosecution evidence to the contrary, the statement of the majority that defendant's condition on the day of the homicide (either before or after the shooting) was one of "stupefaction," cannot be supported. It is based on defense evidence which was rejected by the jury in the face of overwhelming evidence to the contrary.

The majority also attempts to minimize defendant's threat against the life of deceased made one hour before the shooting by characterizing it as an "extravagant" statement which defendant made no "effort literally to carry out." Certainly, a threat to "shoot [deceased's] God damn heart out and wipe it across his mouth" was most *effectively* executed by defendant's fatal shooting of deceased one hour later. The majority while stating that the prosecution witness who heard the threat did not consider it to be "seriously meant," recognizes that the witness on cross-examination testified that when he made the threat the defendant "did sound serious." The majority improperly assumes the function of the jury and minimizes the prosecution evidence while emphasizing the meager defense showing. In so doing, it has usurped the power of the jury.

The majority opinion next seeks support for its reduction of the degree of the homicide in the fact that defendant for some time preceding the shooting had shown ill feeling toward others than the deceased. Ferguson testified, however, that defendant was "particularly" peeved at the deceased. Aside from this, it is difficult to perceive how defendant's quarrelsome attitude and ill-will toward several persons, *including deceased,* can serve to reduce the degree of the homicide resulting from the intentional and premeditated shooting of deceased, particularly when an hour before the shooting defendant had threatened to "shoot [deceased's] God damn heart out and wipe it across his mouth." Certainly, if defendant had killed *all* of the group with whom he had quarreled, it could not be successfully argued that because of his capacity to harbor ill-will against *many* the resulting killings would not constitute murders of the first degree. It is axiomatic that the greater includes the less and it seems too plain for argument where, as here, defendant's display of ill-will *included deceased,* and was coupled with a threat against deceased's life, that the jury might reasonably infer, as it did, that the ultimate execution of the threat was both intentional and premeditated. And having so concluded on substantial evidence, this court is powerless to disturb its verdict.

Moreover, the majority in seeking support for its reduction of the degree of the crime by referring to defendant's display of ill-will toward others than the deceased, loses sight of the rule that *"it is the law of this state that, in order to sustain a conviction of murder* [of the first degree] *it is not necessary to show person-*

al enmity on the part of the defendant against the deceased." (People v. Fleming, 218 Cal. 300, 309, 23 P.2d 28, 31; People v. Sainz, 162 Cal. 242, 121 P. 922.) This being so, the majority's emphasis of defendant's asserted lack of enmity toward deceased is not only unwarranted under the evidence but wholly immaterial.

The Sainz case, supra, presented a factual situation substantially identical with that stressed by the majority herein (but rejected by the jury) as requiring a reduction of the degree of the crime, nevertheless the decision in that case affirmed a judgment of murder of the *first* degree. The decision in that case states (page 243 of 162 Cal., page 922 of 121 P.): "Defendant was sheepshearer and a member of Santos Carrissosa's sheepshearing camp, which contained 20 or 30 Indians and Mexicans. The deceased, Jose Machado, was likewise a member of the camp. The camp was composed of two tents or encampments, one known as Carrissosa's tent, where Machado lived; the other known as Mirando's tent. The sheepshearing was over. The defendant began to drink, became somewhat intoxicated, and fell into an ugly and quarrelsome mood. With his sheepshears, he went to the entrance of Carrissosa's tent and challenged the *occupants generally* to come out and fight him. Thereafter he took his Winchester rifle and began shooting at a can upon the ground, firing six or eight shots, and declaring that 'this is the way I am going to kill *one or two to-night.*' He then, still carrying his rifle went into the Mirando tent, stumbled over some harness, fell down, got up, and asked who had pushed him. Being told that nobody had, he said, 'I'll go out and kill *two or three.*' He walked outside and began firing his rifle. He discharged three shots, the third striking Machado, who was standing at the entrance of Carrissosa's tent, a short distance away, killing him instantly. * * * Appellant's contentions against the sufficiency of the evidence resolve themselves into two propositions: First, that he was drunk at the time of the shooting; that there is no proof of malice on his part toward or against Machado; that no enmity between them is shown to have existed, and there was therefore no motive for the crime. * * * The evidence leaves little doubt but that the defendant's ugly passions were aroused by the liquor which he voluntarily drank; that, as the Indians phrase it, 'his heart was bad.' *There is no evidence of personal enmity or hostility on the part of defendant against the deceased; but there is evidence that his blood lust had been aroused, and that he was willing to slay, and did slay, without provocation. This evidence clearly indicates malice. Whether it be called express or implied (Pen.Code, § 188) is immaterial. There is enough to justify the jury in finding that he stepped to the door of the tent with the deliberate intention unlawfully to take human life; and upon the other hand, there is enough to support the finding that there was no provocation at all, and that the circumstances attending the killing showed an abandoned and malignant heart.* Of course, his voluntary intoxication was no excuse for his crime (Pen.Code, § 22), and the question whether, by reason of that intoxication, he was incapable of forming a specific criminal intent was one for the jury to pass upon under proper instruction, which the court gave, and they decided the question against him. There was no motive for the crime in the sense that it was shown to have been for revenge or the outgrowth of preexisting hostility; but, while evidence of motive is always permissible and ofttimes valuable, it is never essential to the proof of a crime. People v. Durrant, 116 Cal. 179, 48 P. 75. Yet, in another sense, motive sufficiently appears. The act was the expression of a mind inflamed by intoxicants, brutal, malignant, and on murder bent." (Italics added.)

The foregoing quotation furnishes ample support for the jury's implied finding that the fatal shooting of Riley was both *intentional and premeditated* within the statutory definition of murder of the first degree.

In People v. Howard, 211 Cal. 322, 329, 295 P. 333, 336, 71 A.L.R. 1385, wherein the degree of the crime was reduced, the court stated, "there is a *dearth* of evidence tending to show the conditions as they existed at the time of the homicide, and from which it might reasonably be held that the murder was, in fact, willful, premeditated, and intentional. In this regard, the state failed to satisfy the burden of proof." This is not true in the instant case. Here, there is an abundance of evidence showing the circumstances that existed both before and at the time of the homicide. Defendant was quarrelsome for a day preceding the homicide; he was "particularly" peeved at deceased; he threatened to go home and get his gun and shoot deceased's heart out; he did get his gun and he did fatally shoot the deceased approximately one hour later; and the majority recognizes that "The overwhelming weight of the evidence, including defendant's own testimony and extrajudicial statements, establishes that defendant was not an innocent person suddenly confronted with imminent danger of great bodily harm" but "by his quarrelsome and challenging attitude, not only toward deceased but others * * * had created an atmosphere of antagonism that might naturally lead to physical combat." It is difficult, in the face of the evidence and such a statement, to justify the conclusion of the majority that the jury could not find the killing to have been intentional and premeditated.

I am satisfied that the evidence overwhelmingly supports the jury's verdict that the murder was of the first degree. As conceded in the majority opinion, the appraisal of the evidence "is primarily a jury function and within a *wide field of discretion* its determination is *final.*" In the face of the substantial prosecution showing, the jury did not abuse the discretion confided to it and, under settled principles, its verdict should stand undisturbed by this court.

SHENK and EDMONDS, JJ., concurred.

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25 Cal.2d 48

LLOYD et al. v. MURPHY.

L. A. 18738.

Supreme Court of California.

Oct. 31, 1944.

Rehearing Denied Nov. 28, 1944.

1. Landlord and tenant 🔑93

The applicability of the doctrine of commercial frustration with respect to leases depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was entered into.

2. Contracts 🔑309(1)

The doctrine of "commercial frustration" is akin to the doctrine of "impossibility of performance", but frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance. Civ.Code, § 1511.

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Frustration" and "Impossibility of Performance".

3. Contracts 🔑309(1)

Under the doctrine of "commercial frustration", performance remains possible but the expected value of performance to the party seeking to be excused has been discharged by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration.

4. Contracts 🔑309(1)

The question in cases involving commercial frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of the disruption or complete destruction of the contract's equilibrium on defendant or plaintiff, and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on promisor, has made performance vitally different from what was reasonably to be expected.

5. Contracts 🔑309(1)

The relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable.

6. Contracts 🔑309(1)

Where the risk of the event that has supervened to cause the alleged frustration was foreseeable, there should have been provision for it in the contract, and the absence of such provision gives rise to the inference that the risk was assumed.

7. Contracts 🔑309(1)

The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts.

8. Contracts 🔑309(1)

A promisor, to excuse himself from performance, must prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counter-performance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counter-performance remains valuable.

9. Contracts 🔑309(1)

Laws or other governmental acts that make performance impossible, or more difficult or expensive do not excuse the duty to perform contractual obligations.

10. Contracts 🔑309(1)
War 🔑10(1)

Where parties have contracted with reference to a state of war, or have contemplated the risks arising from it, they may not invoke the doctrine of frustration to escape their obligations.

11. Landlord and tenant 🔑105
War 🔑4

Where a lease of premises for the sale and repair of new automobiles was executed after passage of National Defense Act providing for mobilization of industry, and with knowledge that production of automobiles would soon be restricted, tenant failed to prove that the possibility of war and its consequences on the production and sale of new automobiles was wholly outside the contemplation of parties so as to justify tenant in terminating lease on theory of "commercial frustration". 50 U.S.C.A. Appendix, § 1152(a).

12. Landlord and tenant 🔑105
War 🔑4

Where a governmental regulation does not entirely prohibit the business to be carried on in the leased premises but only limits or restricts it, thereby making it less profitable and more difficult to continue, the lease is not terminated or the lessee excused from further performance.

13. Landlord and tenant 🔑105
War 🔑4

Tenant claiming right to terminate lease restricting use of the premises to the sale of new automobiles and petroleum products, on theory of frustration because of federal restrictions on production of new automobiles, did not sustain burden of proving that value of the lease had been totally or nearly totally destroyed.

14. Landlord and tenant 🔑93

Provisions that prohibit subleasing, or other uses than those specified, affect the value of a lease and are to be considered in determining whether its purpose has been frustrated or its value destroyed.

15. Landlord and tenant 🔑105
War 🔑4

Where lease provisions, prohibiting subleasing and the use of leased premises for any purpose other than the sale of new automobiles and gasoline, were waived and lessor offered to lower the rent if tenant could not operate profitably, tenant could not terminate lease on theory of frustration by reason of governmental restrictions on sale of new automobiles.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Caroline A. Lloyd and others against William J. Murphy for a declaration of rights under a lease and for rent. From an adverse judgment, defendant appeals.

Affirmed.

Prior opinion, 142 P.2d 939.

Chas. W. Rollinson and Wm. Roy Ives, both of Los Angeles, for appellants.

Albert W. Leeds, Schultheis & Laybourne, and Everett B. Laybourne, all of Los Angeles, for respondents.

Schultheis & Laybourne and Clifford E. Royston, all of Los Angeles, amici curiæ on behalf of respondents.

TRAYNOR, Justice.

On August 4, 1941 plaintiffs leased to defendant for a five-year term beginning September 15, 1941, certain premises located at the corner of Almont Drive and Wilshire Boulevard in the city of Beverly Hills, Los Angeles County, "for the sole purpose of conducting thereon the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other purpose whatsoever without the written consent of the lessor" except "to make an occasional sale of a used automobile." Defendant agreed not to sublease or assign without plaintiffs' written consent. On January 1, 1942 the federal government ordered that the sale of new automobiles be discontinued. It modified this order on January 8, 1942 to permit sales to those engaged in military activities, and on January 20, 1942, it established a system of priorities restricting sales to persons having preferential ratings of A-1-j or higher. On March 10, 1942, defendant explained the effect of these restrictions on his business to one of the plaintiffs authorized to act for the others, who orally waived the restrictions in the lease as to use and subleasing and offered to reduce the rent if defendant should be unable to operate profitably. Nevertheless defendant vacated the premises on March 15, 1942, giving oral notice of repudiation of the lease to plaintiffs, which was followed by a written notice on March 24, 1942. Plaintiffs affirmed in writing on March 26th their oral waiver and, failing to persuade defendant to perform his obligations, they rented the property to other tenants pursuant to their powers under the lease in order to mitigate damages. On May 11, 1942, plaintiffs brought this action praying for declaratory relief to determine their rights under the lease, and for judgment for unpaid rent. Following a trial on the merits, the court found that the leased premises were located on one of the main traffic arteries of Los Angeles County; that they were equipped with gasoline pumps and in general adapted for the maintenance of an automobile service station; that they contained a one-story storeroom adapted to many commercial purposes; that plaintiffs had waived the restrictions in the lease and granted defendant the right to use the premises for any legitimate purpose and to sublease to any responsible party; that defendant continues to carry on the business of selling and servicing automobiles at two other places. Defendant testified that at one of these locations he sold new automobiles exclusively and when asked if he were aware that many new automobile dealers were continuing in business replied: "Sure. It is just the location that I couldn't make a go, though, of automobiles." Although there was no finding to that effect, defendant estimated in response to inquiry by his counsel, that 90 per cent of his gross volume of business was new car sales and 10 per cent gasoline sales. The trial court held that war conditions had not terminated defendant's obligations under the lease and gave judgment for plaintiffs, declaring the lease as modified by plaintiffs' waiver to be in full force and effect, and ordered defendant to pay the unpaid rent with interest, less amounts received by plaintiffs from re-renting. Defendant brought this appeal, contending that the purpose for which the premises were leased was frustrated by the restrictions placed on the sale of new automobiles by the federal government, thereby terminating his duties under the lease.

[1] Although commercial frustration was first recognized as an excuse for nonperformance of a contractual duty by the courts of England (Krell v. Henry, C.A., 1903, 2 K.B. 740; Blakely v. Muller, K.B., 19 T.L.R. 186; see McElroy and Williams, The Coronation Cases, 4 Mod.L.Rev. 241) its soundness has been questioned by those courts (see Maritime National Fish, Ltd., v. Ocean Trawlers, Ltd., [1935] A. C. 524, 528–29; 56 L.Q.Rev. 324, arguing that Krell v. Henry, supra, was a misapplication of Taylor v. Caldwell, 1863, 3 B.&S. 826, the leading case on impossibility as an excuse for nonperformance), and they have refused to apply the doctrine to leases on the ground that an estate is conveyed to the lessee, which carries with it all risks. Swift v. McBean, 1942, 1 K.B. 275; Whitehall Court v. Ettlinger, [1919] L.J. [K.B.] N.S. 126; 137 A.L.R. 1199, 1224; see collection and discussion on English cases in Wood v. Bartolino, 48 N.M. 175, 146 P. 2d 883, 886, 887. Many courts, therefore, in the United States have held that the tenant bears all risks as owner of the estate (Cusack Co. v. Pratt, 78 Colo. 28, 239 P. 22, 44 A.L.R. 55; Yellow Cab Co. v. Stafford-Smith Co., 320 Ill. 294, 150 N.E. 670, 43 A.L.R. 1173), but the modern cases have recognized that the defense may be available in a proper case, even in a lease. As the author declares in 6 Williston, Contracts (Rev.Ed.1938), § 1955, pp. 5485–5487, "The fact that lease is a conveyance and not simply a continuing contract and the numerous authorities enforcing liability to pay rent in spite of destruction of leased premises however, have made it difficult to give relief. That the tenant has been relieved, nevertheless, in several cases indicates the gravitation of the law toward a recognition of the principle that fortui-

tous destruction of the value of performance wholly outside the contemplation of the parties may excuse a promisor even in a lease. * * *

"Even more clearly with respect to leases than in regard to ordinary contracts the applicability of the doctrine of frustration depends on the total or nearly total destruction of the purpose for which, in the contemplation of both parties, the transaction was entered into."

The principles of frustration have been repeatedly applied to leases by the courts of this state (Brown v. Oshiro, 58 Cal.App.2d 190, 136 P.2d 29; Davidson v. Goldstein, 58 Cal.App.2d Supp. 909, 136 P.2d 665; Grace v. Croninger, 12 Cal.App.2d 603, 55 P.2d 940; Knoblaugh v. McKinney, 5 Cal.App.2d 339, 42 P.2d 332; Industrial Development & Land Co. v. Goldschmidt, 56 Cal.App. 507, 206 P. 134; Burke v. San Francisco Breweries, Ltd., 21 Cal.App. 198, 131 P. 83) and the question is whether the excuse for nonperformance is applicable under the facts of the present case.

[2, 3] Although the doctrine of frustration is akin to the doctrine of impossibility of performance (see Civ.Code, § 1511; 6 Cal.Jur. 435–450; 4 Cal.Jur. Ten-year Supp. 187–192; Taylor v. Caldwell, supra) since both have developed from the commercial necessity of excusing performance in cases of extreme hardship, frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance (see Mineral Park Land Co. v. Howard, 172 Cal. 289, 293, 156 P. 458, L.R.A.1916F, 1; Christin v. Superior Court, 9 Cal.2d 526, 533, 71 P.2d 205, 112 A.L.R. 1153; 6 Williston, op. cit. supra, § 1935, p. 5419; Restatement, § 454, comment a., and Cal.Ann. p. 254). Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration. Krell v. Henry, supra; Blakely v. Muller, supra; Marks Realty Co. v. Hotel Hermitage Co., 170 App.Div. 484, 156 N.Y.S. 179; 6 Williston, op. cit. supra, §§ 1935, 1954, pp. 5477, 5480; Restatement, Contracts, § 288.

[4-6] The question in cases involving frustration is whether the equities of the case, considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case (Fibrosa Spolka Akcyjina v. Fairbairn Lawson Combe Barbour, Ltd., H.L. 1942, 167 L.T.R. 101, 112, 113; see Smith, Some Practical Aspects of the Doctrine of Impossibility, 32 Ill.L.Rev. 672, 675; Patterson, Constructive Conditions in Contracts, 42 Columb.L.Rev. 903, 949; 27 Cal.L.Rev. 461), and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected (6 Williston, op. cit. supra, § 1963, p. 5511; Restatement, Contracts, § 454). The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.

[7, 8] The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts. Anglo-Northern Trading Co. v. Emlyn Jones and Williams, [1917] 2 K.B. 78; 137 A.L.R. 1199, 1216–1221. The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable. La Cumbre Golf & Country Club v. Santa Barbara Hotel Co., 205 Cal. 422, 425, 271 P. 476; Johnson v. Atkins, 53 Cal.App.2d 430, 434, 127 P.2d 1027; Grace v. Croninger, 12 Cal.App.2d 603, 606, 607, 55 P.2d 940; Industrial Development & Land Co. v. Goldschmidt, 56 Cal.App. 507, 511, 206 P. 134; Burke v. San Francisco Breweries, Ltd., 21 Cal.App. 198, 201, 131 P. 83; Megan

v. Updike Grain Corp., 8 Cir., 94 F.2d 551, 553; Herne Bay Steamboat Co. v. Hutton, 1903, 2 K.B. 683; Leiston Gas Co. v. Leiston Cum Sizewell Urban District Council, 1916, 2 K.B. 428; Raner v. Goldberg, 244 N.Y. 438, 155 N.E. 733; 6 Williston, op. cit. supra, §§ 1939, 1955, 1963; Restatement, Contracts, § 288.

[9, 10] Thus laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation. Sample v. Fresno Flume, etc., Co., 129 Cal. 222, 228, 61 P. 1085; Klauber v. San Diego Street-Car Co., 95 Cal. 353, 358, 30 P. 555; Texas Co. v. Hogarth Shipping Co., 256 U.S. 619, 630, 41 S.Ct. 612, 65 L.Ed. 1123; Columbus Ry., Power & Light Co. v. Columbus, 249 U.S. 399, 414, 39 S.Ct. 349, 63 L.Ed. 669, 6 A.L.R. 1648; Thomson v. Thomson, 315 Ill. 521, 527, 146 N.E. 451; Commonwealth v. Bader, 271 Pa. 308, 312, 114 A. 266; Commonwealth v. Neff, 271 Pa. 312, 314, 114 A. 267; London & Lancashire Ind. Co. v. Columbiana County, 107 Ohio St. 51, 64, 140 N.E. 672; see 6 Williston, op. cit. supra, §§ 1955, 1963, pp. 5507–09. It is settled that if parties have contracted with reference to a state of war or have contemplated the risks arising from it, they may not invoke the doctrine of frustration to escape their obligations. Northern Pac. Ry. Co. v. American Trading Co., 195 U.S. 439, 467, 468, 25 S.Ct. 84, 49 L.Ed. 269; Primos Chemical Co. v. Fulton Steel Corp., D.C.N.Y., 266 F. 945, 948; Krulewitch v. National Importing & Trading Co., 195 App.Div. 544, 186 N.Y.S. 838, 840; Smith v. Morse, 20 La.Ann. 220, 222; Lithflux Mineral & Chem. Works v. Jordan, 217 Ill.App. 64, 66; Mederios v. Hill, 8 Bing. 231, 131 Eng.Reprint 390, 392; Bolckow V. & Co. v. Compania Minera de Sierra Minera, K. B., 115 L.T.R. 745, 747.

[11] At the time the lease in the present case was executed the National Defense Act, Public. Act No. 671 of the 76th Congress, 54 Stats. 676, § 2(a), 50 U.S. C.A.Appendix § 1152(a), approved June 28, 1940, authorizing the President to allocate materials and mobilize industry for national defense, had been law for more than a year. The automotive industry was in the process of conversion to supply the needs of our growing mechanized army and to meet lend-lease commitments. Iceland and Greenland had been occupied by the army. Automobile sales were soaring because the public anticipated that production would soon be restricted. These facts were commonly known and it cannot be said that the risk of war and its consequences necessitating restriction of the production and sale of automobiles was so remote a contingency that its risk could not be foreseen by defendant, an experienced automobile dealer. Indeed, the conditions prevailing at the time the lease was executed, and the absence of any provision in the lease contracting against the effect of war, gives rise to the inference that the risk was assumed. Defendant has therefore failed to prove that the possibility of war and its consequences on the production and sale of new automobiles was an unanticipated circumstance wholly outside the contemplation of the parties.

[12, 13] Nor has defendant sustained the burden of proving that the value of the lease has been destroyed. The sale of automobiles was not made impossible or illegal but merely restricted and if governmental regulation does not entirely prohibit the business to be carried on in the leased premises but only limits or restricts it, thereby making it less profitable and more difficult to continue, the lease is not terminated or the lessee excused from further performance. Brown v. Oshiro, supra, 58 Cal.App.2d at page 194, 136 P.2d 29; Davidson v. Goldstein, supra, 58 Cal. App.2d Supp. at page 918, 136 P.2d 665; Grace v. Croninger, supra, 12 Cal.App.2d at page 607, 55 P.2d 940; Industrial Development & Land Co. v. Goldschmidt, supra; Burke v. San Francisco Brewing Co., supra, 21 Cal.App. at page 202, 131 P. 83; First National Bank of New Rochelle v. Fairchester Oil Co., 267 App.Div. 281, 45 N.Y.S.2d 532, 533; Robitzek Inv. Co., Inc., v. Colonial Beacon Oil Co., 265 App.Div. 749, 40 N.Y.S.2d 819, 824; Colonial Operating Corp. v. Hannan Sales & Service, Inc., 265 App.Div. 411, 39 N.Y.S.2d 217, 220; Byrnes v. Balcolm, 265 App.Div. 268, 38 N.Y.S.2d 801, 803; Deibler v. Bernhard Bros., 385 Ill. 610, 53 N.E.2d 450, 453; Wood v. Bartolino, 48 N.M. 175, 146 P. 2d 883, 886, 888, 890. Defendant may use the premises for the purpose for which they were leased. New automobiles and gasoline continue to be sold. Indeed, defendant testified that he continued to sell new automobiles exclusively at another location in the same county.

[14, 15] Defendant contends that the lease is restrictive and that the government orders therefore destroyed its value and frustrated its purpose. Provisions that prohibit subleasing or other uses than those specified affect the value of a lease and are to be considered in determining whether its purpose has been frustrated or its value destroyed. See Owens, The Effect of the War Upon the Rights and Liabilities of Parties to a Contract, 19 California State Bar Journal 132, 143. It must not be forgotten, however, that "The landlord has not covenanted that the tenant shall have the right to carry on the contemplated business or that the business to which the premises are by their nature or by the terms of the lease restricted shall be profitable enough to enable the tenant to pay the rent but has imposed a condition for his own benefit; and, certainly, unless and until he chooses to take advantage of it, the tenant is not deprived of the use of the premises." 6 Williston, Contracts, op. cit. supra, § 1955, p. 5485; see, also, People v. Klopstock, 24 Cal.2d 897, 151 P.2d 641. In the present lease plaintiffs reserved the rights that defendant should not use the premises for other purposes than those specified in the lease or sublease without plaintiffs' written consent. Far from preventing other uses or subleasing they waived these rights, enabling defendant to use the premises for any legitimate purpose and to sublease them to any responsible tenant. This waiver is significant in view of the location of the premises on a main traffic artery in Los Angeles County and their adaptability for many commercial purposes. The value of these rights is attested by the fact that the premises were rented soon after defendants vacated them. It is therefore clear that the governmental restrictions on the sale of new cars has not destroyed the value of the lease. Furthermore, plaintiffs offered to lower the rent if defendant should be unable to operate profitably, and their conduct was at all times fair and cooperative.

The consequences of applying the doctrine of frustration to a leasehold involving less than a total or nearly total destruction of the value of the leased premises would be undesirable. Confusion would result from different decisions purporting to define "substantial" frustration. Litigation would be encouraged by the repudiation of leases when lessees found their businesses less profitable because of the regulations attendant upon a national emergency. Many leases have been affected in varying degrees by the widespread governmental regulations necessitated by war conditions.

The cases that defendant relies upon are consistent with the conclusion reached herein. In Industrial Development & Land Co. v. Goldschmidt, supra, the lease provided that the premises should not be used other than as a saloon. When national prohibition made the sale of alcoholic beverages illegal, the court excused the tenant from further performance on the theory of illegality or impossibility by a change in domestic law. The doctrine of frustration might have been applied, since the purpose for which the property was leased was totally destroyed and there was nothing to show that the value of the lease was not thereby totally destroyed. In the present case the purpose was not destroyed but only restricted, and plaintiffs proved that the lease was valuable to defendant. In Grace v. Croninger, supra [12 Cal.App.2d 603, 55 P.2d 941], the lease was for the purpose of conducting a "saloon and cigar store, and for no other purpose" with provision for subleasing a portion of the premises for bootblack purposes. The monthly rental was $650. It was clear that prohibition destroyed the main purpose of the lease, but since the premises could be used for bootblack and cigar store purposes, the lessee was not excused from his duty to pay the rent. In the present case new automobiles and gasoline may be sold under the lease as executed and any legitimate business may be conducted or the premises may be subleased under the lease as modified by plaintiff's waiver. Colonial Operating Corp. v. Hannon Sales & Service, Inc., 178 Misc. 879, 34 N.Y.S.2d 116, was reversed in 265 App.Div. 411, 39 N.Y.S.2d 217, and Signal Land Corp. v. Loecher, City Ct., 35 N.Y.S.2d 25; Schantz v. American Auto Supply Co., Inc., 178 Misc. 909, 36 N.Y.S.2d 747; Canrock Realty Corp. v. Vim Electric Co., Inc., 179 Misc. 391, 37 N.Y.S.2d 139, involved government orders that totally destroyed the possibility of selling the products for which the premises were leased. No case has been cited by defendant or disclosed by research in which an appellate court has excused a lessee from performance of his duty to pay rent when the purpose of the lease has not been totally destroyed or its accomplishment rendered extremely impracticable or where it has been shown that the lease remains valuable to the lessee.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

25 Cal.2d 45

MITCHELL et al. v. CEAZAN TIRES, LIMITED.

L. A. 18690.

Supreme Court of California.

Oct. 31, 1944.

1. Landlord and tenant 🔑105
War 🔑4

Where a lease provided for the use of premises for the automobile tire business, and other related businesses such as automobile supplies, and authorized subletting, federal restrictions on the manufacture and sale of tires did not entitle tenant to cancellation of lease under theory of "commercial frustration".

See Words and Phrases, Permanent Edition, for all other definitions of "Commercial Frustration".

2. Appeal and error 🔑1010(1)

The excuse of frustration for nonperformance of a lease, like that of impossibility, is a conclusion of law drawn by the court from the facts of a given case, and trial court's conclusion that tenant's business was frustrated and impossible by reason of federal regulations could not stand when not supported by evidence.

3. Landlord and tenant 🔑105
War 🔑4

Government regulations restricting the manufacture and sale of automobile tires did not render the conduct of tenant's tire business and other related businesses unlawful, so as to justify termination of lease on theory of "impossibility of performance".

See Words and Phrases, Permanent Edition, for all other definitions of "Impossibility of Performance".

In Bank.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Alfred D. Mitchell and others against Ceazan Tires, Limited, for a declaration that a lease between the parties was still a binding obligation upon defendant. From a judgment for defendant, plaintiffs appeal.

Reversed.

Prior opinion, 146 P.2d 49.

L. D. Uhlman, of Long Beach, for appellants.

Charles J. Katz, Alfred Gitelson, and Samuel W. Blum, all of Los Angeles, for respondent.

TRAYNOR, Justice.

On March 21, 1940, plaintiffs leased to defendant corporation, a wholesale dealer in automobile tires and tubes, then in possession under an earlier lease since 1937, for a three-year term to begin July 25, 1940, certain premises located at 1147 American Avenue in the city of Long Beach, used by defendant as one of several wholesale outlets for its business. The lease provided among other things that "The Lessee shall have full control and occupancy of the buildings upon said premises and may sublet or sublease any part or portion thereof to any acceptable and responsible person, but the Lessee is to be liable for the rentals herein reserved and for the performance of all the conditions of this lease imposed upon the Lessee.

"The premises hereby leased are to be used for the conduct of an automobile tire business and other related businesses such as automobile supplies and in no event for a business that would increase fire hazard or insurance rates."

On December 11, 1941, the federal government issued an order restricting the sale of automobile tires and tubes to persons assigned to A-3 or better preferential rating. On December 30, 1941, the Office of Price Administration promulgated a series of Tire Rationing Regulations, which superseded earlier regulations. The regulations were revised on February 11, 1942, to clude recapped and retreaded tires. On February 23, 1942, plaintiff received written notice from defendant that it had concluded that the effect of the governmental regulations on the sale of tires excused it from further performance under the lease, and that it would quit the premises on

February 25, 1942. Defendant vacated the premises and plaintiffs brought this action on March 3, 1942, seeking a judgment declaring that the lease remained in effect. The trial court found that the total amount of business transacted by defendant in California, Arizona and Nevada in the year 1941, was approximately $2,000,000 without indicating what proportion of the business was transacted at the Long Beach establishment and that the business transacted by defendant from December 11, 1941, to February 25, 1942, totaled $2,500. It concluded that the effect of the government regulations on defendant's business excused it from further performance under the lease. From the judgment declaring the lease terminated plaintiff appeals.

[1] Since the sale of new and used tires remains lawful although on a restricted basis, no question of illegality or impossibility arises. The problem is one of commercial frustration of the purpose and value of a lease where wartime regulations have operated to restrict the business being engaged in on the leased premises. The principles applicable are those declared in Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47, where the same problem was involved. The lease in the present case is less restrictive than the lease in Lloyd v. Murphy, supra, for it authorizes the lessee to engage in "other related businesses such as automobile supplies" and permits subleasing "any part or portion thereof to any acceptable and responsible person."

Defendant has proved neither that the risk of war and governmental regulations restricting the free sale of new automobile tires was not reasonably foreseeable nor that the value of the lease has been virtually destroyed. The lease in the present case was executed on March 21, 1940, when the entry of this country into the war was the subject of much debate, so that such an event was not so remote as to be unforeseeable. Even assuming that such an event and its effect upon civilian tire production and consumption were outside the reasonable contemplation of the parties, the lease nevertheless retained value for defendant.

There is nothing in the lease prohibiting the sale of reconditioned tires. It is common knowledge that there is a great demand for such tires and those presently engaged in the business meet this demand by recapping and retreading old tires and selling them to consumers. Furthermore, the lease provides that the premises may be freely used for "other related businesses such as automobile supplies." If defendant finds it impractical, unprofitable or for other reasons does not wish to engage in any other business than as an exclusive agency for the sale of a particular brand of new tires it may nevertheless freely sublease the premises. Defendant has not proved or offered to prove that the leased premises on American Avenue, one of the principal traffic arteries in the city of Long Beach, are not commercially desirable or adaptable to use for the "other related businesses" authorized by the lease.

[2, 3] Defendant contends that frustration is a question of fact resolved in its favor by the trial court. The excuse of frustration, however, like that of impossibility, is a conclusion of law drawn by the court from the facts of a given case, and although the trial court found both as a finding of fact and as a conclusion of law that the defendant's business was "frustrated" and "unlawful" and "impossible," the evidence does not establish that the sale of new tires was made illegal or impossible, or that the purpose of the lease was frustrated. Nor does the finding that the lawful conduct of the businesses specified in the lease was an implied condition of the lease rendered impossible by the governmental regulations aid defendant for there is nothing to show that such businesses were made illegal.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

66 Cal.App.2d 757

McKOIN v. ROSEFELT et al.

Civ. 14399.

District Court of Appeal, Second District,
Division 3, California.

Nov. 10, 1944.

1. Partnership 🔑142(1)

In action to quiet title by trustee under an assignment for benefit of creditors executed by one of members of partnership and including partnership property, as against trust deed executed by other member of partnership, evidence supported finding that partner executing such trust deed did not have the right or authority to encumber the property.

2. Mortgages 🔑25(6)

In action to quiet title by plaintiff holding as trustee under an assignment for benefit of creditors and under a grant deed including partnership property as against a trust deed executed by member of partnership, evidence supported finding that no consideration was paid for the note and such subsequent trust deed securing it.

3. Appeal and error 🔑1071(1)

Although finding in action to quiet title by trustee under assignment for benefit of creditors including partnership property as against trust deed executed by member of partnership that such partner had no beneficial interest in property was erroneous, in view of fact that he had an interest in property as a partner, it was not prejudicial in view of other findings supported by evidence that such partner did not have the right to encumber property and that there was no consideration for note and the trust deed securing it.

4. Mortgages 🔑270

In action to quiet title by trustee under assignment for benefit of creditors including partnership property as against trust deed executed by one of partners, evidence supported finding that consideration paid by assignee of trust deed was grossly inadequate and that he took note secured by trust deed with notice of invalidity thereof.

5. Bills and notes 🔑509, 525

Although mere inadequacy of consideration is not sufficient of itself to justify finding that note was accepted with notice of invalidity, that fact may be considered with other circumstances upon the question of notice of invalidity.

6. Assignments for benefit of creditors 🔑268

Where legal title to property is vested in trustee under assignment for benefit of creditors, it is unnecessary to state in complaint by trustee in action to quiet title the means by which legal title was acquired, and in so far as defendant in a quiet title action is concerned, the trustee is the real party in interest, and may sue in his own name. Code Civ.Proc. §§ 367, 369.

7. Quieting title 🔑34(1)

A cause of action to quiet title pleaded in general form is sufficient to state a cause of action although fraud is one of its constituent elements.

8. Quieting title 🔑42

Where complaint in action to quiet title alleged that plaintiff was owner of property and that defendant without right claimed an interest therein adverse to plaintiff, and amendment set forth in detail allegations upon which plaintiff relied to show defendant's claims were without right, but case was not tried upon theory that fraud was in issue and the court made no finding as to fraud, the allegation was sufficient, even though failing to state facts sufficient to constitute a cause of action for fraud.

9. Estoppel 🔑22(2)

Where, after assignment for benefit of creditors by one of members of partnership including partnership property, other partner executed a second trust deed covering partnership property, trustee for benefit of creditors was not estopped in quiet title action from questioning validity of second trust deed because of having made a third trust deed in attempt to obtain release of the second trust deed and thereby create a benefit for creditors, and which trust deed recited that it was subject to second trust deed, there being no showing that assignee of second trust deed took the note and deed in reliance on such recital.

10. Assignment for benefit of creditors 🔑47

The right to attack an assignment for benefit of creditors because it is not in compliance with statutory provisions is limited to nonconsenting creditors of the assignor and to subsequent purchasers and incumbrancers in good faith and for value. Civ. Code, §§ 3461-3466.

11. Assignments for benefit of creditors 🔑268

Plaintiff in action to quiet title as trustee under assignment for benefit of creditors and also under a grant deed, was entitled to maintain action regardless of failure to comply with statutory provisions relating to assignments for benefit of creditors as against defendants who were neither creditors nor purchasers nor incumbrancers in good faith. Civ.Code, §§ 3461–3466.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action to quiet title by Kay McKoin against Noel Rosefelt, one Dion, one Perilmuter, and others. From a judgment for plaintiff and orders denying motions for a new trial, the last two named defendants appeal.

Judgment affirmed and appeals from the orders denying motions for new trial dismissed.

Sherman & Sherman and Glenn M. Still, all of Los Angeles, for appellant W. A. Perilmuter.

F. D. R. Moote, of Los Angeles, for appellant J. Dion.

Albert W. Leeds, of Los Angeles, for respondent.

PARKER WOOD, Justice.

This is an action to quiet title to real property. The plaintiff held title as trustee under an assignment for the benefit of creditors, and under a grant deed. The defendants Dion and Perilmuter, who are the appellants herein, claimed interests in the property under a second trust deed. The other defendants did not claim any interest in the property. Judgment was for plaintiff. The appeal is from the judgment and the orders denying the motions for a new trial.

The principal questions are: (1) Whether one Rosefelt, who executed the $6,500 note and the second trust deed to secure it, had the right to execute them; (2) whether the defendant Dion, in whose favor the note and second trust deed were executed, gave any consideration for them; and (3) whether defendant Perilmuter, to whom the note and second trust deed were assigned, took them with notice of their invalidity, if they were invalid.

It was the contention of plaintiff at the trial, and is his contention on appeal, that the defendants Dion and Perilmuter had no interest in the property under the second trust deed for the reasons: that Rosefelt, who placed the second trust deed on the property, held the legal title merely as a trustee of a partnership consisting of one Byrd and Rosefelt; that the giving of the trust deed to defendant Dion was without the knowledge of the true owner and was not for any purpose connected with the partnership business; that Rosefelt did not have the right to encumber the property; that no consideration was given to the partnership or to Rosefelt for the trust deed; and that defendant Perilmuter, to whom the trust deed was assigned by an assignee of Dion, took it with notice of its invalidity.

Rosefelt did not claim any interest in the property, but he asserted, as a witness, that the property was his individual property when he made the $6,500 note and second trust deed, to secure it. He asserted further that said note and second trust deed were given to Dion in payment of two notes totaling $3,250 which had been executed previously by Rosefelt in favor of Dion—one note being for $1,600 for cash which Dion lent to Rosefelt for his personal use, and the other one being for $1,650 for repairs on a house (not the one involved here) owned by Rosefelt personally.

Defendant Dion contended that the consideration for the $6,500 note and second trust deed was the cancellation of said notes totaling $3,250.

Defendant Perilmuter, an attorney at law, contended that he took the note (which had been reduced to $3,250) and second trust deed as security for payment of legal services of the value of $1,680 rendered, and to be rendered, by him in behalf of Rosefelt.

The findings of the court were in accordance with the contention of plaintiff.

Appellants contend that the finding of the court that Rosefelt had no right to encumber the property was not supported by the evidence. Robert L. Byrd had established a business of building and selling houses, and the business was known as the Byrd Construction Company. He entered into an oral agreement with one Rosefelt whereby they were to be joint venturers or partners in the business of that company and were to share equally in the profits and losses. A set of books for the company's business was kept, and the signatures of Byrd and Rosefelt were required on the company's checks. Various amounts from the company's funds were paid to each one for his personal use, but those amounts were charged against each one on the books, and the accounts were settled at the end of each year. Byrd testified that the legal title to all the company's real property, about 18 or 20 parcels, was taken in Rosefelt's name for convenience in passing title to purchasers, in that, Byrd being a general contractor, the right to a mechanic's lien on the property would expire within 30 days instead of 60 days. It also appeared that Rosefelt was a single man and that Byrd was married. The property here involved was purchased in 1939 in the name of Rosefelt. A down payment thereon of $500 was made by Rosefelt from his funds. Approximately $9,000 was borrowed from a loan company, and the payment thereof was secured by a trust deed on the property. In addition to the loan of $9,000, the company spent about $9,000 in building a house upon the property. The company paid about $4,000 for furniture which was placed in the house. The cost of the house and the furniture was about $22,000. When the house was being constructed, it was the intention of Rosefelt to get married and to occupy the house, and to reimburse the company for its expenditures in building and furnishing the house. He did not marry and did not reimburse the company, but he moved into the house in the fall of 1940 and remained there until about June, 1941. The property was for sale during the time he occupied it, and it was listed as property of the company. On October 15, 1940, while he was occupying the property, and when the company was insolvent and involved in financial troubles, he executed a promissory note for $6,500 and a second trust deed on the property as security for the note. The note and second trust deed, the validity of which is involved herein, were executed without the knowledge of Byrd, in favor of Rosefelt's "old friend," J. Dion. The consideration for those documents, according to the testimony of Rosefelt and Dion, was the cancellation by Dion of two notes totaling $3,250 which had been made by Rosefelt in favor of Dion. Rosefelt had the trust deed recorded. The company paid the utility bills incurred at the property, and paid the monthly payments of $30 on the note which was secured by the first trust deed.

On February 14, 1941, Byrd made an assignment for the benefit of creditors and named one Hummel as trustee, but no schedule of property was attached to the assignment. On February 19, 1941, Byrd and Rosefelt dissolved their business relationship and settled their accounts. On February 28, 1941, Byrd made another assignment for the benefit of creditors and named the plaintiff herein, Kay McKoin, as trustee in place of Hummel. In that assignment the property here involved was listed as a company asset. Hummel, the first trustee, executed the documents necessary to accomplish the transfer from himself to McKoin. On March 10, 1941, Rosefelt signed a statement or rider, attached to the assignment to plaintiff, which was to the effect that he consented to the assignment and that he joined the assignor in conveying all his right, title and interest in the property assigned, and that he agreed to execute all instruments necessary to effect that result. On that same date he executed a grant deed in favor of plaintiff to the property here involved.

Byrd testified that the property here involved was owned by the company. In response to a question on cross-examination as to whether he had an "agreement" with Rosefelt to the effect that the property was to be Rosefelt's property, he said (without objection being made thereto) the "agreement" was, when the property was first purchased, that if it didn't sell and if Rosefelt got married that Rosefelt would take it for his home and would pay the difference between the cost of the property and the $500 he had paid on it; and that when he did not marry they then "agreed" to spend more money and open the property as a model house and sell it, and they "decided" to build a swimming pool in order to sell the property more readily and get their money out of it.

The accountant for the company, called as a witness for plaintiff, testified that Rosefelt held legal title to real property of the company in approximately 20 instances; that each construction job was set up on an individual sheet or sheets in the ledger of the company; that the first ledger sheet concerning the property here involved was entitled "Rosefelt," which was the same way the ledger sheets for other properties taken in Rosefelt's name were entitled; that the ledger sheets for this property show the amount obtained from the loan company (secured by the first trust deed), the loan of $500 that Rosefelt obtained (for the down payment), and that the construction company repaid that $500 loan; that the ledger shows that the company paid on account of that property $12,072.80 over and above the amount of the first trust deed; that the ledger does not show that Rosefelt reimbursed the company or that he paid anything on the construction costs; that the interest on the first trust deed was paid by the company; and that the property here involved was shown on the books as a company asset.

Rosefelt testified that he held some properties in his name which belonged to the company; that the property here involved was his individual property; that the down payment of $500 was his money and Byrd had no interest in the property; that the company provided funds for building the house, except the funds which came from the first financing; that all expenditures were charged on the books against the property; that Rosefelt had no credits on that sheet; that on the statement signed by Byrd and him in settling their affairs, the property was treated as partnership property; that at the time the assignment was made to plaintiff he believed "the property was in the red" for about $9,000 or $9,500 which was directly chargeable to him, and he would owe Byrd an additional one-half of "that $9,500," and to "offset that" he "agreed to turn the property in to Mr. McKoin on the assignment," and that was the first time there was any agreement between Byrd and him that Byrd "was to have any interest in that property"; that the company advanced the money for him and it was their money; that he was to be charged with it personally; that he had the house for sale from the time he went into it until he came out, and when he did not get married he listed the house with Byrd "to try to sell it"; that he was not sure who paid the utility bills for that property; and that if the company paid those bills "they were probably charged" to him.

A draftsman for the company, called as a witness by defendants, testified that he was the draftsman for the company at the time the plans for the house were drawn, and that he had done private work for Rosefelt; that he drew the plans for the house here involved; and that he was not sure whether it was the company or Rosefelt who paid him for drawing the plans.

Other evidence relating to the right of Rosefelt to encumber the property, which evidence relates also to the question of consideration, is discussed hereinafter.

[1] If the property was the individual property of Rosefelt, he had the right, of course, to encumber it. The court found that he did not have the right to encumber it, and by necessary implication found that it was not his individual property. The evidence was legally sufficient to support the finding that he did not have the right or authority to encumber the property.

Appellants contend further that the finding that no consideration was paid by Dion for the note and second trust deed was not supported by the evidence. Byrd testified that he first learned of the second trust deed in the latter part of October, 1940, when Rosefelt told him that "he put a second trust deed on the property for $6,500 for our protection," and that "Dion did not even know it was on"; that later when they were settling their accounts after dissolution of the partnership, and Byrd was assisting the trustee in efforts to remove the second trust deed, Byrd made demand on Rosefelt for the second trust deed and Rosefelt refused to surrender it, and said: "'After all, you know, Bob, I put it on for us, and after all, you can have your one-half too'"; that Byrd asked for his one-half at that time, and Rosefelt said "he would have to get hold of Dion first"; that later Rosefelt said he could not assign a part of the second trust deed to him, but could give him his half only by crediting the $6,500 note with a payment of $3,250 and obtaining from McKoin, the trustee, a new note for $3,250 in favor of Byrd, and a third trust deed on that property made by McKoin in favor of Byrd, securing the new note; that thereafter at a meeting where Rosefelt, Byrd and McKoin were present (Dion not being present) the third trust deed was made by McKoin, and the credit of $3,250 was written on the $6,500 note by Rosefelt; that the new note and third trust deed in favor of Byrd were not delivered to Byrd, but were retained by McKoin.

The accountant testified that he heard a discussion between Byrd and Rosefelt in which Byrd was "trying to get" Rosefelt to release the second trust deed, and Rosefelt said, "'Bob, I know it is a phoney, but I put it on there for our protection, after all'"; that Rosefelt said, everybody "'is going to get their money, and this will be $6,500 that we can go back to and build a house on'"; that he heard several conversations between them about the trust deed, but that was the only time he ever heard Rosefelt call the deed "phoney"; that in October, 1940 (the month when the second trust deed was made), he and Rosefelt were "holding down the office alone at that time" (Byrd was in the east); that materialmen had stopped deliveries; that they "had over four thousand of drawn checks in the drawer" which there were "no funds in the bank to cover"; that several checks were returned by the bank; and that on two occasions he advanced his own personal money.

McKoin testified that he was present when Rosefelt wrote the credit of $3,250 in the $6,500 note and that McKoin said to Rosefelt, "you better put your initial on there if you are going to sign J. Dion's name"; that Rosefelt signed it and put his initials on it (Dion was not present); that the new note and third trust deed had not been out of McKoin's possession.

Dion was not present at the trial. His deposition, taken under section 2055 of the Code of Civil Procedure, was offered in evidence by plaintiff and was received. According to his testimony he lent $1,600 in cash to Rosefelt about 1937; he never had a bank account; he remodeled a house for Rosefelt in 1938 and his charge was $1,650; he received no principal payments on these debts; he did not file an income tax report until 1941; he did not know why the note was for $6,500 instead of $3,250 until Rosefelt told him it was in that amount because he would have to discount the note since it was secured by a second trust deed. When Rosefelt's deposition was taken he testified that he had the two notes representing the two previous debts, but he refused to state where they were. In response to the question, "Where are they?" he said, "Well, that is my concern, isn't it?" At the trial he did not produce those notes and testified that they could not be found.

[2] Whether there was a consideration for the note and second trust deed was a question of fact for the trial judge. The evidence was legally sufficient to support the finding that no consideration was paid by Dion for the $6,500 note and the second trust deed.

[3] Another contention of appellants is that the finding that Rosefelt owned no beneficial interest in the property was not supported by the evidence. It appearing that Rosefelt had an interest in the property as a partner, the finding that he owned no beneficial interest therein was erroneous. Concededly, the $6,500 note and second trust deed were not executed for any purpose connected with the partnership affairs, but were executed, according to the testimony of Rosefelt, to obtain the cancellation of two personal notes of Rosefelt. The court having found that Rosefelt did not have the right or authority to encumber the property and that there was no consideration for the $6,500 note and second trust deed, and those findings being supported by the evidence, the further finding that Rosefelt had no beneficial interest in the property, even though erroneous, was not prejudicial.

[4, 5] Another contention of appellants is that the finding that any consideration paid by defendant Perilmuter for said note was grossly inadequate and he took said note with notice of the invalidity thereof, was not supported by the evidence. After the note and trust deed were executed, Dion delivered the note to Rosefelt, who used it in his settlement with Byrd by reducing it to one-half of its face value and signing Dion's initials and his own initials thereon. Later Dion, without any consideration therefor, assigned the note to Harold Mann, a friend of Dion and Rosefelt. Thereafter when Rosefelt again requested the note for his personal use, Mann endorsed it, and made a written assignment of the second trust deed to defendant Perilmuter. No consideration was paid to Mann or Dion therefor. Rosefelt, the maker of the note and second trust deed, delivered them to Mr. Perilmuter before maturity of the note. Mr. Perilmuter, a cousin of Rosefelt, testified that his and Rosefelt's "relations were strained," and the first time he "ever had any legal business" for Rosefelt was in April, 1941, at which time he "appeared as his attorney" in a case which "was consummated the latter part of November" of 1941 (That case involved $2,094.75, and Rosefelt was one of five defendants therein. The case was not tried, having been dismissed); that it was the only business he had had for Rosefelt at that time, and Rosefelt owed him $1,680 for his services; that after he completed that case, there "was subsequent work" for Rosefelt; and that the note (of the face value of $3,250) was assigned to him for "services rendered and to be rendered; that he had not sent Rosefelt a bill for his services; that he made a charge on his books; that he did not give Rosefelt a receipt for payment of his services when he took the note—that he "could not very well" because he "didn't know how much was going to be due" him—there "were other services to be discussed, to be taken out of that"; that any balance, above the amount of his serv-

ices, he would either turn "over to Mr. Mann, or turn it into court and have Mr. Mann and Mr. Dion fight it out between them." In his deposition he testified that as to any balance, his "surmise would be to return it to Mr. Mann." Mr. Perilmuter testified further that he had telephoned Rosefelt for "the money" for his services, and that Rosefelt "turned over" the note "secured by a deed of trust" which Rosefelt informed him "he had secured from a friend"; that he did not meet Mann "until May of 1942" (Mann assigned the note to him on February 14, 1942); that he did not remember whether Rosefelt told him who the owner of the property was at the time he took the note; that Rosefelt "may have mentioned Mr. McKoin's name"; that he did not get in touch with McKoin; that he made no demand on McKoin to pay the note; that the first thing he did was file notice of default; and that he made no inquiry concerning the fact the interest, payable quarterly, had not been paid for about a year and a half. It appears therefore that some of the circumstances surrounding the acceptance of the note by defendant Perilmuter which should have caused him to inquire concerning the existing equities, if any, as to prior parties are: (1) the note showed on its face that it had been "Adjusted" or reduced to one-half of its original amount (the word "Adjusted," having been written thereon), and no explanation appeared therefor; (2) the note showed on its face that the maker of the note (Rosefelt) had acted as his payee's agent in reducing the amount of the note, having signed the payee's initials followed by his own initials; and (3) the note showed on its face that the interest, which was payable quarterly, had not been paid for a year and one-half. He made no inquiry at all concerning the history of the note or of the property. The evidence was sufficient to support the finding that any consideration paid by defendant Perilmuter was grossly inadequate and that he took the note with notice of its invalidity. The mere inadequacy of consideration, however, was not sufficient of itself to justify the finding that the note was accepted with notice of its invalidity (Witty v. Clinch, 1929, 207 Cal. 779, 783, 279 P. 797; Imperial Gypsum & Oil Corp. v. Chaplin, 1935, 4 Cal.App.2d 109, 113, 40 P.2d 596), but that fact may be considered with other circumstances in the case upon the question of notice of invalidity. Menges v. Robinson, 1933, 135 Cal.App. 161, 164, 26 P.2d 882; Smith v. Armstrong, 1927, 85 Cal.App. 624, 631, 260 P. 347. That question was one of fact for the trial judge. The findings as to that question, being supported by substantial evidence showing circumstances which required him to make inquiries concerning the validity of the note, cannot be disturbed on appeal.

[6] Appellants contend also that plaintiff is not the proper party plaintiff for the reason that he claims to act as trustee for the benefit of creditors and, therefore, should have brought the action as such trustee. Section 367 of the Code of Civil Procedure provides that, "Every action must be prosecuted in the name of the real party in interest, except as provided in section three hundred and sixty-nine of this code." Section 369 of said Code provides in part: "An executor * * * or trustee of an express trust * * * may sue without joining with him the persons for whose benefit the action is prosecuted. A person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." In addition to holding title to the property as trustee for the benefit of creditors, the plaintiff held the title under a grant deed executed by Rosefelt who had been the owner of record of the legal title. Where the legal title to property is vested in the trustee, it is unnecessary to state in the complaint the means by which plaintiff acquired it, and so far as concerns the defendant he is the real party in interest and may sue in his own name. 20 Cal.Jur. § 12, p. 495; Thorpe v. Story, 1937, 10 Cal.2d 104, 114, 73 P.2d 1194; Mitchell v. Shorcridge Oil Co., 1938, 24 Cal.App.2d 382, 384, 75 P.2d 110, 77 P.2d 221; Cortelyou v. Jones, 1901, 132 Cal. 131, 132, 64 P. 119. In Restatement of Trusts, § 280(h), it was said: "* * * it is unnecessary for the trustee in the pleadings or other proceedings to describe himself as trustee. He can proceed in the action as though he were the owner of the claim which he is enforcing. If he does describe himself as trustee the description is treated as surplusage. * * *" It was not necessary for plaintiff to describe himself as trustee.

[7, 8] A further contention of appellants is that the amendment to the complaint does not state facts sufficient to constitute a cause of action for fraud. It is apparently appellants' argument that fraud is the basic element of plaintiff's cause of

action and therefore it was necessary that an averment of fraud appear either in the complaint or the amendment thereto. A cause of action to quiet title pleaded in general form is sufficient to state a cause of action although fraud is one of its constituent elements. 22 Cal.Jur. § 32, p. 152; Aalwyn v. Cobe, 1914, 168 Cal. 165, 167, 142 P. 79. Furthermore, it does not appear that plaintiff relied upon the theory of fraud in presenting his evidence. He alleged in his complaint that he was the owner of said property and that defendants, without right, claimed an interest therein adverse to plaintiff. By amendment he set forth in detail the allegations upon which he relied to show defendants' claims were without right. The case was not tried upon the theory that fraud was in issue, and the court made no finding as to fraud. The judgment was in accordance with the cause of action stated in the complaint and the amendment. The allegations were sufficient.

Appellants contend further that McKoin is estopped to question the validity of the said note, secured by the second trust deed; that prior to the time Rosefelt executed a deed to the property to plaintiff, the plaintiff knew of the existence of the second trust deed; and that plaintiff recognized the validity of the second trust deed by executing a third trust deed to the property, in favor of Byrd, which third trust deed recited that it was subject to the second trust deed. Appellants argue that "equitable estoppels are founded solely on the theory that to permit the party to maintain the right which he asserts would operate as a legal fraud upon his adversary, or induces the party to change his position so that he will be pecuniarily prejudiced by the assertion of an adversary claim." There was no showing that defendant Perilmuter took the note and second trust deed in reliance upon the statement in the third trust deed that it was subject to the second trust deed. The third trust deed was made by McKoin in favor of Byrd and was not delivered to Byrd, and was not recorded. It appears that defendant Perilmuter did not know who the owner of the property was when he accepted the note and second trust deed, and that he made no inquiry as to ownership of the property. There was no statement by McKoin to defendant Perilmuter concerning the second trust deed or the third trust deed or at all prior to the time defendant Perilmuter accepted the note and second trust deed.

[9] The evidence showed that, prior to the making of the third trust deed, Byrd had been attempting, for the benefit of creditors, to obtain from Rosefelt a release of the second trust deed; that Rosefelt would not release it as security for the whole $6,500 note, but he proposed the third trust deed arrangement which in effect would amount to a release of the second trust deed as security for one-half of the $6,500 note; that Rosefelt would not credit the note with $3,250 unless the third trust deed was made; that McKoin and Byrd considered it would be for the benefit of the creditors if they should obtain at that time, under the third trust deed plan, the release of one-half of the second trust deed encumbrance; and that McKoin considered that since Byrd had previously made the assignment for the benefit of creditors, that if he (McKoin) gave a third trust deed to Byrd that he (McKoin) would in effect be giving the third trust deed to himself. There was no showing that defendant Perilmuter accepted the note and second trust deed in reliance upon any declaration or conduct of McKoin, the trustee; nor was there any showing that any declaration or conduct of the trustee, in making the third trust deed or at all, misled defendant Perilmuter to his prejudice or at all. The contention that plaintiff was estopped cannot be sustained.

[10, 11] Another contention of appellants is that the assignment was void for the reason it was not in compliance with Sections 3461 to 3466, inclusive, of the Civil Code; and therefore the title given to McKoin pursuant to the assignment was invalid and of no effect. The particulars wherein they assert the assignment fails to comply with those sections are: that it does not have a list of all properties which were not exempt from execution; that it does not contain the inventory as required by Section 3461; that it does not contain an affidavit of the assignor as required by Section 3462; and that it was not recorded as required by Sections 3463 and 3464. The right to attack an assignment because it is not in compliance with statutory provisions is limited to nonconsenting creditors of the assignor, and to subsequent purchasers and encumbrancers in good faith and for value. Garn v. Thorwaldson, 1919, 40 Cal.App. 62, 66, 180 P. 9. The appellants were not creditors of Byrd or the construction company. According to the findings of the trial court, hereinabove referred to, the ap-

pellant Dion was not a creditor of Rosefelt, and appellant Perilmuter was not a purchaser or encumbrancer in good faith. Furthermore, McKoin's title did not rest solely on the assignment. He held title under a grant deed. Plaintiff was entitled to maintain the action.

By reason of the conclusions hereinabove stated, it is not necessary to discuss other contentions of appellants.

(After the commencement of this action and prior to the trial, the property involved herein was sold. Pursuant to a stipulation between plaintiff and appellants the trial court ordered that $3,467.40 of the amount received for the property be impounded to be distributed in accordance with the final judgment.)

The judgment is affirmed, and the appeals from the orders denying the motions for a new trial are dismissed.

SHINN, Acting P. J., and FOX, Justice pro tem., concur.

SHOPIRO v. SHOPIRO.

Civ. 14642.

District Court of Appeal, Second District,
Division 2, California.

Nov. 8, 1944.

Hearing Granted Jan. 4, 1945.

1. Trial 🔑18

A litigant is entitled to not only a fair trial, but it should appear to be fair.

2. Trial 🔑18

The trial court's manner should not be such as to prevent a full presentation of all the relevant evidence.

3. Divorce 🔑223, 227(1), 235, 240(2)
Husband and wife 🔑295, 298(1)

An award for alimony and for counsel fees is to be determined in the court's discretion based upon the needs of the wife and the ability of the husband to pay. Civ.Code, § 137.

4. Courts 🔑26

The exercise of trial court's "discretion" means nothing more than the application of statutes and legal principles to all of the facts of a case.

See Words and Phrases, Permanent Edition, for all other definitions of "Discretion".

5. Courts 🔑26

The trial court's discretion is abused when exercised contrary to the spirit of the law and in a manner calculated to impede or defeat the ends of substantial justice.

6. Courts 🔑26

An abuse of trial court's discretion is manifested when the jurist exceeds the bounds of reason, exhibits caprice or partiality, or is arbitrary in ignoring relevant evidence, or in scorning legal rules.

7. Divorce 🔑214(3), 215, 226, 227(1)
Husband and wife 🔑295

The statute providing for the allowance of alimony and counsel fees was not designed to enrich the wife or her counsel out of the separate estate of the husband, but merely requires that allowances be made only for the purpose of covering the current needs of the wife pending her action and to enable her to present her case satisfactorily, and she must show the items and amounts of her needs. Civ.Code, § 137.

8. Husband and wife 🔑295

Although a wife is not required to impair her own capital to supply her needs pending her action for separate maintenance, yet, if she has income of her own, it should be supplemented from the community estate, or from the husband's separate income, only to such extent as will enable her to live as comfortably as has been her custom at the community fireside. Civ. Code, § 137.

9. Husband and wife 🔑295

Evidence of wife's possessions as well as of her income should be proved at the hearing on her application for alimony and counsel fees pending her action for separate maintenance. Civ.Code, § 137.

10. Husband and wife 🔑295

Where wife had her own separate income, an allowance for her temporary support pending action for separate maintenance should have been limited to an amount sufficient to enable her to obtain her necessaries as shown by the evidence. Civ. Code, § 137.

11. Husband and wife 🔑295

A separation agreement providing for monthly payments of a fixed amount to wife, even though the agreement might eventually be held to be unenforceable as a contract, was some evidence of the reasonableness of temporary alimony, and court's refusal to consider such agreement in fixing temporary alimony and counsel fees was an abuse of discretion. Civ.Code, § 137.

12. Husband and wife 🔑295

A husband, who had been ordered to appear to show cause why an order for temporary alimony and counsel fees should not be made in wife's action for separate maintenance, had the right to controvert all issues presented by the order, and to have his evidence pondered and his authorities and reasons considered by the court. Civ.Code, § 137.

13. Husband and wife 🔑295

The amount of a lawyer's fee to be awarded in a matrimonial action is to be governed by the amount recovered, the importance of the action, the customary charges in the community for similar work, the professional standing of the attorney, and his degree of ability, skill, and experience. Civ.Code, § 137.

14. Attorney and client 🔑140

The primary factor in determining amount of counsel fees is the importance and amount of service actually performed.

15. Husband and wife 🔑295

In fixing a fee for future services to be rendered by counsel for plaintiff in matrimonial action, the pleadings and testimony of the plaintiff and her counsel as to number of witnesses, and evidence and research required to establish the complaint, may be considered in determining amount of work required for complete preparation of the case for trial. Civ.Code, § 137.

16. Divorce 🔑229

Where an allowance has been made for future services of plaintiff's counsel in divorce action, a supplemental award may be made where counsel finds in the course of his labors that his inquiries have led him into fields not at first contemplated. Civ.Code, § 137.

17. Attorney and client 🔑140

Any attorney fee paid is unjust to the extent that it exceeds the value of services rendered.

18. Divorce 🔑227(1)

Counsel fees for a wife's attorney in a divorce action are not to be determined solely by the wealth of the husband. Civ. Code, § 137.

19. Divorce 🔑227(1)

A generous fee for the conduct of a divorce case against a wealthy man is oppressive unless it be commensurate with the services to be performed. Civ.Code, § 137.

20. Divorce 🔑227(1)

While the seriousness of the charges made by the parties in a divorce action and the gravity of the interests involved may enhance or diminish the obligation laid upon wife's attorney to preserve her status as wife and to maintain her in the social esteem, such factors do not justify a liberal fee in the absence of work done and results accomplished. Civ.Code, § 137.

21. Husband and wife 🔑295

Wife's declaration that many difficult and complex questions of law would be involved in her action for separate maintenance was not sufficient evidence of amount of work required of her counsel, upon which an order for fee for future services was made, since she was not qualified to testify upon such matters. Civ.Code, § 137.

22. Husband and wife 🔑295

The only service for which an award of fees for plaintiff's counsel in action for separate maintenance could have been made was that to be performed in the future, and the court had no jurisdiction to order payment for services rendered prior thereto. Civ.Code, § 137.

23. Husband and wife 🔑295

An award of $7,500 counsel fees for services to be rendered by wife's counsel in her action for separate maintenance was an abuse of discretion and excessive by $5,000, although husband was worth $211,000, where the issues were neither novel nor complex, wife was worth $46,000, and it was not shown that extraordinary demands would be made upon her counsel. Civ.Code, § 137.

24. Husband and wife ⚷295

In separate maintenance action against husband who was worth $211,000, an award to plaintiff's counsel of $2,500 for preparing a reply brief on husband's appeal from order allowing her temporary alimony and counsel fees of $7,500 was excessive and reduced to $750, where no unusual skill would be required of counsel. Civ.Code, § 137.

25. Husband and wife ⚷301

An allowance of $250 court costs to plaintiff wife on husband's appeal from order for temporary alimony and counsel fees, in wife's action for separate maintenance was excessive and reduced to $100, where the reply brief consisted of 50 pages including cover, index, and table of authorities. Code Civ.Proc. § 1034.

26. Husband and wife ⚷295

Where wife had a separate estate of $46,000 from which she received a net income of about $94 per month, and husband had separate estate of $211,000, from which he received an income of $750 a month, and evidence as to wife's necessaries did not show an amount in excess of $306 a month, an order granting wife temporary alimony of $300 per month pending her action for separate maintenance was excessive and reduced to $225. Civ.Code, § 137.

◆

Appeal from Superior Court, Los Angeles County; William S. Baird and Stanley Mosk, Judges.

Action by Hattie L. Shopiro against Samuel Shopiro for separate maintenance on ground of desertion, wherein defendant filed cross-complaint for divorce alleging extreme cruelty. From an order requiring defendant to pay $7,500 attorney's fees to plaintiff's counsel and $300 per month to plaintiff as alimony, defendant appeals.

Orders modified and affirmed as modified.

Harry G. Sadicoff, of Los Angeles, for plaintiff and respondent.

Mark M. Cohen, and Irwin M. Fulop, both of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

Plaintiff filed an action for separate maintenance on the ground of desertion. A cross-complaint for divorce alleged extreme cruelty. Following a hearing upon an order to show cause the court below made its order requiring appellant forthwith to pay to plaintiff's counsel $7500 attorney's fees and the sum of $300 per month to plaintiff as alimony. Appeal having been lodged in this court from that order, a subsequent hearing was held pursuant to another order to show cause, after which the court entered a second order requiring defendant to pay to plaintiff's counsel the sums of $250 "costs on appeal" and $2500 "attorney's fees upon said appeal." Appeal from the second order having also been taken, both orders are now before us. Since the first was by Judge Baird, the second by Judge Mosk, they are referred to herein as the Baird order and the Mosk order, respectively.

The principal attack on both orders is based upon the abuse of the court's discretion. Each of such contentions is well founded. In addition thereto the conduct of the court at the first hearing is assigned as error in that "the court evinced a state of mind and an arbitrariness that are wholly inconsistent with the exercise of legal discretion." While it is not impossible for a trial judge to exhibit impatience while dispensing even-handed justice, yet it must be conceded that the two are not Siamese twins. Whether appellant's criticism is warranted may be readily determined from a review of a portion of the proceedings.

At the conclusion of the testimony Judge Baird announced an award of $300 a month as alimony and $5000 fees for respondent's attorney, "with a stipulation that further attorney's fees may be fixed by the trial court if any." Thereupon the following occurred:

"Mr. Sadicoff: So stipulated.

"Mr. Fulop: If your Honor please, may we have an opportunity to be heard on that question, please?

"The Court: It won't do you any good.

"Mr. Fulop: Very well, it won't do any good, but once in a while it seems to me that you might ask counsel to help the Court. You have not read this property settlement agreement, have you?

"The Court: No, I did not.

"Mr. Fulop: Very well. I think that is the best evidence of what the parties meant to allow.

"The Court: I have nothing in front of me but your own statement, and all of the argument won't change my mind. I have got your own statement here of what he has got in the way of property and income.

"Mr. Fulop: I would like to call your attention, however, to one fact, that these parties entered into an agreement—

"The Court: If you go into an argument I may raise the attorneys' fees instead of asking for a stipulation.

"Mr. Fulop: Your Honor has power to do that, and we have power to take an appeal.

"The Court: Sure, that is right. I will be very glad to let you do that.

"Mr. Fulop: I think that you ought to give us the courtesy of letting us be heard on a matter of this kind. I would like to call your attention to just one thing, then I will sit down. These parties agreed at the time that they separated. We have two parties here with both having separate estates that they had before they were married. There is no community property, no showing of any community property. They agreed the husband shall pay to the wife $150 a month. We have advised our client that the agreement is void because it was made under peculiar circumstances which need not concern us right now. That was what she agreed to take. The cases all hold, your Honor, that the best evidence of what is reasonable is what the parties have agreed to.

"The Court: You just stated a minute ago that you thought it was void.

"Mr. Fulop: That is correct.

"The Court: Then, there is no agreement.

"Mr. Fulop: No, but there is evidence of what they have agreed between themselves is reasonable.

"The Court: This Court decides what is reasonable.

"Mr. Fulop: Very well.

"Mr. Sadicoff: Will your Honor make the order that the fee be paid to counsel direct?

"The Court: Yes. How do you want the $300 a month paid, direct or through the court trustee?

"Mr. Sadicoff: Direct, your Honor.

"The Court: The first payment to be made forthwith. Attorney's fee to be paid forthwith with the stipulation that further attorney's fees may be fixed by the trial court, if any?

"Mr. Sadicoff: So stipulated.

"The Court: I haven't heard any stipulation from you.

"Mr. Fulop: I am not stipulating to anything.

"The Court: Very well, then it will be $7500, payable forthwith. That is all."

During the course of hearing the testimony, after an inquiry had been directed to respondent to ascertain the items comprising $150 a month for incidentals listed in her questionnaire, the court said: "If he wants to waste time going into matters like that, it is perfectly all right with me, as I have nothing to do but listen to it."

[1, 2] The retorts of the court as evidenced by the foregoing do not accord with the behavior of a jurist searching for the truth of a litigated controversy. A litigant is entitled to not only a fair trial but it should appear to be fair. Rosenfield v. Vosper, 45 Cal.App.2d 365, 372, 114 P.2d 29. The Court's manner should not be such as to prevent a full presentation of all the relevant evidence. Shippey v. Shippey, 58 Cal.App.2d 174, 177, 136 P.2d 86. Impatience and petulancy on the part of the trial judge do not create an atmosphere conducive of the best efforts of the participants in a trial. They stifle the advocate's confidence that he is striving before an open-minded jurist; they intimidate the lay witness; they send away the litigant with the conviction that he has been dealt with unjustly. Withal, the state of mind developed by an impatient arbiter is not the parent of a wise discretion. A request by counsel to be heard upon the legality of a proposed order aimed at divesting his client of large sums of money should be kindly heeded. It is the function of counsel to present to the court his own views of the evidence and those theories of the law that may be favorable to the cause he champions. When in a divorce proceeding the court refuses to hear argument upon the significance of a written agreement of the parties in evidence, he serves no purpose other than to irritate counsel and to convince the protesting litigant that decrees of importance are derived from the inner consciousness of the chancellor rather than from his intellectual processes and his conscience under the influence of all of the admitted evidence.

But the court's abuse of discretion is evidenced by a still more serious vice than that of the court's impatience. Respondent filed her verified questionnaire in support of her application for the Baird order, in which she set forth an itemization of her necessities. While they totaled $593 on her ex parte affidavit, yet under cross-examination she established her monthly necessities to the extent of only $306. She made no substantial showing as to her necessary expenses for physician, dentist, insurance, or incidentals, all listed at generous monthly sums in her questionnaire. She has a separate estate consisting of liquid assets worth about $46,000 from which she receives a net income of about $94 per month. In spite of this modest income from her separate estate, she took an apartment for which she pays $115 monthly. At the age of 48 years she married appellant. At the time of the separation she was 56; he was 69. Although she alleged the existence of community property, the description of which she has no knowledge, yet she attached to her complaint a property settlement agreement which bears a date seven months prior to the filing of her suit, in which she declared (1) that she knows the nature of all property owned by her husband; (2) that all property standing in his name is his separate property and that she has no interest therein; (3) that she released all claims upon it. While this agreement was received in evidence the court declined to read it. The financial statement of appellant listed his assets at $211,498.50 and the testimony supported that value. Among the items constituting his estate are two second mortgages, which respondent insists upon appraising at their face value. But their appraisal by appellant's testimony appears reasonable and there is no proof to the contrary. The aggregate of his monthly income does not exceed $760 and it is all derived from his separate estate.

[3-9] In fixing the sums to be awarded plaintiff as alimony and for counsel fees the court is to be guided by section 137, Civil Code and the interpretations thereof. Such award is to be determined in the court's discretion based upon (1) the needs of the wife and (2) the ability of the husband to pay. Legal discretion is a readily comprehended concept. It means nothing more than the application of statutes and legal principles to all of the facts of a case. Watson v. Sutro, 103 Cal. 169, 173, 37 P. 201. It is abused when exercised contrary to the spirit of the law and in a manner calculated to impede or defeat the ends of substantial justice. Bailey v. Taaffe, 29 Cal. 422, 424. Its abuse is manifested when the jurist exceeds the bounds of reason, exhibits caprice or partiality, or is arbitrary in ignoring relevant evidence or in scorning legal rules. Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345. "Such procedure cannot be sustained." Fewel v. Fewel, 23 Cal.2d 431, 433, 144 P.2d 592, 594. Section 137 was not designed to enrich the wife or her counsel out of the separate estate of the husband. It merely requires that allowances be made only for the purpose of covering the current needs of the wife pending her action and to enable her to present her case satisfactorily, and she must show the items and amounts of her needs. Tremper v. Tremper, 39 Cal.App. 62, 66, 177 P. 868. While she is not required to impair her own capital to supply such needs if she has only a modest estate, yet if she has income of her own it should be supplemented from the community estate or, for want of such estate, from the husband's separate income, only to such extent as will enable her to live as comfortably as has been her custom at the community fireside. Westphal v. Westphal, 122 Cal.App. 379, 10 P.2d 119; 1 Cal.Jur. 968, paragraph 21. In any event, evidence of her possessions as well as of her income should be proved at the hearing.

[10-12] The order granted herein, if enforced, would take from the capital assets of defendant to support plaintiff in her solitary luxury. Having her own separate income to the extent of $94 monthly, an allowance for her temporary support should have been limited to an amount sufficient to enable her to obtain her necessaries in the sum of $306, pendente lite as shown by the evidence. Westphal, supra. Certainly if it was her own sober and advised opinion that $150 per month from appellant would suffice for the balance of her life, that opinion should at least have been considered by the court. Even though it might eventually be held to be unenforcible, as a contract, it would continue to be an agreement (I Williston, secs. 1 and 2), and its declarations would be evidence of a meeting of the minds of its authors with respect to its covenants and of their opinions as to the existence of the facts thereby established for them-

selves. Havemeyer v. Superior Court, 84 Cal. 327, 378, 24 P. 121, 10 L.R.A. 627, 18 Am.St.Rep. 192; California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 720, 75 P. 320; Offeman v. Robertson-Cole Studios Inc., 80 Cal.App. 1, 13, 251 P. 830; Clark v. United States, 95 U.S. 539, 543, 24 L.Ed. 518. Having been ordered to appear to show cause, it was appellant's right to controvert all issues presented by the order, Mudd v. Mudd, 98 Cal. 320, 33 P. 114, and to have his evidence pondered and his authorities and reasons considered, Fewel, supra. The court's refusal to do so was an abuse of discretion.

The award of $300 monthly for temporary alimony, alone, might not have warranted an appeal. But concomitant with its allowance the court ordered the payment to respondent's counsel of a very generous fee. This award of $7500 as attorney's fees cannot be justified on any theory under the facts established in this case. It is not unlikely that respondent's counsel may be able to demonstrate as the case progresses that the amount awarded is a reasonable sum for the total fee for all work to be done. The value of the services of a diligent and capable lawyer rapidly mounts with the hours invested, problems solved and results achieved.

[13-16] Notwithstanding the explicit language of section 137, Civil Code, it is there implied that the amount of a lawyer's fee to be awarded in a matrimonial action is to be governed by many factors including the amount recovered, the importance of the action, the customary charges in the community for similar work, the professional standing of the attorney and his degree of ability, skill and experience. 7 C.J.S., Attorney and Client, § 191, p. 1080 et seq. However, the primary factor in deriving a determination is the importance and amount of service actually performed. Of course actual performance cannot be shown where demand is made to fix a fee for future services as must be done in divorce cases in which the plaintiff establishes her financial incompetence to go forward. Lacey v. Lacey, 108 Cal. 45, 40 P. 1056; Brockmiller v. Brockmiller, 57 Cal. App.2d 623, 135 P.2d 184; White v. White, 96 Cal.App. 765, 274 P. 990; Smith v. Superior Ct., 89 Cal.App. 177, 186, 264 P. 573. But in any event a fair understanding of the activities necessarily to be done may be had from the pleadings and from the testimony of the wife and her counsel as to the number and location of witnesses to be interviewed, of depositions to be taken and of other evidence and research required for the ultimate establishment of the allegations of the wife's complaint. From such showing the court to which the application is addressed can determine to a fairly reasonable degree the amount of work that will be required of the attorney for the complete preparation of the case for trial and can fix the fee accordingly. If in the course of his labors the attorney should find that his inquiries have led him into fields not at first contemplated he may make demand for additional compensation for work yet to be done preparatory to the trial, and upon a showing of services rendered and of those yet to be performed the court will be enabled to supplement the initial award. Such is the universal practice in general equity matters (7 C.J.S., Attorney and Client, § 193, p. 1096; Wallace v. Fiske, 8 Cir., 80 F.2d 897, 107 A.L.R. 726; Adams v. California Mut. Bldg. & Loan Ass'n, 18 Cal.2d 487, 116 P.2d 75; Carbon Steel Co. v. Slayback, 4 Cir., 31 F.2d 702; Tanner v. Superior Court, 43 Cal.App.2d 732, 111 P.2d 713), and such is the common practice in divorce actions in other states of the union. See Gould v. Gould, 61 Misc. 120, 114 N.Y.S. 331. That such practice may inconvenience counsel and congest court dockets does not outweigh the injustice that may be suffered by one whose capital might be taken from him by the occurrence of an event not foreseeable, with no adequate recompense. Unless such practice be followed every divorce proceeding becomes an occasion for potential injustice.

[17-20] Any fee paid is unjust to the extent that it exceeds the value of services rendered. Counsel fees for a wife's attorney in a divorce action are not to be determined solely by the wealth of her husband. A generous fee for the conduct of a divorce case against a wealthy man is oppressive unless it be commensurate with the services to be performed. While the seriousness of the charges made by the parties and the gravity of the interests involved may enhance or diminish the obligation (Clark v. Ellsworth, 104 Iowa, 442, 73 N.W. 1023) laid upon the wife's attorney to preserve her status as wife and to maintain her in the social esteem, such factors do not justify a liberal fee in the absence of work done and results accomplished.

[21] There was no proof of the extent of the services to be required of her coun-

sel save respondent's declaration that "many difficult and complex questions of law will be involved in this case" with respect to whether a part of the property in defendant's possession is community and whether new rights and obligations arose under the property settlement agreement. Such declaration is not sufficient support for the order. Hoorman v. Climax Cycle Co., 9 App.Div. 579, 41 N.Y.S. 710. She was not qualified to testify upon such matters.

[22, 23] The only service for which an award could have been made was that to be performed in the future. The court has no jurisdiction to order payment for services rendered prior to the order. If none should ever be rendered, the award of a fee in any sum would have been excessive. Should either of the parties to this action decease at any time after payment of the $7500 and prior to any service in the preparation of the case for trial, the payment would be a total loss to appellant. The same would likewise be true should plaintiff's counsel immediately pass on to his final reward. Furthermore, should he conclude that, under the evidence developed within a day, he could not establish appellant's desertion or defeat the charges of his client's cruelties, he would then act most advantageously in effecting a settlement. Surely he would not, in that event, claim that he had earned $7500. Such a sum is seldom if ever justified in a divorce case where the husband's total estate is worth only $211,000 and the facts are no more complicated than those here involved. The issues here are neither novel nor complex. The questions projected are commonplace to an experienced attorney. Every rule of law and every principle of equity suggested by the pleadings have been repeatedly clarified by the appellate courts. In the absence of proof that extraordinary demands will be made upon respondent's counsel, it was an abuse of discretion for the court thus to exercise its "vicarious generosity" (Chief Justice Taft in In re Gilbert, 276 U.S. 296, 48 S.Ct. 309, 72 L.Ed. 580) in ordering the payment by defendant of a sum not warranted by the evidence presented at the hearing in limine.

In view of the covenants, property settlement agreement and the facts there declared and of the properties listed by appellant as constituting the assets of his separate estate, it is our opinion that the reasonable value of counsel's services, reasonably certain to be required of him in the preparation of this case for trial, is $2,500. The order should have required the immediate payment of that sum. Also, it should have authorized counsel to make applications for additional fees in the event that he is able to show at any time during the course of his labors preliminary to trial that his services already rendered exceed, or equal, in value the amount of the initial award. Whether such additional fees are requested during his work of preparing the case for trial, at or after the time of moving to set the case for trial, he may ask the court to order the payment of fees for the trial of the action and the preparation and settlement of findings and judgment.

The Mosk Order.

[24, 25] The hearing on the Mosk order was of brief duration. No showing was made that any unusual genius or skill would be required of respondent's counsel. The only performance required and the only act done was to write a reply brief on the appeal from the Baird order. The court may have contemplated an oral argument by respondent's counsel. None was made, but if such argument had been made it could have added nothing to the contents of the brief he had filed. That document is an excellent treatment of the subject but there is utterly no basis for an award of $2500 for its preparation. Neither the nature of the questions discussed nor the importance of the order on appeal warranted a charge in excess of $750. Also, the allowance of $250 court costs for that appeal was in excess of the sum reasonably to be incurred. The brief consists of 58 pages including its cover, topical index and table of authorities. Even though its printing cost had been excessive, the amount recoverable as costs for the printing of a brief being limited to $100.00, Sec. 1034, Code Civ.Proc., suggests an amount for this allowance.

In the Bancroft case (9 Cal.App.2d 464, 50 P.2d 465) after appeal from the order for the payment of $500 an account of trial costs and $3500 on account of attorney's fees, on the hearing of a second order to show cause to fix costs on appeal and fees for the wife's attorney to resist the appeal from the first order, the court allowed $200 costs and $1750 attorney's fees on appeal from the first order. Holding that such sums were disproportionate to the costs incurred and the services rendered on appeal, the appellate court reduced the amounts of the order to the actual costs on appeal and the attorney's fees to $750. This fixes a fair criterion for our guidance in holding that the Mosk order was the result of abuse of discretion.

[26] It is therefore ordered that the Baird order be amended as follows: (a) In paragraph "I" substitute the figures "$225.00" in lieu of the words and figures "Three hundred ($300)" wherever they occur; (b) instead of paragraph "II" substitute the following: That defendant Samuel Shopiro pay forthwith to Harry G. Sadicoff, Esq., the sum of $2500 on account of attorneys fees for his services to be rendered on behalf of plaintiff to and including his appearance for the setting of the case for trial. Thereafter the court will upon motion make such other orders as may be deemed equitable and appropriate.

It is further ordered that the Mosk order be modified by substituting the figures "$100" in the place of the words and figures, "Two Hundred and Fifty Dollars ($250.00)," and the figures "$750" in lieu of the words and figures "Twenty-five hundred dollars ($2500)."

As thus modified both of said orders are affirmed.

McCOMB, J., concurs.

W. J. WOOD, Justice (concurring).

I concur in the conclusions of the foregoing opinion and in the modification of the Mosk order, but I think that the Baird order should be so amended as to fix a specified fee for all legal services to and including the entry of judgment. Section 137 of the Civil Code, which authorizes an allowance of counsel fees, provides that the court may require the husband to pay any money necessary "to prosecute or defend the action." There is no provision in the section for two orders to be made, one to cover fees for the preparation for the trial and another for the work of counsel during the trial, and there is no occasion for a requirement that two applications be made for counsel fees in all cases that go to trial. Of course, counsel can at any time before the final conclusion of the trial ask for an additional allowance if circumstances be shown establishing that work is to be done which was unknown and could not reasonably have been contemplated at the time of the making of the original order. Rose v. Rose, 109 Cal. 544, 42 P. 452.

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66 Cal.App.2d 562

SMITH et al. v. CITY OF LOS ANGELES et al.

ARTHUR REALTY CORPORATION v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

STAHL et al. v. CITY OF LOS ANGELES et al.

Civ. 14245, 14244, 14254.

District Court of Appeal, Second District, Division 3, California.

Oct. 31, 1944.

Hearing Denied Dec. 28, 1944.

1. Municipal corporations 🔑834
Waters and water courses 🔑57, 81

Neither a natural person nor a private corporation may, with impunity, obstruct or divert flow of a natural water course to damage of another's property, and the same rule applies to a municipal corporation or political subdivision of the state.

2. Eminent domain 🔑271

If property is not condemned by legal proceedings and damage paid in advance before construction by county of works for public purposes, the county is liable for damage resulting therefrom and an action will lie against it for recovery thereof. Const. art. 1, § 14.

3. Eminent domain 🔑293(1)

Amended complaint, charging that dikes erected by city, county flood control district, and two railroads had effect of diverting waters naturally flowing in one of channels of river to other channels from which the water escaped by reason of inadequacy of channels to carry increased flow, with resultant damage to plaintiffs' property, was sufficient to state a cause of action against all named defendants. Const. art. 1, § 14.

4. Appeal and error 🔑917(1)

On appeal from judgment for defendants following sustaining of defendants' demurrers to amended complaint without leave to amend, allegations of the complaint were accepted as true.

5. Pleading 🔑214(3)

Where amended complaint, charging that dikes erected by defendants had effect of diverting naturally flowing waters, with resultant damage to plaintiffs' property, contained provision that earlier dikes constructed by certain of defendants were "tied in" with a subsequent dike and that they constituted a single structure, it could not be held on demurrer, contrary to such allegations, that acts of certain defendants in building earlier dikes did not contribute to injury sustained by plaintiffs.

6. Waters and water courses 🔑179(1)

Where amended complaint, charging that dikes erected by defendants had effect of diverting naturally flowing waters with resultant damage to plaintiffs' property, alleged that plaintiffs were unable to determine whether damage sustained by them was occasioned as a concurrence of acts of all defendants or was caused in part by acts of certain defendants and in part by acts of other defendants, plaintiffs were entitled to join all defendants and have such questions determined in one trial. Code Civ.Proc. §§ 379a, 379c.

7. Waters and water courses 🔑171(1)

A lower riparian owner has no right of redress for injury to his land caused by improvements made in the stream for purpose of draining or protecting land above, even though channel is inadequate to accommodate increased flow of water resulting from improvements.

8. Waters and water courses 🔑171(1)

Drainage improvements must follow natural drainage of the country and, if water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to owner whose land is injured by such discharge.

9. Eminent domain 🔑2(10)

Fact that county flood control district constructed dikes diverting waters naturally flowing in one of channels of river to other channels for purpose of flood control did not make district immune from liability for damage inflicted thereby upon plaintiffs' lands caused by waters overflowing thereon by reason of inadequacy of channels to carry increased flow. Const. art. 1, § 14.

10. Waters and water courses 🔑38

A water course does not lose its character as such by reason of fact that it is improved by deepening or is artificially controlled, or because it is used as a conduit to carry other waters, nor because all water has been diverted therefrom, no matter how long a period.

11. Eminent domain 🔑2(10)

Neither county flood control district nor city department of water and power could escape liability for damage caused to plaintiffs' land as result of diverting water from one of channels of river into other channels by erection of dikes on ground that channel shut off by district's dikes had been completely shut off for a period of years before erection of their dikes by other dikes, and that their dikes were simply an improvement of bank of stream.

12. Waters and water courses 🔑52

Where a natural water course is obstructed, diverter is under continuing duty of providing proper facilities for handling diverted waters so as to prevent damage to property of others.

13. Waters and water courses 🔑115

"Floodwaters", as respects right of property owner to divert to others' lands, are those which escape from a stream or other body of water and overflow adjacent territory, and do not include waters flowing in a natural water course.

See Words and Phrases, Permanent Edition, for all other definitions of "Floodwater".

14. Waters and water courses 🔑115, 123

Where waters in river with which dikes erected by city interfered were flowing in various channels of the river, the waters were not "floodwaters", and hence city could not escape liability for damage to adjoining lands caused by city's diverting water from one of channels into other channels upon the "common enemy doctrine".

See Words and Phrases, Permanent Edition, for all other definitions of "Common Enemy Doctrine".

15. Waters and water courses 🔑176

County could be held liable for damages to adjoining lands caused by diverting water from one of channels of river into other channels by erection of dikes on ground that dikes built and maintained by county constituted a dangerous or defective condition of which county had notice and ample opportunity to remedy. Gen.Laws 1937, Act 5619, § 2.

16. Limitation of actions 🔑55(7)

Where plaintiff was seeking to recover for damages to adjoining lands caused by diversion of waters from one of channels of river into other channels by defendants' erection of dikes, thereby causing plaintiff's lands to be flooded, plaintiff's cause of action accrued when his lands were overflowed, and not when structures were built by defendants.

17. Eminent domain ⚷288(1)

Where plaintiffs' causes of action for damages to their adjoining lands caused by diversion of water from one of channels of river into the other channels by erection of dikes were all at law, and plaintiffs sought no equitable relief, defense of laches was not available.

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Appeal from Superior Court, Los Angeles County; Clarence M. Hanson and Frank G. Swain, Judges.

Consolidated actions by Daphne B. Smith and others, by Arthur Realty Corporation, and by Luther B. Stahl and others, against the City of Los Angeles and others, for injuries sustained by each of plaintiffs as result of flooding of their respective properties alleged to have been caused by the construction by the defendants of certain dikes. From a judgment for defendants, following order sustaining demurrers to the complaints, without leave to amend, the plaintiffs appeal.

Judgments reversed with directions.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, Sherman Grancell, of Van Nuys, and Kenneth W. Kearney, of Los Angeles, for appellants Arthur Realty Corporation and Daphne B. Smith et al.

W. L. Pollard, of Los Angeles, for appellants Luther B. Stahl et al.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., Samuel Poorman, Jr., Asst. City Atty., and Carl Davis, Wendell Mackay, Leonard Husar, Louis A. Babior, and Bourke Jones, Deputy City Attys., all of Los Angeles, for respondents City of Los Angeles and Department of Water and Power of City of Los Angeles.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Arthur Loveland, Deputy Co. Counsel, all of Los Angeles, for respondents County of Los Angeles and Los Angeles County Flood Control District.

Bauder, Veatch & W. I. Gilbert, of Los Angeles, for respondents Southern Pac. Co. and Southern Pac. R. Co.

FOX, Justice pro tem.

This is an appeal by the plaintiffs from a judgment in favor of the defendants following an order sustaining, without leave to amend, demurrers to the first amended complaint. The demurrers were sustained not only upon general grounds but also upon the further grounds that any cause of action stated in the amended complaint was barred by the statute of limitations and by laches. (Other grounds of demurrer were marked off calendar.)

This action was instituted by some 176 different plaintiffs, or groups of plaintiffs, seeking to recover damages for injuries sustained by each as a result of the flooding of their respective properties during the early part of March, 1938, by the overflowing of the Tujunga River, alleged to have been caused by the construction therein by the defendants, the county of Los Angeles, Los Angeles County Flood Control District, Southern Pacific Company and Southern Pacific Railroad Company, of certain dikes, which had the effect of diverting all of the waters normally flowing in its easterly channel into the westerly and middle channels thereof, and which latter channels were inadequate to accommodate the increased flow, due in part to the construction of certain other dikes in the westerly channel by the defendants, the city of Los Angeles, its Department of Water and Power and said Flood Control District. The causes of action of all plaintiffs are substantially similar.

It should be noted that there are two companion cases, in which it has been stipulated that the briefs herein shall serve as the briefs in those cases because of the identity of the pleadings. Those cases are: Arthur Realty Corporation v. Los Angeles County Flood Control District et al., 2nd Civil No. 14244, and Luther B. Stahl et al. v. City of Los Angeles et al., 2nd Civil No. 14254. There are fifty plaintiffs, or groups of plaintiffs, in the latter case. The aggregate amount of damages claimed by the plaintiffs in the three cases is approximately $1,715,000.

In the interest of brevity the city of Los Angeles will be referred to as the "city"; Department of Water & Power as the "department"; county of Los Angeles as the "county"; Los Angeles County Flood Control District as the "district"; and Southern Pacific Company and Southern Pacific Railroad Company as the "railroad companies."

For the purpose of summarizing the allegations upon which the plaintiffs base their right to recover, we have selected the amended complaint of Daphne B. Smith. It contains four separate causes of action. The first is directed against the district, the railroad companies and the county. After stating the corporate or political status of the various defendants, it alleges the following as facts:

From time immemorial there existed and now exists, in the county of Los Angeles, two natural water courses, each with well defined banks and beds, commonly known as the Big Tujunga River and the Little Tujunga River. Each of said rivers has its source in the westerly slope of the San Gabriel Mountains in said county. The Little Tujunga as it leaves its mountain canyon and ravine flows in a general southerly direction, while the Big Tujunga as it leaves its mountain canyon and ravine flows in a general westerly direction, after which the two streams come together and form a confluence, from which point the stream is known as the Tujunga River. Below such confluence the Tujunga River divides into two natural channels, which are designated as the easterly channel and the westerly channel respectively. The westerly channel in turn divides into two natural channels which are designated as the westerly channel and the middle channel, respectively. The easterly channel runs in a southerly direction, while the westerly channel runs in a southwesterly and southerly direction, and the middle channel runs in a southerly direction from the point where it debouches from the westerly channel.

During the year 1877 there was constructed, by persons to the plaintiff unknown, an embankment or dike in the vicinity of the confluence of these rivers, which began at the base of the Verdugo Hills (forming a part of the southerly bank of the Big Tujunga River) and which ran westerly and southwesterly therefrom for a distance of approximately 1300 feet. This dike is referred to as the "1877 Dike." It has remained in existence at all times but has been reinforced and strengthened by certain of the defendants. Said dike did not at any time obstruct the waters of the Tujunga River which naturally flowed in the easterly channel thereof from flowing therein, and all of the waters of the Tujunga River which naturally flowed in the easterly channel continued to flow therein after the construction of the said 1877 Dike until the easterly channel was obstructed and closed by the dikes and embankments constructed by certain of the defendants as hereinafter set forth.

During the years 1911 and 1912, the railroad companies constructed a dike or embankment across the entrance of the easterly channel, which extended in a southwesterly direction from the 1877 Dike for a distance of approximately 2300 feet and into the point of land dividing the easterly and westerly channels of said river. This dike is hereafter referred to as "Southern Pacific Dike No. 1." During the year 1914 a portion of this dike (approximately the northeasterly 1050 feet thereof) was washed away, and thereafter, during the years 1914 and 1915, the county, with the consent and approval of the railroad companies, reconstructed and restored a portion thereof by the construction of a dike or embankment which extended approximately 850 feet from the southwesterly end of the 1877 Dike and along and upon the same location formerly occupied by the portion of said Southern Pacific Dike No. 1 which was so washed away. Following the reconstruction and restoration of such portion of Southern Pacific Dike No. 1 by the county there remained a gap or opening of approximately 200 feet between the southwesterly end of the reconstructed portion thereof and the part of said Southern Pacific Dike No. 1 which had been left standing. This gap was, during the year 1917, closed by the county by the construction, with the consent and approval of the railroad companies, of a dike across the same. At the same time, the county strengthened and reinforced the portion of the dike previously restored and reconstructed by it in 1914 and 1915, as well as the 1877 Dike. The dikes so constructed by the county are referred to as "County Dikes."

During the years 1914 to 1917 the railroad companies constructed along the southerly and easterly bank of the westerly channel a dike extending in a southwesterly direction from the southwesterly end of Southern Pacific Dike No. 1 to San Fernando Road. This dike is referred to as "Southern Pacific Dike No. 2." Following the completion of this last named dike and at all times thereafter there existed a continuous dike or embankment, faced over its entire distance upon its streamward side with riprap, extending from San Fernando Road northeasterly to the foot of the Verdugo Hills, which dike at all times subsequent to 1914 was maintained in part by the county and in part by the railroad companies.

During the years 1931 and 1932 the district, with the consent and approval of the railroad companies and the county, constructed a dike "immediately contiguous to and on the streamward side of and tied in with Southern Pacific Dike No. 1, Southern Pacific Dike No. 2, and the County Dike." Said dike extended northeasterly from San Fernando Road to approximately the southwesterly end of the 1877 Dike "into which it was tied." This dike is referred to as the "Flood Control Dike." The said Flood Control Dike was constructed "for the purpose of strengthening and reinforcing" all the previously constructed dikes, namely, Southern Pacific Dike No. 1, Southern Pacific Dike No. 2, the County Dikes and the 1877 Dike, and "in order to more effectively and permanently obstruct the entrance of the easterly channel of the Tujunga River," and thus prevent the waters naturally flowing to and in the easterly channel from flowing therein, and to divert the same from the said easterly channel to the westerly channel thereof; that all said dikes "constituted a single structure, each unit of which was designed to and did contribute to strengthen, sustain and support the whole structure," and was "designed for the sole purpose of permanently closing the entrance of the easterly channel of the Tujunga River and diverting all of the waters naturally flowing in said easterly channel to the westerly channel thereof." All the dikes hereinbefore mentioned except the 1877 Dike were erected upon land belonging to the Los Angeles Land & Water Company pursuant to licenses or permits granted by it to the various defendants.

The easterly channel of the Tujunga River in its natural state from time immemorial had carried, and but for the erection and maintenance of said dikes would have continued to carry substantially all or the greater portion of the waters of said Tujunga River, but the dikes constructed by the defendants collectively operated to and did completely obstruct the entrance of the easterly channel and effectively prevented any of the waters which would naturally flow to and into said easterly channel from flowing therein and diverted all of said waters to the westerly channel of said river. The westerly channel and middle channel in their natural state, and prior to the erection of said dikes across the easterly channel, carried, and but for the erection and maintenance of said dikes would have carried, only a small portion of the waters of said river, and while each in its natural state was entirely adequate and of sufficient capacity to hold and carry and would have held and carried such of the waters of said Tujunga River as naturally flowed therein without overflowing its banks, each was wholly inadequate and of insufficient capacity to carry all of the waters of said river or the greatly increased flow which was diverted therein and thereto from the easterly channel by the construction and maintenance of the dikes across the easterly channel of said river.

Between the 1st and 5th days of March, 1938, a heavy rainstorm occurred, as a result of which a large body of storm waters collected and flowed into the Big Tujunga and Little Tujunga Rivers, and by reason of the erection and maintenance of the dikes across the easterly channel of the Tujunga River all of the waters of said stream or the greater portion thereof which normally would have flowed in and down the easterly channel away from the lands and premises of the plaintiff were diverted from and kept out of said easterly channel and were forced to, in and down the westerly channel and middle channel of said river, as a result of which each of the said last named channels was overtaxed and overflowed its banks, and the waters thereof were caused to flow over, upon and across the lands and premises of the plaintiff, to her damage in the sum of $9,000. The first cause of action concludes with an allegation as to the timely presentation of claims for damages to the county and to the district, and the rejection thereof by each of said defendants.

The second cause of action is directed against the railroad companies and the county. It repeats substantially all of the facts alleged in the first cause of action, and further alleges that the dikes constructed and maintained by the railroad companies and the county were constructed and maintained in a negligent manner, in that the defendants knew or should have known that the westerly and middle channels were inadequate and of insufficient capacity to hold and carry the waters of the Tujunga River, particularly during periods of heavy rainfall, and that the diversion thereto of the waters naturally flowing in the easterly channel would cause the waters of said river to overflow the said westerly and middle channels and flood the properties of the plaintiff and others similarly situated, but that the defendants negligently failed to deepen or improve the westerly channel or middle channel so that the same would hold and carry the waters which were diverted into each of them from the easterly channel or to provide reasonable or any means whereby the said waters so diverted from the easterly channel might be conveyed into and by the westerly and middle channels without damage to the surrounding territory lying southerly and westerly from the point of diversion. It is further alleged that the Supervisors of the county had knowledge and notice of the dangerous condition created by the erection and maintenance of said dikes, but took no action looking toward correcting this dangerous condition.

The third cause of action is directed against the district, alone. It is substantially similar to the first cause of action, and alleges that the damages occasioned to the plaintiff resulted from the construction and maintenance by the district of the dike which it constructed across the easterly channel of the Tujunga River.

The fourth cause of action is directed against the district, the city, and the department. It alleges all the facts set forth in the first cause of action and in addition thereto the following: during the years 1926 and 1927 the district constructed a dike "in and across substantially the whole" of the westerly channel of the Tujunga River where the middle channel debouches from said westerly channel, which dike was approximately 4341 feet in length and consisted of a double pipe and wire fence approximately six feet high. This dike is referred to as the "Westerly Dike," and was constructed by the district for the purpose of diverting and it did divert substantially all of the waters then flowing into the westerly channel of said river into the middle channel thereof. Following the construction of the Westerly Dike and during the year 1932 the city and the department, with the consent and approval of the district, constructed a dike at a point beginning near the northerly terminus of the said Westerly Dike and extending in a southerly direction for approximately 3200 feet. This dike is referred to as "City Dike." It consisted of a single row of two inch pipe extending for a distance of approximately 800 feet from the northerly end of the Westerly Dike and a double row of six inch pipe for a distance of approximately 2400 feet; said pipes were driven in front of and on the streamward side of and immediately contiguous to the Westerly Dike; wire netting was attached to said pipes and behind the said pipes and wire there were deposited and placed earth, rocks and boulders; said City Dike was constructed for the purpose of strengthening and reinforcing the Westerly Dike, and in order to more effectively divert the greater portion of the waters flowing in the westerly channel of the Tujunga River to and into the middle channel of said river. Both the City Dike and Westerly Dike were constructed upon land belonging to the city and the department, the latter dike having been constructed by the district pursuant to a permit or license granted to it by said city and department.

Immediately prior to the construction of the said Westerly Dike and said City Dike the westerly channel of the Tujunga River had carried, and but for the erection of said dikes would have continued to carry substantially all the waters then flowing in the westerly channel, but the erection and maintenance of said last mentioned dikes operated to and did obstruct the westerly channel and prevented the greater portion of the waters which would otherwise flow in said westerly channel from flowing therein. The middle channel in its natural state was adequate and of sufficient capacity to hold and carry and would have held and carried such of the waters of the Tujunga River as naturally flowed therein without overflowing its banks, but was wholly inadequate and of insufficient capacity to carry all of the waters of said river or to carry the greatly increased flow diverted therein and thereto from the westerly channel by reason of the construction and maintenance of the said dikes therein, and but for the erection and maintenance of said dikes all of the waters naturally flowing in the westerly channel or the greater portion thereof would have flowed in and down the westerly channel and away from the lands and premises of the plaintiff. Following the heavy rain storm which occurred between the first and fifth days of March, 1938, as a result of which large volumes of water collected in the Tujunga River, the waters thereof were, by the said dikes so constructed in the westerly channel, diverted into the middle channel, as a result of which the said middle channel overflowed its banks and said storm waters were caused to flow over, across and upon the lands and premises of the plaintiff, to her damage. This cause of action concludes with an allegation with reference to the timely presentation of claims for damages to the district, the city and the department, and their rejection.

In our opinion the amended complaint states a cause of action in each count against the defendant or defendants therein named and the right of the plaintiffs to recover thereon is not barred by the statute of limitations or by laches.

The gravamen of the first three causes of action in plaintiffs' amended complaint is that the county, the district and the railroad companies, by the erection of dikes in and across the easterly channel of the Tujunga River, diverted therefrom the waters naturally flowing therein to the other channels from which said waters escaped by reason of their inadequacy to hold and carry the increased flow, with resultant damage to the plaintiffs. The foundation for the fourth cause of action is that the district, city and department, by the erection of the dikes "in and across substantially the whole of the westerly channel" where the middle channel debouches from it, diverted "substantially all of the waters" into the middle channel which was of insufficient capacity to carry the greatly increased flow, resulting in damage to plaintiffs' property.

[1] It is clear that neither a natural person nor a private corporation may, with impunity, obstruct or divert the flow of a natural watercourse to the damage of another's property. This is the holding in Hellman, etc., Bank v. Southern Pac. Co., 1923, 190 Cal. 626, 214 P. 46, wherein the two railroad companies which are defendants in these actions were held liable for damages resulting from the diversion of the waters of this same easterly channel of the Tujunga River by the dike built across said channel in 1912 by the railroad companies and referred to herein as Southern Pacific Dike No. 1. See, also, Horton v. Goodenough, 1920, 184 Cal. 451, 453, 194 P. 34, and Mogle v. Moore, 1940, 16 Cal.2d 1, 10, 104 P.2d 785.

The same rule likewise applies where the diverter is a municipal corporation or political subdivision of the state. Conniff v. San Francisco, 1885, 67 Cal. 45, 48, 7 P. 41; Richardson v. City of Eureka, 1892, 96 Cal. 443, 447, 31 P. 458; Los Angeles Cemetery Ass'n v. Los Angeles, 1894, 103 Cal. 461, 467, 37 P. 375; Tyler v. Tehama Co., 1895, 109 Cal. 618, 621, 42 P. 240; Geurkink v. City of Petaluma, 1896, 112 Cal. 306, 308, 44 P. 570; Rudel v. Los Angeles County, 1897, 118 Cal. 281, 288, 50 P. 400; Larrabee v. Cloverdale, 1900, 131 Cal. 96, 98, 63 P. 143; Elliott v. County of Los Angeles, 1920, 183 Cal. 472, 191 P. 899; Pacific Seaside Home v. Newbert Protection Dist. 1923, 190 Cal. 544, 213 P. 967; White v. City of Santa Monica, 1931, 114 Cal.App. 330, 299 P. 819; Jefferis v. City of Monterey Park, 1936, 14 Cal.App.2d 113, 57 P.2d 1374; Archer v. City of Los Angeles, 1936, 15 Cal.App.2d 520, 59 P.2d 605; Archer v. City of Los Angeles, 1941, 19 Cal.2d 19, 26, 28, 119 P.2d 1; Mitchell v. City of Santa Barbara, 1941, 48 Cal.App.2d 568, 571, 120 P.2d 131.

[2] The foundation for this liability as against public bodies is section 14 of Article I of the State Constitution, which prohibits the taking or damaging of private property without compensation. The applicability of the principle is well illustrated by Elliott v. County of Los Angeles, supra, where the county had diverted storm waters from their natural course resulting in damage to the plaintiff. The court said, 183 Cal. at page 475, 191 P. at page 900: "* * * The case, therefore, is one wherein property has been damaged by works constructed for public purposes, and no compensation has been provided or paid in advance, as required by the Constitution. Article I, § 14. In such cases the rule is well established that if the property is not condemned by legal proceedings and the damage paid in advance before the construction of the works, the county is liable for the damage resulting therefrom, and an action will lie against it for the recovery thereof." The first case cited in support of this statement is Tyler v. Tehama Co., supra, which was an action for damages caused to plaintiff's property by the erection of a bridge over Elder Creek, the abutments of which operated to turn the current of the stream against the plaintiff's property, to his damage. The court there discussed at great length the damage provision of Article I, section 14, of the Constitution, and held that plaintiff was entitled to recover the consequential damages he had suffered under the authority of that constitutional provision. The final word on the right to recover consequential damages under Article I, section 14, of the Constitution, is Rose v. State of California, 1942, 19 Cal.2d 713, 123 P.2d 505.

[3] Under the principles set forth in these authorities the allegations of plaintiff's amended complaint state facts sufficient to constitute a cause of action against any of the defendants who participated in obstructing the aforesaid channels and thus diverted the waters onto her property unless the acts therein alleged are legally excused or recovery for their consequential damage barred by lapse of time.

[4, 5] It is strenuously argued that two different groups of these dikes did not have any part in obstructing the easterly channel and diverting the water into the other channels and ultimately onto plaintiff's property. The first group of these dikes consists of the 1877 dike, Southern Pacific Dike No. 2 and so much of the Flood Control Dike as lies immediately in front of and on the streamward side of Southern Pacific Dike No. 2. It is said that these dikes are innocent structures; that they did not in any way prevent the waters of the Tujunga River from flowing into the easterly channel. The second group of dikes consists of Southern Pacific Dike No. 1 and the county dikes. It is argued that since the Flood Control Dike is larger, higher and stronger than the other two it must have operated by itself to obstruct the entrance to the easterly channel. Therefore, so the argument goes, neither Southern Pacific Dike No. 1 nor the county dikes had any part in diverting the water from the easterly channel and consequently neither could have been the proximate cause of any damage sustained by the plaintiffs. The answer to both these arguments is the same. It is to be found in the allegations contained in the first cause of action of the amended complaint. It is there alleged that the "Flood Control dike was constructed immediately contiguous to * * * and *was tied in with* Southern Pacific Dike No. 1, Southern Pacific Dike No. 2 and the County Dike" (emphasis added); also, that it *was tied into* the 1877 dike. It is further alleged that the *"Flood Control Dike was constructed * * * for the purpose of strengthening and reinforcing Southern Pacific Dike No. 1, Southern Pacific Dike No. 2, the County Dikes,* and the 1877 Dike, and *in order to more effectively and permanently obstruct the entrance of the easterly channel* of the Tujunga River * * *. *That said Flood Control Dike and said Southern Pacific Dike No. 1, Southern Pacific Dike No. 2 and the County Dike constitute and at all times herein mentioned have constituted a single structure, each unit of which was designed to and did contribute to strengthen, sustain and support the whole structure* * * *." (Emphasis added.) These allegations, like all other factual allegations of the amended complaint, must be accepted as true since the judgments appealed from followed sustaining of defendants' demurrers without leave to amend. Regardless then of how innocent some of these dikes may have been when originally built or the fact that some of them now operate in a second or third line of defense, they lose their innocence and impotence when they are all "tied in" together and "constitute a single structure" and each unit serves "to strengthen, sustain and support the whole structure." The situation in principle is not unlike that which would have been presented if each of the defendants here involved had built "a single structure" across the easterly channel by each building a few hundred feet of the dike, or by each building its portion of the dike on top of that built by another defendant or by all the defendants working together as a unit in the building of the offending structure. The net result in all these supposed cases is to produce "a single structure" which wrongfully accomplishes a given result to the plaintiffs' damage. Under such circumstances all those who participated in building the structure may properly be said to have contributed to the resultant damage. In view of the allegations of the amended complaint that these dikes were "tied in" with each other, that they "constituted a single structure" and that each unit serves "to strengthen, sustain and support the whole structure" it cannot be held on demurrer, contrary to such allegations, that the acts of some of the defendants in building particular dikes which made up the completed structure did not contribute to the injuries sustained by the plaintiffs.

[6] It is also alleged that the plaintiffs are unable to determine whether the damage sustained by them was occasioned as a concurrence of the acts of all of the defendants or was caused in part by the acts of certain of the defendants and in part by acts of other defendants and hence they are in doubt as against which of the defendants they are entitled to redress, the extent thereof, and as to whether such liability is joint or several. These questions can only be determined by the evidence upon the trial. But the plaintiffs are entitled,

under the circumstances here disclosed, to join all the defendants and have these questions determined in one trial. Code Civ. Proc., secs. 379a and 379c; Morris v. Duncan, 1936, 14 Cal.App.2d 635, 58 P.2d 669; Kraft v. Smith, 1944, 24 Cal.2d 124, 148 P. 2d 23.

[7, 8] It is argued by the district and county that these two public bodies are exempt from liability for any damage caused the plaintiffs by the construction and maintenance of their respective dikes. Their theory is that these dikes were constructed for flood control purposes under the police power and that any damage resulting from improvements made for this purpose is damnum absque injuria. In view of the extended consideration given this question in Archer v. City of Los Angeles, supra, 19 Cal.2d 19, 119 P.2d 1, and Rose v. State of California, supra, it would seem unnecessary to cite and attempt to analyze earlier cases on the subject since they all appear to have been cited and considered by the court in those two cases. In the Archer case the court said, 19 Cal.2d at pages 24, 25, 119 P.2d at page 5: "It is established in California and other jurisdictions that a lower owner has no right of redress for injury to his land caused by improvements made in the stream for the purpose of draining or protecting the land above, even though the channel is inadequate to accommodate the increased flow of water resulting from the improvements." (Emphasis added.) But, said the court, 19 Cal.2d at page 26, 119 P.2d at page 5: "The improvements must follow the natural drainage of the country. If the water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to the owner whose land is injured by such discharge." The court further pointed out that (19 Cal.2d at page 28, 119 P.2d at page 6): "Any damage caused by an obstruction to the natural flow of waters is also actionable." In that case, however, there was no evidence of diversion.

[9] The above quoted language is directly applicable here. The amended complaint alleges that, by reason of the structures erected by the district in the easterly channel, the waters naturally flowing therein were excluded therefrom and diverted to the other channels from which they overflowed and damaged the plaintiffs. A similar factual problem is presented in the fourth cause of action for it is there alleged that the offending dikes were erected "in and across substantially the whole of the westerly channel" thereby causing "substantially all of the waters" to be diverted into the middle channel where they overflowed onto plaintiffs' land. Such interference with the natural flow of the water into and in the respective channels is not, under this decision, such an exercise of the police power as will relieve the district and the county from liability, for injuries caused thereby.

The decision in the Archer case insofar as it relates to the question of immunity from liability for damages occasioned by the exercise of the police power was further amplified in the Rose case, supra. After extensively reviewing the purpose, as well as the nature and extent of the protection afforded by section 14 of Article I of the State Constitution, the court proceeds to consider the police power, concerning which it says, 19 Cal.2d at page 730, 123 P. 2d at page 515:

"Defendants contend that even if plaintiffs were damaged, the damaging occurred as the result of the exercise of police power and is damnum absque injuria. This contention is wholly without merit as there is no basis for the application of the police power doctrine to the factual situation in this case.

"Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiffs' property here involved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain.

"While it is true that the seeming absolute protection against the taking or damaging of private property for public use provided for in section 14 of article I of our Constitution may be qualified by the police power in the area in which such power operates, it should be obvious that the police power doctrine cannot be invoked in the taking or damaging of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our Constitution against the taking or damaging of private property for a public use without compensation."

In the light of this authoritative pronouncement it is apparent that simply because the district constructed the dikes in question for the purpose of flood control does not make it immune from liability for damage inflicted thereby upon the plaintiffs. There was here no emergency requiring split-second action. That no emergency existed is shown by the fact that some six years elapsed between the construction of the Flood Control Dike and the flooding of plaintiffs' property in 1938. During this period the district had ample time and opportunity to make adequate provision for the care of the diverted waters and for the protection of plaintiffs' property. It was simply a choice of means deliberately made by the governing board of the district in selecting one method of controlling possible future floods as against another. The board of course was competent to make the choice but this does not mean that, under the circumstances alleged in the amended complaint, the district can escape liability for the consequential damages suffered by the plaintiffs. Ironically enough, the plaintiffs were not only subjected to the burden of assuming the consequences of future floods, but they were taxed on the same basis as those more favored citizens of the easterly section for the cost of erecting and maintaining the very instrumentalities which worked to their damage.

[10, 11] The district makes the contention that it is not liable by reason of the construction and maintenance of the Flood Control Dike (across the easterly channel), or the Westerly Dike (by which the water was diverted into the middle channel). This contention is based upon the theory, so far as Flood Control Dike is concerned, that the easterly channel had been completely shut off for a period of years by the other dikes which had been constructed by the railroad companies and the county, and thereby the westerly channel had become and was the natural watercourse for all the waters of the Tujunga River, including those formerly flowing in the easterly channel. As a result, it is argued, when the district constructed its dike it merely improved the banks of a natural watercourse which anyone may lawfully do.

It is to be noted that the easterly channel did not cease to be a natural watercourse simply because all the waters were diverted therefrom by the dikes erected and maintained by the county and railroad companies. On this point it is said in 25 Cal. Jur., p. 1038, sec. 38, that: "A watercourse does not lose its character as such by reason of the fact that it is improved by deepening or is artificially controlled, nor because it is used as a conduit to carry other waters. Again, the character of a watercourse is not changed by the fact that a pond is created by a dam. *Nor does a watercourse lose its character as such because all the water has been diverted therefrom, no matter for how long a period*—although such diversion may deprive lower riparians of their rights—nor by reason of the fact that the water has all been dammed at a place far up the stream. * * *" (Emphasis added.)

The district, in support of its contention, relies principally on San Gabriel Valley Country Club v. Los Angeles County, 1920, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200. But the decision in that case did not turn upon any question of diversion. The character of the channel—whether natural or artificial—does not appear to have been an issue in the case. The case simply involved an improvement *in the channel* by which the speed of the water was accelerated but without any water being added.

The district also cites Chowchilla Farms, Inc., v. Martin, 1933, 219 Cal. 1, 25 P.2d 435, on this point. That was an action between riparian proprietors involving the right to water. The court held that the doctrine of riparian rights was applicable to a watercourse artificially created, but there is nothing in the opinion indicating that one who diverts water from a natural watercourse into another channel from which it escapes by reason of the insufficiency of the latter to hold and carry the same is not liable in damages to persons injured thereby. The case of Matheson v. Ward, 1901, 24 Wash. 407, 64 P. 520, 85 Am.St.Rep. 955, is also relied on. In that case all the waters naturally flowing in the west channel of the Dungeness River were diverted to two other channels thereof and this situation continued for some 30 years. Thereafter, the defendants attempted to remove the diverting dam and cast the waters back into their original channel which would have resulted in damage to the plaintiffs. The court properly held this could not be done and the principle finds approval in Natural Soda Products Co. v. City of Los Angeles, 1943, 23 Cal.2d 193, 143 P.2d 12. But nothing in those cases warrants the conclusion that if a property owner has been injured as the result of the original diversion damages may not be recovered therefor. If plaintiffs here were seeking to compel the defendants to return to the easterly channel the waters naturally flowing therein prior to the construction of the dikes in question the Matheson case might be in point.

The state of repair of the dikes which had been built across the easterly channel is not stated in the amended complaint but it is clear from the allegations that the Flood Control Dike was constructed, not for the purpose of improving the bank of the stream, but, according to the allegations, "for the purpose of strengthening and reinforcing" the other dikes and "in order to more effectively and permanently obstruct the entrance of the easterly channel." From these allegations it is clear that the Flood Control Dike was built in order to make the diversion of the waters which were wont to flow down the easterly channel both complete and permanent.

[12] Where a natural watercourse is obstructed the diverter is under the continuing duty of providing proper facilities for handling the diverted waters so as to prevent damage to the property of others. Mitchell v. City of Santa Barbara, supra, 48 Cal.App.2d at page 572, 120 P.2d 131; Willson v. Boise City, 1899, 6 Idaho 391, 55 P. 887; Willson v. Boise City, 1911, 20 Idaho 133, 117 P. 115, 36 L.R.A.,N.S., 1158; Atchison, T. & S. F. Ry. Co. v. Jones, 1903, 110 Ill.App. 626.

The district's argument, in effect, that its Westerly Dike by which water was diverted into the middle channel was simply the improvement of the bank of the stream and that by its existence for a period of some years the middle channel had become the natural channel of the stream is lacking in persuasiveness. It does not appear from the allegations in the amended complaint that this dike was a part of any bank of the stream which it might be said to improve. In fact, quite the contrary would appear from the allegation that it was constructed "in and across substantially the whole of the westerly channel." It is further alleged that this dike was constructed "for the purpose of diverting and it did divert substantially all of the waters then flowing in the westerly channel of said river to and into the middle channel." Under such allegations it is difficult to see how this dike could either be considered as an improvement of the bank of the westerly channel, or as a part of the bank of that channel.

The city and the department also invoke the principle that a person may improve the banks of streams without incurring liability as justification for their acts in building the City Dike which is on the streamward side of and immediately contiguous to the district's Westerly Dike. The "bank" which they claim to have improved is the Westerly Dike. But since that dike, under the allegations of the amended complaint, does not constitute a bank of a stream their argument necessarily falls.

The city and department seek to escape liability for the erection and maintenance of the City Dike by reliance upon the "common enemy doctrine" applicable to flood waters. That principle is not here applicable. They point out that the City Dike was erected on their property and then assert that it was built for the purpose of preventing damage to their property by waters escaping from a natural watercourse. This assertion is not justified by the allegations in the amended complaint. It is alleged in the fourth cause of action, which is the one that deals with the City Dike, that it "was constructed by the defendants, The City of Los Angeles and Department of Water & Power of the city of Los Angeles, for the purpose of strengthening and reinforcing the Westerly Dike, and in order to more effectively divert the greater portion of the waters flowing in the westerly channel of the Tujunga River to and into the middle channel of said river * *." This allegation makes the purpose for which the City Dike was constructed perfectly plain.

[13] The waters in the Tujunga River with which the City Dike interfered were flowing in a natural watercourse and hence do not come within the definition of flood waters. In Everett v. Davis, 1941, 18 Cal. 2d 389, 393, 115 P.2d 821, 823, the court, quoting from LeBrun v. Richards, 1930, 210 Cal. 308, 315, 291 P. 825, 72 A.L.R. 336; says that "'Flood waters are those which escape from a stream or other body of water and overflow the adjacent territory.'" The court goes on in the Everett case to say that "the drastic rule which allows a property owner to divert such wa-

ters to the lands of others only applies to flood waters in the strict sense, that is, waters escaping because of their height from the confinement of a stream and running over adjacent property." This proposition finds specific support in Thomson v. La Fetra, 1919, 180 Cal. 771, 773, 183 P. 152, and in Mitchell v. City of Santa Barbara, supra, 48 Cal.App.2d at page 572, 120 P.2d 131. That the city and department did not have the right under the common enemy doctrine relating to flood waters to construct and maintain the City Dike so as to divert the waters from the westerly channel into the middle channel to the plaintiffs' damage is further demonstrated by what the court said in Weinberg Co. v. Bixby, 1921, 185 Cal. 87, 196 P. 25, and in Hellman Bank v. Southern Pac. Co., supra. In the former case, 185 Cal. at page 95, 196 P. at page 29, the court points out that: "The doctrine of the common law relating to protection against flood overflow of rivers, and which has been adopted by the California courts, recognizes such flood waters as a common enemy which may be guarded against or warded off by one whose property is invaded or threatened by obstructions which are merely defensive in their nature and not calculated to interfere with the current of the water in its natural channel." At page 96 of 185 Cal., at page 29 of 196 P., the court made this further statement on the point: "We recognize the limitation in all of these cases that *such right of self-protection does not permit of any obstruction of or interference with the natural channel of the stream or diversion of the flow of the water in such channel.*" (Emphasis added.)

In the Hellman case, the court, speaking of the easterly channel of the Tujunga River involved in the case at bar, as well as the construction therein of some of the very dikes involved herein, had this to say regarding the right to divert the torrential or even the exceptional and unprecedented flow of waters from their natural channels, 190 Cal. at page 634, 214 P. at page 49: "The next contention of the appellants is that the trial court erred in its instruction to the jury as to the rights of the defendant to dike off the torrential waters of said river from said east wash, or wash No. 1 thereof. This, however, is but a repetition in another form of its former objection, since, if the east wash had become a permanent and established water course of said river, it would follow as a matter of logical consequence that neither the defendants nor any one else would have the right to divert either the usual or the torrential, or even the exceptional and unprecedented flow of these waters from their natural and accustomed channels to another of the courses or channels of said river, if such diversion would result in precipitating upon the lands of the plaintiff an outflow of said stream which, but for such diversion, would in the main have pursued its way down the east wash or channel thereof at a distance from and without injury to plaintiff's land."

[14] From the foregoing it is clear that the waters flowing in the various channels of the Tujunga River were not "flood waters" and therefore the "common enemy" doctrine is not applicable. The allegations in the amended complaint bring this case within the rule that one may not, by the erection of a dam or a dike in a natural watercourse, whether erected upon his own land or that of another with the latter's consent, divert the waters naturally flowing therein out of their natural channel to the injury of another.

[15] Before passing to the final question it should be noted that the second count states a cause of action against the county on the ground that the dikes built and maintained by it constituted a dangerous or defective condition of which the county had notice and ample opportunity to remedy. The basis for such liability is found in section 2 of the Public Liability Act, Deering's General Laws, 1937, Vol. 2, Act 5619. See, also, Bauman v. San Francisco, 1940, 42 Cal.App.2d 144, 152, 108 P.2d 989.

[16] The final question is: When did the plaintiffs' cause of action accrue and when, therefore, did the statute of limitations begin to run? The answer must be either (1) at the time the structures were built by the defendants, or (2) when the injuries complained of were sustained.

It is clear from the allegations of the amended complaint that the defendants had permission to erect the various dikes where they were built. There is no claim that any of these dikes were upon property belonging to any of the plaintiffs. On the contrary, it appears that the properties of the plaintiffs alleged to have been damaged are situate at a considerable distance from said structures. No trespass was committed by the defendants by the mere erection of the dikes in question and no injury resulted to plaintiffs therefrom until March, 1938, when their lands were overflowed. Under such circumstances no cause of action accrued until that date and therefore the statute of limitations has not run. This conclusion is supported by the line of cases of which Brush v. Southern Pac. Co., 1920, 47 Cal.App. 54, 190 P. 216, is typical. In this case, plaintiff sought damages for the flooding of his property by the erection and maintenance of a bridge over a waterway or wash. The bridge which was permanent in nature was erected in 1884, but the damage to plaintiff's property did not occur until some 30 years later, in 1914. The defendant contended, as here, that plaintiff's cause of action was barred by the statute of limitations on the ground that the action accrued at the time the bridge was completed. In holding this contention to be untenable, the court said, 47 Cal. App. at page 57, 190 P. at page 217:

"Appellants contend that the cause of action of the plaintiff is barred by the statute of limitations, not having been begun within either two or three years following the erection of the bridge which was proved to be a permanent structure. They take the position that the limitation period for injury to land, under such circumstances, begins to run from the completion of the structure, although the injury may occur during periods of high water, during successive years thereafter. Appellants have misconstrued the nature of the present action. It is not one to recover for an injury, direct and resulting immediately, from the construction of the bridge, but relates to damages which were an after-result from the erection of that structure. In other words, the action for damages for the injury to the plaintiff's land, caused by the obstruction of the storm waters in San Dimas Canyon, as the result of the construction of the bridge by the defendants, is not for a trespass upon real property, but it is in the nature of an action upon the case at common law for a consequential injury. Daneri v. Southern California Ry. Co., 122 Cal. 507, 55 P. 243; Hicks v. Drew, 117 Cal. 305, 309, 49 P. 189.

"The true rule as to the application of the statute of limitations in such cases is stated by Mr. Redfield, in his work on Railways (6th Ed., vol. 1, p. 595), as follows: 'The general rule in regard to the time of the accruing of the action is, that when the act or omission causes direct and immediate injury, the action accrues from the time of doing the act; but where the act is injurious only from its consequences, as the undermining a house or wall, or causing water to flow back at certain seasons of high tide or high water, the cause of action accrues only from the consequential injury.'"

On p. 58 of 47 Cal.App., at page 217 of 190 P., the court further said: "The authorities relied upon by appellants to the contrary deal with cases where injuries caused by permanent structures infringed immediately upon plaintiff's rights. Such instances are, where water is permanently polluted, streams immediately caused to flow back on adjacent land, and currents of a river turned aside by permanent dikes, at once begin to cut into the opposite bank. They do not deal with cases similar to the one at bar, where a permanent and lawful structure has, for many years, existed without any consequential injury resulting from its construction."

It will be noted that in the Brush case the court cited and relied on Daneri v. Southern California Ry. Co., 1898, 122 Cal. 507, 55 P. 243. There, by reason of a levee erected by the defendants in the Los Angeles River, waters flowing therein were diverted therefrom and caused to cut a large channel through the lands of plaintiff which was located about six miles away. The court held that the cause of action accrued at the time of the injury and not on the completion of the levee. See, to the same effect, Hicks v. Drew, 1897, 117 Cal. 305, 49 P. 189.

In Ketcham v. Modesto Irr. Dist., 1933, 135 Cal.App. 180, 26 P.2d 876, plaintiff sued to recover damages for injuries sustained as a result of seepage from an irrigation ditch. In passing on the question of when the statute of limitations began to run, the court said, 135 Cal.App. at page 191, 26 P.2d at page 880: "It is true that the statute of limitations for damages resulting from seepage of a canal begins to run from the time of discovery of such seepage and resulting damage, and not necessarily from the time of the construction of the ditch."

In support of their argument that plaintiffs' cause of action is barred by the statute of limitations defendants rely principally on Williams v. Southern Pac. R. Co., 1907, 150 Cal. 624, 89 P. 599. The facts of that case are stated in the opinion as follows, 150 Cal. at page 625, 89 P. at page 599: "* * * It alleged that plaintiff was the owner of a parcel of land in the town of Lompoc, extending along and to the center line of Laurel avenue, a public highway; that on January 1, 1900, while plaintiff's predecessor in interest was the owner of the property, the defendant, a railroad corporation, without the consent of the owner, and without any condemnation proceedings, had entered upon the part of said land within Laurel avenue, and laid a railroad track thereon; that ever since said last-named date the defendant had operated its railroad over said track, and occupied said lands within the lines of the street, to the exclusion of the plaintiff, thereby obstructing said street, and depriving the plaintiff of access and approach to the street, and diminishing the value of his premises in the sum of $600." The court observed that the complaint alleged a trespass upon plaintiff's land and pointed out that under subdivision 2 of section 338, Code of Civil Procedure, an action for trespass upon real property must be commenced within three years after the accrual of the cause of action. The court held that the cause of action accrued at the date of the defendant's entry upon plaintiff's land. The principle of this case is sound but it is clearly distinguishable from the case at bar. The Williams case involved a structure, the erection of which was wrongful and unlawful and constituted a trespass upon the property of the plaintiff and was productive of immediate injury and damage to the plaintiff. Here, however, the erection of the dikes did not constitute a trespass upon the plaintiffs' property and their presence alone did not operate to injure or damage their property. The injuries here complained of are purely consequential and appeared long after the dikes were completed. The different principles applicable to the two situations are stated in Porter v. City of Los Angeles, 1920, 182 Cal. 515, at page 518, 189 P. 105, at page 106, as follows: "* * * It is the settled law in this state that the three-year period of limitation for an action for trespass upon real property applies only where there is some entry upon the premises of the plaintiff or direct or intentional injury thereto, amounting to a trespass thereon, and does not apply to actions in which the injury caused to the plaintiff's real property is consequential only and arises from some lawful act of the defendant not done upon the plaintiff's property, but committed elsewhere, and causing as a consequence thereof some injury to plaintiff's property not arising from an entry thereon by the defendant or his agencies." This principle should apply in determining when the statute of limitations starts to run in these cases, irrespective of whether the liability of a particular defendant is based on negligence or on section 14 of Article I of the State Constitution, since, in either case, the damage is consequential in nature. To hold otherwise would be to say that the right of the plaintiffs to recover damages for the injuries they have sustained vanished before they ever had an opportunity to assert it.

[17] Plaintiffs' causes of action are all at law; they seek no equitable relief. Therefore, laches, which the defendants set up as a ground of demurrer, does not lie. Brownrigg v. De Frees, 1925, 196 Cal. 534, 549, 238 P. 714; Western Machinery Co. v. Graetz, 1941, 42 Cal.App. 2d 296, 300, 108 P.2d 711.

Each of the judgments is reversed with directions to the trial court to overrule the demurrers of the respective defendants to the several causes of action.

DESMOND, P. J., and PARKER WOOD, J., concur.

66 Cal.App.2d 736

GROVER v. SHARP & FELLOWS CONTRACTING CO. et al.

Civ. 3282.

District Court of Appeal, Fourth District, California.

Nov. 9, 1944.

Hearing Denied Jan. 4, 1945.

1. New trial 🔑71

In passing on motion for new trial, trial judge is not bound by conflicts in the evidence, but in effect sits as a thirteenth juror with duty of reviewing the evidence and passing on its sufficiency and, if he concludes that verdict has resulted in a miscarriage of justice, it is his duty to grant a new trial.

2. Appeal and error 🔑1015(2)

An order granting a new trial will not be disturbed on appeal, if there is a material conflict in the evidence so that a verdict for moving party would have had evidentiary support.

3. Appeal and error 🔑1015(1)

An order granting defendant's motion for new trial because of insufficiency of the evidence to sustain verdict for plaintiff will not be disturbed on appeal if evidence would sustain finding of contributory negligence of injured party as a matter of fact.

4. Railroads 🔑348(8)

Evidence that automobile approached railroad crossing at night at speed of 30 or 40 miles per hour notwithstanding warning signals along highway and without slackening speed crashed into flat car which was illuminated by headlight of backing locomotive, was sufficient to support finding of contributory negligence of driver which, if imputable to automobile passenger, would preclude recovery for passenger's death.

5. Appeal and error 🔑1015(1)

Where evidence in action for death of automobile passenger, though sharply contradicted, was such as to support finding of contributory negligence of driver, order granting a new trial because of insufficiency of evidence to support verdict for plaintiff must be affirmed, if such negligence was imputable to decedent, regardless of negligence of defendant railroad company or contracting company operating work train with which automobile collided.

6. Negligence 🔑93(1)

Where automobile owner and companion were making trip for common purpose of returning to their respective homes, and companion was driving at time of collision, it was reasonable to infer that companion was driving with consent of owner who sat beside him, so that driver's negligence would be imputed to owner and preclude recovery against third persons for owner's death. Vehicle Code, § 402, St.1937, p. 2353.

7. Negligence 🔑93(1)

Where automobile owner permits another to drive and owner is a passenger in automobile being so operated, an inference arises that driver is operating automobile for the benefit of owner as his agent, so as to make driver's negligence imputable to owner.

8. Automobiles 🔑192(12)
Negligence 🔑93(1)

Where owner of automobile loans it to another and becomes a passenger therein, owner has duty of preventing, if possible, operation of automobile in reckless and negligent manner, and cannot sit idly by and refrain from remonstrance.

9. Negligence 🔑93(1)

Where owner was riding in automobile driven by companion at time of collision, it could be inferred that driver was operating automobile for owner's benefit and as his agent, so that driver's negligence would be imputable to owner.

10. Evidence 🔑595

An "inference" is a conclusion as to existence of a material fact that a jury may properly draw from the existence of certain primary facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Inference".

11. Appeal and error 🔑1015(1)

Where evidence is sufficient to warrant an inference as to existence of a material fact, a question of fact is presented for decision by trier of fact, which, in case of motion for new trial, is the trial judge.

12. Appeal and error 🔑175

Defendants' pleadings were sufficient to raise on appeal question of joint enterprise and imputed contributory negligence, where plaintiff did not demur to pleadings or demand more specific allegations in trial court.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Edith J. Grover against Sharp & Fellows Contracting Company, a corporation, and others, to recover damages for the death of plaintiff's minor son in a collision between a flat car and automobile in which decedent was riding. Verdict for plaintiff, and from an order granting a new trial on ground that evidence was insufficient to justify the verdict, plaintiff appeals.

Order affirmed.

Fred A. Wilson, of San Bernardino, for appellant.

Kenneth J. Murphy, of Los Angeles, and Harry Parsons, of San Bernardino (Henry E. Kappler, of Los Angeles, of counsel), for respondents.

MARKS, Justice.

This is an action by plaintiff to recover damages for the death of James M. Roe, her minor son, in a collision between a flat car and an automobile, owned by Roe, in which he was riding. The automobile was being driven by John Wolbert. The jury returned a verdict in favor of plaintiff and the trial court granted a motion for new trial on "the ground that the evidence is insufficient to justify the verdict." Plaintiff has appealed from this order.

[1, 2] It is thoroughly settled in California that a trial judge in passing on a motion for new trial is not bound by conflicts in the evidence; that in effect he sits as a thirteenth juror with the duty resting on him of reviewing the evidence and passing on its sufficiency; that if he is dissatisfied with the verdict and concludes that it has resulted in a miscarriage of justice it becomes his duty to grant the motion. Olinger v. Pacific Greyhound Lines, 7 Cal.App.2d 484, 46 P.2d 774. It is very generally held that where there is a material conflict in the evidence so that a verdict for the moving party, if returned, would have had evidentiary support, the order granting the new trial will not be disturbed on appeal. Dempsey v. Market Street R. Co., 23 Cal.2d 110, 142 P.2d 929; Moss v. Stubbs, 111 Cal.App. 359, 295 P. 572, 296 P. 86; Myers v. Moose, 36 Cal.App.2d 739, 98 P.2d 551; Anderson v. Lang, 42 Cal.App.2d 725, 109 P.2d 981.

[3] It is also very generally held that where the plaintiff has recovered a judgment and the trial court grants defendant's motion for new trial because of the insufficiency of the evidence the order will not be disturbed on appeal if the evidence would sustain the finding of contributory negligence as a matter of fact on the part of the injured party. Theren v. Hodorowicz, 17 Cal.App.2d 653, 62 P.2d 749; Henderson v. Braden, 35 Cal.App.2d 88, 94 P.2d 625. Thus we may confine our discussion of the case to a consideration of the question of the sufficiency of the evidence to sustain a finding of contributory negligence of the driver of the automobile, if any, and its being imputed to the minor son of plaintiff who was killed in the collision, had a finding of such imputed contributory negligence been made. In so doing we need only detail such of the evidence as points to contributory negligence, disregarding the sharp conflicts in the evidence that a study of the record discloses.

The accident happened at about 8 o'clock P. M. on December 21, 1942, at the intersection of Highway 91 with the tracks of the Tonopah and Tidewater Railroad Company near Baker, on the desert in San Bernardino County. The roadway was dry and the night was clear and cold with the moon shining.

Highway 91 runs in a general easterly and westerly direction on both sides of the place of the accident. At the time of the accident it was crossed by the railroad tracks which ran in a general northeasterly and southwesterly direction. The angle between the highway and the tracks is variously estimated at between 30 and 45 degrees.

The railroad had not been in service as a common carrier for several years. The government had requisitioned its trackage under the war powers and Sharp & Fellows Contracting Company, herein called the contractor, had been given the contract for removing the rails. It had removed the rails from the northern end of the line to about eight miles north of Baker, from which point it was working southerly using the remaining tracks to their junction with the Union Pacific Railroad Company a number of miles southerly from Baker. The contractor had rented an old engine, tender, several flat cars and probably a derrick car from the Tonopah & Tidewater Railroad Company for use in its removal of the rails and their transportation to the Union Pacific line. There was one switch about 100 feet north, and another about 200 feet north of the highway crossing. Both were on the east side of the main line tracks.

On the evening of the accident the train had been made up for its trip southerly. It consisted of a tender, an engine, two or more empty flat cars, two loaded flat cars and the derrick car. The engine, at the southerly end of the train, was in reverse so that the rays of its headlight were projected northeasterly and shone over the rest of the train. They should have been easily visible to a motorist approaching from the east.

At least one employee of the contractor had been stationed in the highway to flag down motor traffic with an electric lantern during the switching operations. Just before the train started southerly across the highway he left that position and went near the first switch so he could transmit signals.

East from the crossing there were various signs on and along the highway warning motorists of their approach to it. About 20 feet east of the crossing two broad white lines were painted across the highway and the usual cross-arm signal was on the north edge of the highway. Sixty or more feet to the east there was a reflector railroad crossing sign on the north edge of the road. About 300 feet east of the crossing two broad white lines were painted across the north half of the pavement with two large white "X's" painted between the lines.

The employee of Sharp & Fellows Contracting Company who had been in the highway to warn traffic testified that when the train was made up he left that post and went to a point near the first switch so he could transmit signals; that when he was about 40 feet north of the highway he saw the automobile involved in the collision when it was several hundred feet east of the crossing; that its headlights were illuminated; that at about that time the engine started to move south across the highway at a speed of three or four miles per hour; that before it started the engineer gave three blasts on the whistle and the usual crossing signal with the whistle; that the headlight on the engine was burning and was shining in a northeasterly direction over the train; that during the entire time between the start of the train and the collision the engine bell was being rung; that when the engine had just cleared the highway one of the empty flat cars was across it.

He further testified that he observed the automobile approach the crossing; that its speed was between 30 and 40 miles an hour, which was not reduced; that when the automobile was about 100 feet east of the crossing he realized the danger of a collision as its speed had not been reduced; that he was then about 40 feet north of the highway; that he waved his lantern, called out a warning and started running towards the highway waving his lantern; that the automobile continued on its course without reducing its speed and crashed into the middle of one of the empty flat cars. There were no tire marks of any kind observable on the pavement.

The automobile which ran into the flat car was owned by James M. Roe, the deceased son of plaintiff, and was being driven by John Wolbert. Plaintiff testified that the deceased, her son, had been working in Salt Lake City prior to the accident. There is no evidence as to the purpose of the journey being made by the two young men other than a statement by counsel during the trial that, "Two boys, one named James M. Roe and the other by the name of Wolbert were coming home from school in Utah to spend the Christmas holidays with their parents who live in Los Angeles County." We regard this statement sufficient to establish the purpose of the trip and the relationship between the youths at the time of the accident.

[4, 5] The evidence we have outlined is sufficient to support the conclusion of the trial judge, if drawn, that Wolbert was not keeping a sufficiently vigilant watch for obstructions on the highway in front of him and did not observe, or at least did not pay sufficient attention to the various warnings of danger which we have mentioned. This is sufficient to support a finding of contributory negligence on his part under the authorities already cited

and if that negligence can be imputed to Roe the order granting a new trial must be affirmed. Because some of the evidence we have outlined is sharply contradicted does not furnish sufficient ground for reversing the order.

We do not find it necessary to consider the question of any negligence on the part of defendants because the facts bearing on contributory negligence are sufficient to support the order, regardless of the negligence, if any, of defendants. While Wolbert might not have been shown to have been guilty of contributory negligence as a matter of law, the finding of contributory negligence as a matter of fact, if made, would have had evidentiary support.

We now come to the question of whether or not the contributory negligence of Wolbert, if found by the trial court, may be imputed to James M. Roe so as to defeat plaintiff's recovery in this action. We conclude that if it may be so imputed the order must be affirmed. It may be so imputed for two principal reasons.

[6] First, under the admission of counsel we must conclude that the two young men were making the trip for the common purpose of returning from Utah to their respective homes in Los Angeles County. The reasonable inference follows that Wolbert was driving at the time of the accident with the consent of Roe, the owner of the car, who was riding on the seat beside Wolbert. Under the provisions of section 402 of the Vehicle Code, St.1937, p. 2353, the negligence of a person who is driving a motor vehicle with the consent of the owner is imputed to the owner. Milgate v. Wraith, 19 Cal.2d 297, 121 P.2d 10; Fox v. Schuster, 50 Cal. App.2d 362, 123 P.2d 56.

[7] Second, it is generally held that where the owner of a motor vehicle permits another to drive it, and the owner is a passenger in the car being so operated, an inference arises that the driver is operating the vehicle for the benefit of the owner and as his agent. Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861; Randolph v. Hunt, 41 Cal.App. 739, 183 P. 358; Bosse v. Marye, 80 Cal.App. 109, 250 P. 693; Maberto v. Wolfe, 106 Cal.App. 202, 289 P. 218.

[8] It has also been held that where the owner of a motor vehicle has loaned it to another, and becomes a passenger in it, the duty rests upon the owner to prevent, if possible, the operation of the vehicle in a reckless and negligent manner; that the owner cannot sit idly by and refrain from remonstrance. Randolph v. Hunt, supra. If this rule be applied here primary negligence might attach to Roe if Wolbert be held negligent in the operation of the car as there is nothing to indicate that Roe remonstrated with Wolbert or was unaware of this negligence.

[9-11] Thus, aside from primary negligence and the admission of the common purpose of the trip, we have here the negligence of Wolbert, if found, and the inference of agency under which that negligence might be imputed to Roe. As said in Blank v. Coffin, 20 Cal.2d 457, 126 P. 2d 868, 870: "An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts. * * * If a jury can reasonably infer from these primary facts that the material facts exist, the party has introduced sufficient evidence to entitle him to have the jury decide the issue." In other words, if such an inference may be drawn, a question of fact is presented for decision by the trier of fact, which is the trial judge, in ruling on a motion for new trial.

Thus there was evidence before the trial court which would have supported a judgment for defendants on the ground of contributory negligence. Under such circumstances the order of the trial judge granting a motion for new trial because of insufficiency of the evidence may not be disturbed.

[12] Plaintiff argues the insufficiency of defendants' pleadings to raise the question of joint enterprise and imputed contributory negligence. The pleadings are not models of excellence but no demurrer was interposed. Had plaintiff desired more specific allegations she should have raised the question in the trial court. We regard the pleadings as sufficient under the circumstances here presented.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

66 Cal.App.2d 743

In re WATTSON'S ESTATE.

No. 12712.

District Court of Appeal, First District, Division 1, California.

Nov. 10, 1944.

1. Wills ⚿686(2)

Where one of testatrix' two surviving heirs, each of whom was beneficiary of testamentary trust in half of testatrix' residuary estate under will providing that corpus should vest in him when he attained age of 35 years or, if he died before then, in his surviving issue at time when he would have attained such age, died without issue before reaching such age, trust for deceased heir lapsed and his widow and remaining heir were each entitled to half of corpus of such trust under law of succession.

2. Wills ⚿435

Courts have no power to rewrite will and supply provision omitted therefrom whether inadvertently or intentionally.

3. Wills ⚿687(2)

Under testamentary clause, bequeathing half of testatrix' residuary estate in trust for one of her two surviving heirs until he reached age of 35 and providing that, if he died before then, corpus should vest in his issue living when he would have attained such age, but that, in default of such issue, trust should terminate and corpus vest in beneficiary's heirs, beneficiary's widow was not entitled to entire trust fund as his sole heir on his death without issue before reaching such age.

4. Wills ⚿470

It is not within court's province to break continuity of language of will and disregard some portions thereof by way of construction when susceptible of reasonable interpretation not inconsistent with other provisions of will read as a whole.

5. Courts ⚿202(5)

On appeal from probate court's judgment, point urged by respondent, taking no appeal from any portion of judgment, need not be considered.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

In the matter of the estate of Mary I. Wattson, deceased. From a judgment construing a trust clause in deceased's will as entitling Leonard Wattson and Mrs. Florence I. Wattson McLean to equal shares of the trust fund on the beneficiary's death, Mrs. McLean appeals.

Affirmed.

Joseph W. Bernal and Jean Bernal, both of Berkeley, for appellant.

John D. Harloe, of San Francisco, for respondent.

KNIGHT, Justice.

This appeal involves the question of whether the construction placed by the probate court on the trust clause of a will is reasonable.

The testatrix, Mary I. Wattson, died September 22, 1940, leaving an estate consisting of corporate stock, uncollected dividends, bank deposits, and one piece of residential property, all of the approximate value of $19,420. Her surviving heirs were two nephews, Leonard and George Wattson, aged respectively 34 and 26 years at the time of her death. By her will, dated January 17, 1936, she provided first for the payment of several cash legacies. She then, in separate clauses identical in form, bequeathed one-half of the residue of her estate to the mother of Leonard Wattson in trust for him until he reached the age of 35 years, and the other half to the mother of George Wattson until he attained the age of 35. The will was admitted to probate on October 9, 1940, and in less than a year thereafter George Wattson died. At the time of his death he was less than 28 years old, and married; but he left no issue; and within a few months after his death his widow again married. She became Mrs. McLean, and on September 3, 1943, she filed a petition for the purpose of having the probate court determine who was entitled to receive the corpus of the George Wattson trust. The court held that the law of succession governed and that therefore Leonard Wattson was entitled to receive one half of the trust fund and Mrs. McLean the other half. Mrs. McLean has appealed, it being her main contention that under the trust clause, properly construed, she is entitled to receive the entire trust fund.

The clause in question reads as follows:

"Sixth: I hereby give, devise and bequeath one-half of the residue of my estate to my sister-in-law, Margaret Wattson, in trust, nevertheless, for the following uses and purposes:

"To pay the net income therefrom to her son, George Wattson, until he shall attain the age of thirty-five years, when the entire corpus and all undistributed income shall go to and vest in him. Should he die before attaining the age of thirty-five years leaving issue, the trust shall continue until he would have attained that age had he lived and then terminate, the net income during that period to be paid to his issue share and share alike. Upon said termination the corpus shall go to, and vest in, said issue then living share and share alike, and in default of issue the trust shall immediately terminate upon the death of the last issue and the corpus and all undistributed income shall thereupon go to, and vest in, those [who] would be his heirs according to the statute of succession then in force in the State of California, assuming that he died coincident with the termination of the trust."

[1, 2] The probate court's decision that the law of succession was controlling and that thereunder the trust fund should be divided equally between respondent and appellant is based upon the following grounds: That although the trust clause of the will provides for the disposal of the corpus of the trust in the event that George Wattson should die before reaching the age of 35, and leave issue, no provision is made therein, or elsewhere in the will, for the distribution of the trust fund in the event he should die before reaching 35 without issue; that since the latter contingency had arisen the trust lapsed upon his death and that as to the portion of the estate covered by the trust, the decedent, Mary I. Wattson, died intestate; and that such being the case the law of succession is controlling as to the distribution of that portion of the estate. The court then goes on to hold that since at the time of the decedent's death her only surviving heirs were her two nephews, one of them, Leonard Wattson, then living, was entitled to receive one-half of the corpus of the lapsed trust, and that Mrs. McLean, as sole heir of the deceased nephew, George Wattson, was entitled to the other half.

An analysis of the trust clause supports the construction so placed thereon by the probate court. As will be noted, the entire trust clause is composed of three separate sentences. The first provides that the income from the trust fund shall be paid to George Wattson up to the time he reaches the age of 35 years, and that upon attaining that age he shall be paid the entire corpus of the trust and the undistributed income therefrom; and the remaining two sentences provide for the disposition of the corpus of the trust and the income only in the event George Wattson should die "before attaining the age of thirty-five years *leaving issue*" (italics ours). In such event, according to the second sentence, the issue become the beneficiaries and receive the income until such time as the original beneficiary would have reached the age of 35, at which time the trust would terminate and the corpus thereof vest in his issue then living; and in the last sentence it is provided merely that if all of the issue died between the time the original beneficiary died and the date on which he would have attained the age of 35, "upon the death of the last issue" the trust would "immediately terminate" and the corpus and the undistributed income be paid to those who would have been the heirs of the original beneficiary, had he died when the last issue died. In other words, nowhere in the trust clause, nor elsewhere in the will, is there any provision made for the disposal of the corpus of the trust in the event the original beneficiary died *without issue*, before reaching the age of 35 years. Whether the omission of such a provision was inadvertent or intentional makes no difference, for the reason that since it is not in the will, it is beyond the power of the courts to rewrite the will and supply it.

[3, 4] Appellant's contention that she is entitled to the entire trust fund is based upon the theory that the trust clause, properly construed, provides that if the original beneficiary named therein should die without issue, before reaching the age of 35, the trust should terminate immediately and the corpus thereof go to his heirs; and that accordingly under such construction and the law of succession she is entitled, as sole heir of the original beneficiary, to receive the entire corpus of the trust. The argument advanced in support of such theory rests largely upon the words "in default of issue" found in the last sentence of the trust clause. In this respect appellant argues that the last sentence provides for the termination of the trust and the vesting of the trust fund either in the event the original beneficiary should die before

reaching the age of 35 years, leaving no issue, or in the event the surviving issue shall have died before the time the original beneficiary would have attained the age of 35 years.

If that portion of the last sentence in which the words above quoted are made a part had provided simply: "* * * and in default of issue the trust shall immediately terminate" and then had gone on to provide that thereupon the trust fund should go to the heirs of the beneficiary, etc., there would be some support for appellant's argument. But that portion of the last sentence is not so written. It reads: "* * * and in default of issue the trust shall immediately terminate *upon the death of the last issue*" (italics ours). It will be seen, therefore, that to adopt the construction contended for by appellant would necessitate changing materially the wording of that portion of the last sentence, by eliminating entirely therefrom the qualifying words "upon the death of the last issue"; and it is well settled that it is not within the province of the courts, by way of construction, thus to break the continuity of the language of a will and disregard some portions thereof, when read as a whole it is susceptible of a reasonable interpretation not inconsistent with other provisions of the will.

Appellant makes the alternative contention that if it should be held that the George Wattson trust is invalid for uncertainty, then the Leonard Wattson trust must likewise fail for the same reason, in which event the entire residue of the estate, after the payment of the cash legacies, would be subject to distribution under the law of succession; and that being so, that as sole heir of George Wattson she would be entitled to receive one-half of the entire residue of the estate. It is unnecessary, however, to give attention to this alternative contention, for it has not been held that the George Wattson trust is invalid for uncertainty, or for any other reason. To the contrary, the probate court has held in effect that to the full extent of the provisions contained in the George Wattson trust it is valid. But, as pointed out, because of the absence therefrom and from the will of any provision for the disposal of the trust fund in the event George Wattson died without issue, the law of succession must govern in the distribution thereof.

[5] The point urged by respondent that under the terms of the trust appellant is not entitled to receive any portion of the corpus of the George Wattson trust is obviously based on an erroneous construction of the trust clause and need not be here considered for the reason that respondent took no appeal from any portion of the probate court's decision.

The judgment and order appealed from are affirmed.

PETERS, P. J., and WARD, J., concur.

STEEN v. BOARD OF CIVIL SERVICE COMMISSIONERS OF CITY OF LOS ANGELES et al.

Civ. 14580.

District Court of Appeal, Second District, Division 2, California.

Nov. 13, 1944.

Hearing Granted Jan. 11, 1945.

Municipal corporations ⇨218(11)

Where demand for reinstatement of discharged civil service employee of city of Los Angeles was not filed with board of civil service commissioners within 90 days after his discharge, as required by city charter, his petition for writ of review to reinstate him was properly denied. Los Angeles City Charter, §§ 112a, 112½.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Proceeding by Otto A. Steen against the Board of Civil Service Commissioners of the City of Los Angeles and the members of such board for a writ of review to reinstate petitioner as a civil service employee of the Department of Water and Power of such city. From an order denying the petition without prejudice, petitioner appeals.

Affirmed.

George E. Cryer and R. Alston Jones, both of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., and A. L. Lawson and George William Adams, Deputy City Attys., all of Los Angeles, for respondents.

W. J. WOOD, Justice.

Petitioner has appealed from an order of the superior court denying without prejudice a petition for a writ of review in which he asked to be reinstated as a civil service employee of the Department of Water and Power of the City of Los Angeles. The superior court held that the petition failed to state a cause of action for the reason that it appears therefrom that petitioner's demand for reinstatement was not filed within the time required by the city charter.

Petitioner alleged that on August 17, 1943, the general manager of the Department of Water and Power served upon him and filed with the Board of Civil Service Commissioners a statement of charges against him and a notice of his discharge. Petitioner had been an employee of the City of Los Angeles in the classified civil service for more than twenty years. On August 18, 1943, petitioner filed with the Board of Civil Service Commissioners a written application for a hearing and investigation of the grounds for his discharge and stated in the application that he was prepared to offer evidence to contradict the charges. Petitioner further alleged that the Board of Civil Service Commissioners referred the matter to the manager of the civil service department, who in turn referred it to Esther Reimers, an employee of the department, for examination and report; that Esther Reimers collected and compiled a mass of hearsay matter and on December 5, 1943, filed with defendant commission a "compilation of unsworn matter as her report in said investigation * * *, unsigned, unsworn and wholly without verification". The petitioner made further allegations to the effect that although he was notified that the commission would on December 14, 1943, consider his discharge, defendant commission did not accord him an opportunity to be heard and did not in fact make an investigation of the cause for his discharge. It was further alleged that on December 14, 1943, a motion was adopted by defendant commission, "that from the information presented by both the report and the questioning by the commission of those present, the commission find that the causes for the discharge of Mr. Steen, as set forth above are sufficient and are sustained, and therefore his appeal is denied." Petitioner alleged that on February 25, 1944, he "filed with the respondent Civil Service Commission a demand in writing for reinstatement in his position".

It is provided in section 112½ of the charter of the City of Los Angeles: "Whenever it is claimed by any person that he has been unlawfully * * * discharged, * * * and that such * * * discharge is ineffective for any reason * * * a demand for reinstatement must be presented in writing within ninety days following the date on which it is claimed that such person was first illegally, wrongfully or invalidly * * * discharged. Such demand for reinstatement must be filed with the Board of Civil Service Commissioners. * * * Failure to file such demand for reinstatement within the time herein specified shall be a bar to any action to compel such reinstatement and proof of filing such a demand for reinstatement must be completed and proved a condition precedent to the maintenance of any action for reinstatement. * * *"

Section 112a of the charter of the City of Los Angeles provides that no person in the classified civil service shall be removed except for cause, which shall be stated in writing and filed with the Civil Service Commission. The section provides that, "upon such filing such * * * discharge shall take effect". It further provides for an investigation of the discharge upon the application of the person discharged and for the reinstatement of the person discharged if the grounds stated are found not to be sustained.

The question now before us was considered by this court in Campbell v. City of Los Angeles, 47 Cal.App.2d 310, 117 P.2d 901. In that case the petitioner was discharged on November 21, 1939, and he applied to the Civil Service Commission for an investigation of the grounds of his discharge on November 24, 1939. The commission sustained the discharge twenty-five days later. The petitioner filed his written demand for reinstatement on February 20, 1940, which was ninety-one days after his discharge. The court gave consideration to the provisions of section 112a and 112½ of the city charter and held that the petitioner was not entitled to redress by court action because he had not complied with the mandatory provision of section 112½, which required him to file his written demand for reinstatement within ninety days from the date of his discharge on November 21, 1939.

We see no reason for a departure from the views expressed by this court in the Campbell case, and for the reasons therein stated the order must be affirmed. It is therefore unnecessary to consider other points presented by respondents.

Order affirmed.

MOORE, P. J., and McCOMB, J., concur.

66 Cal.App.2d 807

PARMER v. AIKEN et al.

Civ. 3166.

District Court of Appeal, Fourth District,
California.

Nov. 16, 1944.

Appeal and error ⚷781(4)

Where defendants appealed from order refusing to dissolve writ of attachment but attachment had been dissolved under statute and defendants' property released from levy, the questions presented of appeal had become moot, appellate court was not required to decide the questions presented by the appeal and appeal would be dismissed. Code Civ.Proc. §§ 554, 555.

Appeal from Superior Court, Kern County; W. L. Bradshaw, Judge.

Action by E. L. Parmer against H. E. Aiken and another for breach of contract to sell real property. From an order denying motion to dissolve writ of attachment, defendants appeal. On plaintiff's motion to dismiss appeal.

Appeal dismissed.

Claflin & Chain, of Bakersfield, for appellants.

Calvin H. Conron, Jr., of Bakersfield, for respondent.

PER CURIAM.

This is a motion to dismiss an appeal on the ground that the question involved has become moot.

Plaintiff brought this action to recover damages for breach of a contract to sell real property. He obtained a writ of attachment against the property of defendants on the ground that they were nonresidents of this State.

Defendants moved to quash the writ claiming to be residents of California. Their motion was heard on conflicting affidavits, submitted by both parties, and was denied. The appeal is from the order denying the motion.

In support of his motion to dismiss the appeal plaintiff has produced certified copies of the record of the trial court showing that the attachment had been dissolved under the provisions of Sections 554 and 555 of the Code of Civil Procedure, by court order dated May 22, 1944.

The only relief that defendants could obtain by their appeal is a reversal of the order refusing to dissolve the attachment. As the attachment has been dissolved and their property released from the levy they have already obtained all of the relief that they could obtain were they successful in this appeal. It follows that the questions presented on appeal have become moot.

We are not required to decide the questions presented by such an appeal and may dismiss it. Weaver v. Reddy, 135 Cal. 430, 67 P. 683; Nelson v. Nelson, 153 Cal. 204, 94 P. 880; California, etc., Ass'n v. Pomeroy Orchard Co., 195 Cal. 264, 232 P. 463.

The appeal is dismissed.

66 Cal.App.2d 788

CALLAGHY v. MOSLE et al.

Civ. 12680.

District Court of Appeal, First District,
Division 1, California.

Nov. 15, 1944.

1. Appeal and error ⚷930(1)

Reviewing court on appeal must accept respondent's evidence as to the facts.

2. Appeal and error ⚷996

Where evidence, to effect that operator of automobile preceded approaching automobile into intersection and continued to operate automobile in a careful manner, presented a question upon which minds of jury might reasonably differ in respect of contributory negligence, the reviewing court will not interfere with the verdict. Vehicle Code, § 550, St.1937, p. 619.

3. Appeal and error ⚿1004(1)

A verdict may not be set aside merely because the amount awarded is larger than is usually allowed.

4. Damages ⚿134(1)

$5,000 for injuries resulting in loss of wages in sum of $1,022 and bill for medical treatment in sum of $74.25, and with reduction in earning capacity by reason of being given a "light sweeping, janitor job" on final return to work, was not so grossly excessive as to warrant reduction by reviewing court.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by William Callaghy against George R. Mosle and others to recover damages arising out of an automobile collision. Judgment for plaintiff, and defendant named appeals.

Affirmed.

Robert L. Lamb, of San Francisco, for appellant.

William M. Malone, of San Francisco (Raymond L. Sullivan, of San Francisco, of counsel), for respondent.

WARD, Justice.

Plaintiff's cause of action arose out of injuries sustained in an automobile collision which occurred at the intersection of Powell and Beach Streets in San Francisco on September 17, 1941. Beach Street runs east and west; Powell, upon which there are two street car tracks, runs north and south. Their intersection is obstructed within the meaning of the Vehicle Code, and there are no traffic stop or control signals of any kind on any corner. On the clear, dry morning of the accident, plaintiff was driving north on Powell Street at about twenty miles an hour, straddling the outer rail of the easterly car track. When he was about twenty feet from Beach Street he put his automobile into second gear and entered the intersection at five, six or seven miles an hour. He first observed defendant's automobile when he was between the south property line and the curb line of Beach Street. At that time it was about 150 feet west of the westerly curb line of Powell Street and was being driven in an easterly direction about in the middle of Beach Street at a speed of around forty-five miles an hour. Plaintiff continued on his way without changing his speed. He made his second observation to the west when he was about four or five feet from the center line of Beach Street. At that time defendant's automobile was about twenty-five feet west of the westerly curb line of Powell Street. It was in the same position on the roadway and had not changed its speed. Upon plaintiff's third observation, when he was four or five feet north of the center line of Beach Street, defendant's automobile was "right on top of" him, the front thereof striking plaintiff's car at a point four or five feet north of the center line of the intersection. Plaintiff sustained injuries which necessitated hospitalization for approximately two weeks, during nine days of which he was confined to his bed. He was unable to return to his work as dock seaman until the middle of January, when, because of his condition, he was given light duties. He was unable to perform them, however, and laid off work for a month. He returned to work a second time and worked several months but found it again necessary to "lay off." Upon his third return to work, he was given a "light sweeping, janitor job." By reason of the accident he sustained loss of wages in the sum of $1,022 and incurred a bill for medical treatment in the sum of $74.25. The jury returned a verdict in his favor in the sum of $5,000.

On appeal defendant claims that the verdict is excessive and that plaintiff was guilty of contributory negligence as a matter of law.

Appellant admits that there is a conflict in the evidence relative to his negligence and concedes that in such case an appellate court may not disturb the verdict of a jury. His position is that the evidence without conflict shows that respondent was guilty of contributory negligence, and that therefore a finding to the contrary is a conclusion of law which should be set aside. In brief, on this point appellant's contention is: "Assuming that the respondent's version of this accident is the correct one, under no conceivable theory of this case was he justified in driving directly into the path of the automobile of the appellant and thereby causing himself injuries."

[1, 2] Accepting respondent's evidence as to the facts, which we must do on appeal, namely, that he preceded appellant

into the intersection and continued to operate his automobile in a prudent and careful manner—a question upon which the minds of the jury might reasonably differ, but which has been decided in favor of respondent—we are unable to go further. Of course a different rule applies if only one conclusion may be reached. San Diego T. & S. Bank v. San Diego County, 16 Cal. 2d 142, 105 P.2d 94, 133 A.L.R. 416. In Couchman v. Snelling, 111 Cal.App. 192, 195, 196, 295 P. 845, 847, the court said: "Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision." Vehicle Code, sec. 550, St.1937 p. 619. The Couchman case was approved in Page v. Mazzei, 213 Cal. 644, 3 P.2d 11. See, also, Keyes v. Hawley, 100 Cal.App. 53, 279 P. 674; Leblanc v. Coverdale, 213 Cal. 654, 3 P.2d 312; Avalos v. Grimale, 30 Cal.App.2d 725, 87 P.2d 392; Osgood v. City of San Diego, 17 Cal.App.2d 345, 62 P.2d 195; Casselman v. Hartford A. & I. Co., 36 Cal.App.2d 700, 98 P.2d 539; Miller v. Cranston, 41 Cal.App.2d 470, 106 P.2d 963.

[3] The only other point raised by appellant is that the damages awarded are excessive. In support of this contention he cites several cases where for a somewhat similar injury a lesser sum was awarded. A verdict may not be set aside merely because the amount awarded is larger than is usually allowed. Respondent replies by reference to several cases where an equal or greater sum was awarded.

[4] In Mecchi v. Lyon Van & Storage Co., 38 Cal.App.2d 674, 678, 102 P.2d 422, 424, 104 P.2d 26, this court said: "Even if the amount awarded is larger than a reviewing court might think justified, we are not in a position to decrease it unless it appears that the verdict was the result of passion or prejudice or that it is so grossly excessive that the ends of justice warrant a reduction, which the facts do not indicate. Morgan v. Southern Pac. Co., 95 Cal. 501, 30 P. 601; Formosa v. Yellow Cab Co., 31 Cal.App.2d 77, 87 P.2d 716; Gladstone v. Fortier, 22 Cal. App.2d 1, 70 P.2d 255." "* * * there is no reasonable ground upon which it may be so held in the present case." Power v. California St. Cable R. Co., 52 Cal. App.2d 289, 126 P.2d 4.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

25 Cal.2d 198

PEOPLE v. CAVAZOS.

Civ. 4578.

Supreme Court of California.
Nov. 14, 1944.

1. Criminal law ⚷543(2)

The question of what constitutes due diligence to secure presence of a witness which will authorize the reading to the jury of testimony taken at preliminary hearing is largely within discretion of trial court.

2. Criminal law ⚷1153(6)

Decision of trial judge on question of diligence used to find witness whose testimony at preliminary hearing is sought to be introduced will not be disturbed on appeal, unless abuse of discretion is shown.

3. Criminal law ⚷543(2)

Trial court did not abuse its discretion in permitting testimony of witnesses given at preliminary hearing to be read to the jury upon receiving of information from military and naval authorities that they were in armed forces of the United States outside of the State.

4. Criminal law ⚷570(1)
Homicide ⚷238

In prosecution for murder and for robbery, evidence did not establish that defendant was intoxicated at time of commission of the offenses.

5. Criminal law ⚷53

Voluntary intoxication is neither excuse nor defense to a crime.

6. Criminal law ⚷570(1)
Homicide ⚷237

In prosecution for murder, and for robbery, evidence supported finding that defendant was sane at time of commission of the offenses.

7. Criminal law ⚷1182

Where record on automatic appeal from conviction of murder in the first degree and of robbery in the first degree disclosed that defendant was not deprived of any substantial right and that his interests were fully protected by counsel and court throughout course of trial, conviction was required to be affirmed. Pen.Code, § 1239.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Alfred Cavazos was convicted of murder in the first degree, without recommendation, and of robbery in the first degree and an automatic appeal under section 1239 of the Penal Code was taken.

Affirmed.

Gerald J. Kenny, Public Defender, and Abraham M. Dresow, Assistant Public Defender, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SHENK, Justice.

This is an automatic appeal under section 1239 of the Penal Code. Defendant, whose counsel has filed a brief on the appeal, was charged by an information filed by the District Attorney of the City and County of San Francisco with the murder of Adam Wondras, on April 5, 1944. This information also charged defendant with the conviction of a prior felony. A second information charged the defendant with the crime of robbery, a felony. Defendant admitted the prior conviction and entered pleas of not guilty and not guilty by reason of insanity to the murder and robbery charges. He was tried before a jury and was convicted of murder in the first degree, without recommendation, and of robbery in the first degree. The jury which found him guilty also found him sane at the time of the commission of the offenses.

The record discloses the circumstances surrounding the homicide.

Adam Wondras, the owner and operator of a jewelry store at 1010a Market Street, San Francisco, was shot in his store at about 7:30 p.m. on April 5, 1944. The bullet entered his left eye and passed through his brain, lodging in the second cervical vertebra. He was dead upon arrival at the hospital. One witness testified that she entered the store of deceased and saw the defendant there; that after she left the store no other person entered it; that she heard a shot and saw defendant leave the premises. Another witness testified that he saw the defendant inside the store, saw him fire a shot, and observed defendant's subsequent flight and capture. Other witnesses testified to the presence of defendant in the store immediately before and after the shooting, of his flight from the scene, of his firing a shot at the pursuing crowd, and of his capture by three members of the military police several blocks away. One of the military police testified that after a command to do so, defendant dropped his gun at the time of his capture. There was also evidence that just prior to defendant's leaving deceased's store, he stole articles of jewelry from the window of the store. After his arrest, two rings, the property of deceased, were found in a pocket of defendant's jacket, together with five unused bullets. The defendant took the witness stand in his own defense, and testified that he purchased the gun on the day before the shooting; that he was intoxicated at the time he entered the store of Mr. Wondras; that he entered for the purpose of buying a ring; that deceased swore at him and accused him of having no intention of buying a ring; that deceased grabbed something from the shelf and threw it at defendant, striking him in the eye; that deceased threatened to shoot defendant, and bent down; that defendant thought he was reaching for a gun, so shot him; that he ran, describing the route taken; that he fired a shot to keep the crowd back; admitted possession of the gun at the time of his arrest, and that the officers removed the two rings from his pocket. There are other circumstances connecting defendant with the homicide, but in view of his admission that he fired the shot, we need not specify them. Defendant does not challenge the sufficiency of the evidence to support the verdict.

Defendant charges that the court erred in permitting the prosecution to read the testimony of the witnesses Lt. Letts and Cal Corbin, members of the armed forces of the United States, which testimony was given by them at the preliminary hearing of the defendant, on the ground that the proper foundation for the reading of their testimony was not established.

In this connection the record shows that Harry Husted, an inspector of the San Francisco Police Department, received subpoenas to serve on these two witnesses; that he consulted the military authorities, who stated that Lt. Letts had been sent to a point in the southeast, outside the jurisdiction of the State of California; that he consulted naval authorities who stated that Cal Corbin was at sea and without the jurisdiction of the State of California, and that neither man was in California. At the trial the defendant offered no objection to the reading of the testimony given at the preliminary examination, nor to the claimed insufficiency of the foundation laid for such reading.

[1, 2] The question of what constitutes due diligence to secure the presence of a witness which will authorize the reading to the jury of testimony taken at the preliminary hearing of the case is largely within the discretion of the trial court, and depends upon the facts of each particular case. The decision of a trial judge on the question of diligence and of the propriety of receiving or rejecting the evidence will not be disturbed on appeal unless it appears that there was an abuse of discretion. People v. Lewandowski, 143 Cal. 574, 77 P. 467; People v. Harris, 16 Cal. App.2d 701, 61 P.2d 348; People v. Noone, 132 Cal.App. 89, 22 P.2d 284; People v. Fay, 82 Cal.App. 62, 255 P. 239. The problem is primarily for the trial court, and its solution will not be disturbed if there is evidence of substantial character to support its conclusion. People v. Noone, supra; People v. Hewitt, 78 Cal.App. 426, 248 P. 1021; People v. Lederer, 17 Cal.App. 369, 119 P. 949.

[3] In this case no abuse of discretion is shown. The two witnesses whose testimony was read were in the armed forces of the United States, and upon receiving information from the military and naval authorities that they were without the jurisdiction of the court, it would have been an idle act to require further inquiry or search in this state.

[4, 5] The defendant's testimony that he was intoxicated when he entered the jewelry store is unsupported except by his own statement that, "I think I was drunk." This statement, however, is entitled to little weight in view of the details related by him as to what occurred while he was in the store. The jury was entitled to conclude that by reason of those recitals at length he was cognizant of everything that took place. Moreover, it is settled that voluntary intoxication is neither an excuse for nor a defense to crime. People v. Hill, 22 Cal.2d 863, 866, 141 P.2d 418.

[6] Three alienists appointed by the court examined defendant, and testified

that in their opinion he was sane at the time of the commission of the crimes and fully aware of the nature of his acts. The jury found in accordance with this evidence.

[7] A reading of the record in this case discloses that defendant was not deprived of any substantial right and that his interests were fully protected by his counsel and the court throughout the course of his trial.

The judgment and the order denying a motion for a new trial are affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

25 Cal.2d 196

PEOPLE v. KEELING.

PEOPLE v. GLENN.

Cr. 4569, 4570.

Supreme Court of California.

Nov. 14, 1944.

Homicide 🔑237

Evidence sustained convictions of murder as against plea of insanity.

In Bank.

Appeals from Superior Court, Monterey County; Henry G. Jorgensen, Judge.

Ernest Keeling and Hershell Glenn were convicted of murder and appeals were automatically taken under Pen.Code, § 1239. Affirmed.

J. T. Harrington, Russell Scott, and Niles C. Cunningham, all of Salinas, for appellants.

Robert W. Kenny, Atty. Gen., for respondent.

GIBSON, Chief Justice.

The defendants were jointly charged with the murder of William Smith. Keeling entered a plea of guilty. Glenn pleaded not guilty by reason of insanity, waived a jury, and after trial by the court was found to be sane. These appeals come to us automatically from judgments imposing the death sentence against each defendant. Pen.Code, § 1239(b). No briefs have been filed in either case.

Examination of the record discloses that on the night of May 20, police officers in Salinas were warned to be on the lookout for a certain automobile, the occupants of which had assaulted a soldier (not the deceased) earlier in the evening. Some time after midnight, defendants were arrested in the described automobile. They had blood on their hands and clothing; a pair of broken pruning shears, an opened pocket knife with blood on the blade, and a billfold belonging to William Smith (deceased) were found in the car. Early in the morning of May 21, 1944, the body of Smith was found in a field by the roadside near Salinas. He had been beaten about the head and stabbed many times. When last seen the night before, Smith was in the company of defendants. Defendant Glenn had in his possession $11 in paper money on which there were blood spots. He admitted it was not his money and stated that Keeling must have taken the money from Smith.

It appears from the evidence, including admissions of defendants, that they picked up the soldier along the highway and Keeling hit him with a wrench while attempting to rob him, and that the soldier escaped by jumping from the car. Later in the evening, they met Smith at a restaurant in Salinas and drove him out of town, apparently for the purpose of robbing him. After beating and stabbing him, they left him in a field to die. They then drove back to Salinas. The police officers testified that although both defendants had been drinking they were able to talk coherently and converse intelligently when arrested.

Keeling, as stated, entered a plea of guilty, while Glenn entered a plea of not guilty by reason of insanity. There was evidence that Glenn suffered from epilepsy and that there had been insanity in his family. Alienists appointed by the court testified, however, that in their opinion Glenn was sane at the time of the commission of the homicide.

We find no error in the record, the evidence is sufficient, and the judgments are therefore affirmed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

66 Cal.App.2d 808

HIGHSMITH v. CRISTA.

Civ. 3267.

District Court of Appeal, Fourth District, California.

Nov. 16, 1944.

Hearing Dismissed Jan. 11, 1945.

1. Appeal and error ⚷1008(1)

In action on a New Mexico judgment, finding that personal service in the New Mexico action was had in that state on defendant, a resident of California, was conclusive on appeal.

2. Parties ⚷61

Pleading ⚷248(2)

Where judgment in divorce action directed husband to pay to the clerk of the court a certain amount each month for the support of a child whose custody had been awarded to the maternal grandmother, in whose name an action on the judgment for support was brought, filing an amendment in which the clerk of the court appeared as plaintiff, without first obtaining order permitting substitution of parties, was not improper nor did amended complaint attempt to plead a different cause of action.

3. Divorce ⚷332

Where foreign state judgment in divorce action directed husband to pay to the clerk of the district court a certain amount each month for the support of a child whose custody had been awarded to maternal grandmother, the clerk was in the position of a trustee as respects duty to collect the payments and had the legal capacity to maintain action on the judgment for support.

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Ethel M. Highsmith, clerk of the District Court of Eddy County, New Mexico, against Wesley W. Crista, also known as William Wesley Crista, on a judgment obtained in the District Court of Eddy County, New Mexico. Judgment for plaintiff and defendant appeals.

Affirmed.

Julius J. Novack, of San Bernardino, and Joseph T. Ciano, of Los Angeles, for appellant.

Edward P. Fogg, of Needles, for respondent.

MARKS, Justice.

This is an appeal from a judgment for $960 which plaintiff recovered as due and unpaid on a judgment obtained in the District Court of Eddy County, New Mexico.

Defendant and Loraine Phillips were formerly husband and wife. They had one child, Billy Lee Crista. Loraine obtained a divorce from defendant in about 1931.

On March 17, 1936, Lorraine obtained the judgment on which this action was brought and which contained the following: "It is therefore ordered, adjudged and decreed by the court that the defendant be and he is hereby ordered and directed on the first day of each month, after the entry of this decree, to pay to the Clerk of Eddy County, New Mexico, for the use and benefit of plaintiff, Loraine Phillips, in the support and maintenance of the minor child, Billy Lee Crista, the sum of Fifteen ($15.00) Dollars."

[1] Crista was then a resident of California, but the records of the New Mexico court show service on him in New Mexico and the judgment of that court so finds. The trial court here found that personal service in that action was had in New Mexico which is conclusive here.

Under amendments of the New Mexico statutes clerks of the District Courts have succeeded to the rights and duties of county clerks in so far as those involved in this case are concerned.

Defendant petitioned the New Mexico court for an order giving him the custody of Billy Lee Crista. After a hearing his petition was denied on the ground that he had failed to support his child and to obey the former order requiring him to pay $15 monthly for that purpose. It was further found that Loraine was not a fit and proper person to have custody and control of Billy and his custody was awarded to Iva Phillips Driver, his maternal grandmother. This order made no provision for the support of the minor. It was dated July 1, 1941, but was not filed until July 15, 1941.

On October 9, 1941, Iva Phillips Driver brought an action in the Superior Court of San Bernardino County, on the judgment rendered by the New Mexico court on March 17, 1936. A demurrer was sustained with leave to amend. An amended complaint was filed in which Ethel M. Highsmith, clerk of the District Court of Eddy County, New Mexico, appeared as plaintiff instead of Iva Phillips Driver, the original plaintiff. Defendant's demurrer to this amended complaint was overruled and after a trial plaintiff was given judgment for $1320 which, on motion for a new trial, was reduced to $960. This appeal followed.

[2] It is first argued that without an order permitting the substitution of the present plaintiff for Iva Phillips Driver, the original plaintiff, such substitution was error; that the amended complaint attempted to plead a distinct and different cause of action from that stated in the original complaint.

These arguments are disposed of adversely to the contention of defendant in the case of Alvez v. Toprahanian, 39 Cal. App.2d 126, 102 P.2d 566.

[3] It is next argued that plaintiff has no legal capacity to maintain this action. This argument seems to be based on two theories: First, that the plaintiff acts as a mere stake-holder in receiving the moneys ordered paid and in paying them out, and, second, that the statutes of New Mexico do not empower the clerk of the court to act in any such capacity.

The first contention is answered by the case of Ex parte Gordan, 95 Cal. 374, 30 P. 561, 562. Robert and Elka Gordan were the parents of Leah Gordan. The divorce action between them involved the custody and support of their daughter. On January 25, 1890, the trial court ordered Robert Gordan to pay $30 per month to Sarah Patek, grandmother of the child, to be used for support of the daughter Leah. The argument was made that the trial court had no authority to order the support money to be paid to a stranger to the action. The Supreme Court disposed of this argument as follows: "The order of January 25, 1890, was not a judgment in favor of a stranger. It was an order for the payment of money to an agent or officer of the court, charged with the duty of carrying its decree into effect."

If the plaintiff in the action before us was acting as an authorized agent of the court in the collection of the support money she acted in the capacity of a trustee as far as her duty to collect the payments and pay them to the proper beneficiary is concerned. That a trustee may bring an action to enable her to perform the duties imposed by the trust needs no citation of supporting authorities.

The statutes of New Mexico are not available to us and none are cited. Therefore we are not able to determine the exact powers conferred by statute on a clerk of a District Court. That court is a court of record and the presumption of the regularity of its judgments comes to the support of plaintiff's right to maintain this action. While plaintiff is clerk of the court she is also an individual and we can see no objection to the appointment of an individual to carry into effect the orders of the court even though that individual happens to occupy an official position.

Defendant argues that the order of July, 1941, awarding the custody of the minor to Iva Phillips Driver and depriving his mother of that custody is a modification of the judgment of March 17, 1936; that since the July order contained no provision for the support of the minor child while in the custody of his grandmother nothing can be collected from defendant for that period. In support of this argument he cites such cases as Lewis v. Lewis, 174 Cal. 336, 163 P. 42, 44, where it is said: "Interpreting and applying the several provisions of the Code, the decisions of this court are clear to the effect that when there has been a decree of divorce, and such decree vests the custody of the minor children in the mother, the father is under no obligation to provide for such children any support or education beyond that which may be directed by the court which has granted the divorce, either in its decree or by subsequent modification. In Ex parte Miller, 109 Cal. 643, 648, 42 P. 428, 429, Temple J., in a concurring opinion, used this language: 'When a parent is deprived of the custody of his child, and, therefore, of the right to its services and earnings, * * * he is no longer liable for its support and education. This is true as a general proposition of law, and it is recognized by our Code.' "

Whatever may be the answer to this question in this case we do not regard it as before us at this time. The decree dated and filed March 17, 1936, directed defendant to pay $15 on the first day of each month for the support of the child. The decree awarding the custody of the minor to Mrs. Driver was filed on July 15, 1941. The first day of the month recurred sixty-four times during that period. Sixty-four times $15 is $960 the exact amount for which judgment was rendered. Therefore it does not appear that the trial court gave judgment for any amount accruing after filing the second decree which changed the custody from the mother to the grandmother. Thus we need express no opinion on this question argued by counsel.

It is true that the brother of defendant testified that he made various payments to Loraine Phillips (Crista) during the time defendant was unable to help support his child. Some of those payments were made prior to the decree of divorce. It cannot be determined how much, if anything, was paid after that time. This evidence is entirely too uncertain to raise any conflict especially in view of the failure of the answer to deny the allegations of the amended complaint to the effect that defendant had failed to pay anything on account of the judgment of the New Mexico court.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

66 Cal.App.2d 791

PEOPLE v. STUTZ et al.

Civ. 3369.

District Court of Appeal, Fourth District, California.

Nov. 15, 1944.

1. Appeal and error 🔑478

In deciding a petition for supersedeas, appellate court has nothing to do with ultimate decision of appeal on its merits and must presume the truth of trial court's findings.

2. Appeal and error 🔑460(2)

A mandatory and not a prohibitory injunction is stayed on appeal.

3. Appeal and error 🔑460(2)

An injunction prohibiting the use of three upper stories of building for hotel purposes until building should be reconstructed, which would require lessees of such stories to cancel their contract with occupants of the rooms, by requiring affirmative action and abandonment by lessees of their property rights, was "mandatory", and hence was automatically stayed by appeal from injunction judgment.

See Words and Phrases, Permanent Edition, for all other definitions of "Mandatory Injunction".

4. Appeal and error 🔑477

Where injunction was automatically stayed by appeal, there was no occasion for issuance of writ of supersedeas.

◆

Proceeding by the People of the State of California against Walter Stutz, Frank Mitchell and Jeanette Mitchell, to enjoin the use of the second, third and fourth stories of the building owned by first-named defendant and leased by last-named defendants on ground that it constituted a public nuisance. From a judgment the last-named defendants appeal. On appellants' petition for a writ of supersedeas to stay pending appeal the execution of the judgment.

Petition for writ of supersedeas denied without prejudice.

James B. Abbey, of San Diego, for petitioners.

J. F. DuPaul, City Atty., and Bertrand L. Comparet, Deputy City Atty., both of San Diego, for respondent.

MARKS, Justice.

This is a petition by Frank Mitchell and Jeanette Mitchell for a writ of supersedeas to stay, pending appeal, the execution of a judgment declaring that the use of the second, third and fourth stories of a building on Third Street, between Broadway and "C" Street in the city of San Diego, is dangerous to life and property, and that those portions of the building constitute a public nuisance, and ordering that all use of such portions of the building cease until major changes be made, including the removal of the fourth floor.

The building is owned by defendant Walter Stutz and petitioners are tenants of the three stories involved. The first floor is occupied by a restaurant and a night club and is not involved here or in the abatement action. The other three floors are used as a hotel accommodating an average of ninety guests.

It is admitted that the action is not brought under any specific State law or ordinance of the city of San Diego, but under the general powers of a municipality to abate a public nuisance under the provisions of Section 731 of the Code of Civil Procedure. It is also admitted that there is no State law or ordinance of the city of San Diego which requires the remodeling of a building long constructed, in the manner required by the judgment, although the method of construction appearing in the building in question is not now permitted.

The building was constructed over fifty years ago. The trial court found that it "was built in form and of materials quite commonly used at that time; and it is, in its present form, not substantially changed in form or materials from its condition at the time of its construction, except as to normal wear and tear suffered by a building of such age, and except insofar as the passage of time has caused the wood in said building to become older, drier and more highly inflammable; that at the time said building was constructed, no statute or ordinance specifically forbade such construction." The trial court also found various defects in construction that rendered the three upper stories of the building a fire trap and dangerous to the occupants and to adjoining buildings in case of fire.

[1] In deciding a petition for supersedeas we have nothing to do with the ultimate decision of the appeal on its merits and we must presume the truth of the findings of the trial court. Canavarro v. Theatre, etc., Union, 15 Cal.2d 495, 101 P. 2d 1081; Smith v. Smith, 18 Cal.2d 462, 116 P.2d 3.

[2] It is well settled that a mandatory injunction is stayed on appeal while a prohibitory injunction is not so stayed. While these rules are certain and well established it is often difficult to determine whether or not an injunction which is merely prohibitory in its terms is mandatory in its effect.

The Supreme Court had such a question before it in Byington v. Superior Court, 14 Cal.2d 68, 92 P.2d 896, 897, where it was said: "What may appear to be negative or prohibitory frequently upon scrutiny proves to be affirmative and mandatory. The authorities indicate that an injunctive decree that compels the surrender of the lawful possession of real property amounts to the granting of affirmative relief and is mandatory in character. Clute v. Superior Court, 155 Cal. 15, 18-20, 99 P. 362, 363, 132 Am.St.Rep. 54; Joerger v. Mt. Shasta Power Corp. 214 Cal. 630, 637, 638, 7 P.2d 706."

A similar situation was before the court in Feinberg v. One Doe Co., 14 Cal.2d 24, 92 P.2d 640, 641, where it was said: "Although the form of the order appealed from purports to be prohibitive in that defendants are enjoined and restrained 'from employing, and continuing to employ, or hereafter employing Amelia Greenwood while she is not a member in good standing of said International Ladies' Garment Workers' Union', it is quite obvious that said order is in its essence and effect a mandatory injunction. It is an order compelling affirmative action on the part of the defendants. Inasmuch as Amelia Greenwood at the time of the issuance of the order was already in the employ of the defendants, and the very controversy arose out of the continuance in employment of said Amelia Greenwood, it is apparent that the result intended to be accomplished by the issuance of said order was the compulsory release of said Amelia Greenwood from employment by the defendants. In short, the order directed and commanded the defendants to discharge said employee." Thus it was held to be stayed by appeal.

In Ambrose v. Alioto, 62 Cal.App.2d 680, 145 P.2d 32, 34, it was said: "An injunction or decree is purely prohibitory which merely has the effect of preserving the subject of the litigation in status quo, while, in general, an injunction or decree is mandatory if it has the effect of compelling the performance of a substantive act and necessarily contemplates a change in the relative position or rights of the parties at the time the injunction is granted or the decree entered. Hence, if the injunction compels a party affirmatively to surrender a position which he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory. Clute v. Superior Court, 155 Cal. 15, 99 P. 362, 132 Am.St. Rep. 54; Mark v. Superior Court, 129 Cal. 1, 61 P. 436; Foster v. Superior Court, 115 Cal. 279, 47 P. 58; 14 Cal.Jur. p. 179, sec. 6."

[3, 4] The judgment declared the three upper stories of the building to be a public nuisance, dangerous to life and property, and provided that the nuisance "shall be abated forthwith, by the immediate and total cessation of all use of said second and/or third and/or fourth story for the purposes of an hotel or rooming or lodging house or other human occupancy.

"It is further ordered, adjudged and decreed that the use of any part of said building above the first story thereof for the purposes of an hotel or rooming house or lodging house, or other human occupancy, shall not be continued or resumed until said building shall have been reconstructed, as follows:" Then followed five separate descriptions of the reconstruction required before the building could be reoccupied as a hotel which included the removal of the entire fourth floor.

Petitioners held possession of the three stories of the building under a lease with the owner. They in turn rented rooms to guests in the average number of ninety. At the time the lease between the owner and petitioners was entered into the transaction was perfectly legal and the use of the premises as a hotel was not contrary to any law or ordinance. Nor was the renting of rooms to guests by petitioners contrary to any law or ordinance. It is clear that while the injunction did not in express terms command petitioners to vacate the building and to cancel their contracts with the occupants of the rooms by compelling them to vacate, such was the necessary effect of the order. The changes in the building were major and it is clear that it could not be occupied by guests during the period of reconstruction. Thus petitioners' right to use the property under their lease was interfered with. Such a right is a vested property right. Also petitioners' contracts with their guests would of necessity be terminated during the period of remodeling. Thus the injunction necessarily contemplated, and its enforcement would compel, a change in the position and rights of petitioners and force them to surrender a position and property rights which they lawfully held at the time it was issued by causing them and their tenants to vacate during the remodeling period. Thus by requiring an affirmative action on the part of petitioners and the abandonment of their property rights, the effect of the injunction is mandatory and is automatically stayed by the appeal. Ambrose v. Alioto, supra. Under these circumstances there is no occasion for the issuance of a writ of supersedeas. See, Clayton v. Schultz, 12 Cal.2d 703, 87 P.2d 355.

There is no intimation that contempt proceedings have been or will be instituted against petitioners. If any such proceedings are started the need and right to apply for the writ may arise. Smith v. Smith, supra.

The petition for a writ of supersedeas is denied without prejudice to making another application therefor should proper occasion arise.

BARNARD, P. J., and GRIFFIN, J., concur.

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66 Cal.App.2d 838

DESSERT SEED CO. et al. v. GARBUS et al.

Civ. 3302.

District Court of Appeal, Fourth District, California.

Nov. 17, 1944.

Hearing Denied Jan. 15, 1945.

1. Specific performance 🔑117

One suing for specific performance of contract must allege and prove, not only that contract is just and reasonable, but that consideration is adequate. Civ.Code, § 3391.

2. Specific performance 🔑49(2)

In suit for specific performance of oral contract for sale of onion seed, where trial court found that allegations in complaint that consideration to be paid was fair and reasonable and fairly represented value of seed when contract was made were untrue and that reasonable market value of seed at such time was larger amount, judgment refusing relief prayed must be sustained.

3. Specific performance 🔑25

The mere fact that contract was not specifically enforceable does not necessarily render it void or voidable.

4. Contracts 🔑324(1)

On promisor's breach of valid contract, promisee may sue for rescission of contract or recovery of damages for breach as circumstances may warrant.

5. Frauds, statute of 🔑125(3)

The statute providing that oral contract to sell goods worth $500 or more shall not be enforceable unless buyer gives something in earnest or part payment or accepts and actually receives part of goods, does not make verbal contract within statute void, but renders it merely voidable at election of either party to contract, as statute presupposes existing lawful contract and affects only the remedy to enforce it. Civ.Code, § 1624a.

6. Frauds, statute of 🔑119(1)

The statute declaring oral contract to sell goods worth $500 or more unenforceable by action, unless buyer gives something in earnest or part payment or accepts and receives part of goods, does not provide mere rule of evidence, but imposes limitation on judicial authority to afford remedy, and failure properly to comply with statutory requirements bars relief. Civ.Code, § 1624a.

7. Frauds, statute of 🔑125(3)

Failure to comply with provisions of statute declaring oral contract to sell goods worth $500 or more unenforceable by action, unless buyer gives something in earnest or part payment or accepts and receives part of goods, does not render contract void, but merely unenforceable at option of person against whom it is sought to be enforced. Civ.Code, § 1624a.

8. Frauds, statute of 🔑125(2)
Specific performance 🔑38

In action for specific enforcement of or damages for failure to perform oral contract for sale of onion seed worth over $500, plaintiff cannot recover, unless defendant is estopped to plead statute of frauds or brings himself within exceptions noted therein. Civ.Code, § 1624a.

9. Contracts 🔑256

Abandonment of contract may be implied from parties' acts and accomplished by one party's repudiation of contract and other party's acquiescence in such repudiation.

10. Specific performance 🔑121(10)

In action for specific enforcement or damages for nonperformance of oral contract for sale of onion seed, evidence warranted conclusion that contract was mutually abandoned.

11. Frauds, statute of 🔑158(4)
Specific performance 🔑121(8)

In action for specific enforcement or damages for nonperformance of oral contract for sale of onion seed, evidence was sufficient to support conclusion that there was no bona fide delivery of seed to, or actual acceptance thereof by, plaintiff, as required to take contract out of statute of frauds. Civ.Code, § 1624a; Code Civ. Proc. § 1973a.

12. Specific performance 🔑39

Where consideration agreed on in oral contract for sale of onion seed did not fairly represent value of seed when contract was made, and contract was subsequently rescinded, sellers were not equitably estopped from raising statute of frauds as bar to buyer's action for specific enforcement of contract. Civ.Code, §§ 1624a, 3391.

13. Equity 🔑65(1)

When party, seeking to set judicial machinery in motion and obtain equitable remedy, violates conscience, good faith or other equitable principle in connection therewith, court will refuse to award him any remedy.

14. Frauds, statute of 🔑144

The doctrine of equitable estoppel should not be enforced when it would compel performance of contract found to have been rescinded or to be unfair and unreasonable as to consideration involved.

◆

Appeal from Superior Court, Imperial County; V. N. Thompson, Judge.

Action by the Dessert Seed Company and another against Phil Garbus and another, as individuals and as partners doing business under the firm name and style of P. & G. Produce Company, for specific enforcement of an oral contract for sale of onion seed or recovery of damages for nonperformance thereof. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Harry W. Horton, of El Centro, for appellants.

A. C. Finney, of El Centro, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action to specifically enforce an oral contract involving the sale of onion seed by defendants to plaintiffs or for damages for failure of defendants to perform.

Plaintiff Dessert Seed Company was doing business as such in Imperial County. Defendant company was operating a produce business in Los Angeles and did business in Imperial County and elsewhere. Defendants purchased a growing crop of onions on a 50-acre tract in Imperial County for $4,500 about April 23, 1942. They harvested about ten acres of the crop and due to a fall of the market decided to raise and sell the rest for seed. According to plaintiff Dessert's testimony, about May 8, 1942, he visited the property, met defendant Garbus, asked him if the crop was for sale, and inquired about the price. Garbus fixed it at $3,400, payable $500 down and the balance later. Dessert left his card and told him if he would take less, to notify him. On May 14, 1942, Garbus came to plaintiffs' place of business, again offered the crop for $3,400, but plaintiff stated he would only pay $2,000. Thereafter plaintiffs found an outlet for onion seed through government agencies, and on May 19, 1942, Dessert called Garbus at Los Angeles by phone and asked him if he still wanted to sell the patch for $3,400, accept $500 down, and the balance on July 6th. Garbus replied that he did want to sell and would accept the amount suggested.

Plaintiff testified that after a second telephone call that same evening he asked Garbus if that was a "firm sale"; that he told Garbus he had sold some of the seed and asked if it was all right to go ahead and "sell on" it; that Garbus stated it was and to get the papers out to him in the morning. Garbus denied this.

That same day plaintiff Dessert wrote Garbus a letter, setting forth the terms of the telephone conversation, and asked him to sign an enclosed copy for confirmation. On the following day, May 20th, Dessert confirmed the sale to the government agency. He then made a check for $500, executed a note for $2,900, payable to defendant company on July 6, 1942, and sent them to defendants with a letter reading "* * * We herewith confirm purchase from you. * * * Purchase Price * * * $3400.00 * * * inclosing our check for $500.00 along with our note for $2,900.00 due July 6th. Kindly initial and return the extra copy of this letter for our files."

Dessert, without the knowledge of Garbus, then went to the property to look it over and found employees of defendants working there. (These men were working under a written agreement with Garbus for a 25% interest in the net proceeds from the sale of the crop.) He told them he had bought the onions and directed them to cease weeding them. He paid one of the employees $20 to irrigate one of the fields, paid a Mr. Cosulas, owner of the land under lease, $75 for an extension of the lease, paid Cosulas' agent $25 for some purpose, and secured a water card for the premises. Garbus contends that these expenditures were unnecessary because he had previously made proper arrangements for all of these items, under his purchase agreement. On May 23rd defendant Garbus came to plaintiffs' office, laid the note, check and papers on the counter and told Dessert "that isn't a deal, my partner wouldn't go through with it * * * I didn't sign anything." Plaintiff Dessert told Garbus that he was "in a pretty bad spot" because he had sold the seed to the government and had to put up a bond guaranteeing delivery. After some further conversation, Garbus walked out. Dessert retained the note, check and letter and subsequently tore his signature off of the instruments. In a letter dated May 19, but mailed seven days later, Dessert attempted to negotiate another and different contract for the purchase and sale of the *onion seed,* instead of the *onion crop.* The letter contained a new check for $3,400 and a carbon copy of the original letter in which a new offer of $3,400 for the *onion seed* was made and providing that onions left after harvesting would belong to defendants. Then follows this quotation: "If this letter states your understanding of our agreement, *as it now stands* (italics ours), please confirm by signing on the left below and return to us". "Confirmed by P. & G. Produce Company, By ———." On May 27th Garbus wired: "* * * Not interested your deal, let's call whole thing off". Garbus wrote Dessert and returned his check and confirmation letter, forwarded under the counter-offer, unsigned. In reply Dessert wired: "I have kept the terms of the contract you entered into with me and I am standing on it." There is evidence of several oral proposals made in reference to the sale of the onion seed between May 19th and June 4th. Garbus wired Dessert that his partner agreed on $5,000 and would accept $1,000 and a note due July 6th for $4,000. On the same day Dessert wired him "* * * We bought this from you on May 19 for $3,400. * * * Will send you $1,000 and note for balance of $2,400." On June 4th Dessert wired Garbus: "* * * As a matter of compromise only * * *" will pay $5,000, $1,000 now and balance of $4,000 July 6th, "otherwise will stand on our contract". Defendants expended considerable money and employed many men to finish harvesting the seed crop. This action followed.

On application of plaintiffs, under their attachment, a receiver was appointed by the court to take charge of the onion seed. When judgment was entered for defendants the seed was disposed of pursuant to an order of the trial court and no longer remained a subject of the contract which plaintiffs seek to have specifically performed.

The trial court found that the defendants, during all the times mentioned in the complaint, were the owners of the onion crop described and of all the seed produced therefrom; that defendants, on May 19, 1942, entered into an oral agreement with plaintiffs for the sale of the onion crop for $3,400, $500 of which was, under the terms of the oral agreement, to have been paid forthwith, and the remaining balance of $2,900 was to have been paid on July 6, 1942, by executing and delivering a promissory note in that amount; that the oral agreement was subsequently reduced to writing and submitted to defendants for acceptance but that they repudiated the oral agreement and refused to make or sign any written contract for the sale of the onion crop or seed; that on May 23, 1942, defendants returned the check and note and notified plaintiffs that they were unwilling to comply with the terms of the oral agreement which they had made over the telephone; that in reliance upon the oral agreement, plaintiffs accepted certain orders from the government for the purchase of onion seed and made definite commitments to it to sell part of the onion seed, which defendants orally agreed to sell to plaintiffs; that since May 19th plaintiffs were able and willing to comply with the terms of the oral agreement and that defendants were unwilling and refused to comply therewith.

The court found that there never was at any time any written agreement for the sale of the onion crop as required in section 1624a of the Civil Code; that defendants were the owners of the crop and seed and entitled to recover the same and that plaintiffs never did have any right, title or interest therein; that plaintiffs take nothing by their complaint and defendants recover from plaintiffs their costs. Judgment was entered accordingly.

[1] It is a well-recognized principle of law in this state, in an action for specific performance of a contract, that a plaintiff must not only allege, but also prove, that the contract sought to be specifically enforced is not only just and reasonable, but that the consideration is adequate. Sec. 3391, Civ.Code. The burden of proving this fact is on the person seeking the remedy. Many cases supporting this rule are to be found cited in 23 Cal. Jur. § 16, p. 438 et seq. and sec. 51, p. 492 et seq. See also, Eichholtz v. Nicoll, Cal.App., 151 P.2d 664.

[2-4] In the instant case plaintiff alleged in the complaint that the consideration to be paid (i. e., $3,400) was fair and reasonable and fairly represented the value of the onion seed at the time the contract was made. The trial court not only found these allegations to be untrue but also found that the reasonable market value at that time was $5,000. If for no other reason, the judgment refusing specific performance of the contract here involved must be sustained. However, the mere fact that a contract is not specifically enforceable does not necessarily render it either void or voidable. For a breach of a valid contract by the promisor, the promisee has his action for rescission or damages as the circumstances may justify or warrant. Norris v. Lilly, 147 Cal. 754, 82 P. 425, 109 Am.St.Rep. 188.

Apparently, plaintiff concedes that the oral contract falls within the provisions of section 1624a of the Civil Code but contends that the facts as established and found by the court operate to bring it within the exceptions therein provided, i. e., (1) that the buyer gave something in earnest to bind the contract, or (2) in part payment, or (3) that plaintiff accepted part of the goods contracted to be sold or sold, and actually received the same.

[5] Under former section 1624, subdivision 4 of the Civil Code, oral contracts such as here described were *invalid* unless coming within the exceptions therein specified. Under section 1624a, as constructed by Statutes of 1931, page 2261, such a contract to sell or a sale of goods of the value of $500 or over *"shall not*

be enforceable by action unless", etc. This provision is taken from section 4, Statute of Frauds, Uniform Sales Act, Vol. 1, U.L.A. p. 18. In interpreting the effect of that provision it has been held that such a statute of frauds does not make a verbal contract falling within the statute illegal or void, but makes it merely voidable at the election of either of the parties thereto. The statute presupposes an existing lawful contract and affects only the remedy to enforce it. Abraham v. Durward, 46 N.D. 611, 180 N.W. 783.

[6, 7] In Manufacturers' Light & Heat Co. v. Lamp, 269 Pa. 517, 112 A. 679, 681, it was said that the statutes such as this section of the Uniform Sales Act "do not provide mere rules of evidence, but are limitations upon the judicial authority to afford remedies. * * * If, then, there has been a failure to properly comply with the legislative requirements, relief cannot be granted." Failure to comply with the provisions of this section, therefore, does not render the contract void, but merely unenforceable at the option of the person against whom it is sought to be enforced. Edwards Manufacturing Co. v. Bradford Co., 2 Cir., 294 F. 176; Maddaloni Olive Co., Inc. v. Aquino, 191 App. Div. 51, 180 N.Y.S. 724.

[8] As to the prayer for damages, the contract here involved is one which is required by the Statute of Frauds to be in writing and plaintiff is not entitled to recover unless the defendant is estopped to plead the statute or has brought himself within the exceptions therein noted. Albany Peanut Co. v. Euclid Candy Co., 30 Cal.App.2d 35, 38, 85 P.2d 471. We will therefore consider the evidence and the finding of the court in connection with these claimed exceptions.

Plaintiff Dessert testified that defendant Garbus orally agreed to accept his check for "five hundred dollars down and the balance on July 6th." The trial court found that defendants orally agreed to sell the crop for $3,400, $500 "of which was, under the terms of said oral agreement, to have been paid forthwith, and the remaining balance of $2,900 was to have been paid on July 6, 1942, through and in pursuance of, the making, executing and delivery of a promissory note" for $2,900. No mention was made as to any agreement to accept plaintiffs' check. Plaintiffs argue, therefore, that the mailing of the check and note was full performance on their part; that nothing remained to be done by them; that a sale had been made and plaintiffs gave, and defendants actually received, something in part payment, or at least plaintiffs gave something in earnest to bind the contract; that as a matter of law, plaintiffs brought themselves within the exception; that defendant Garbus' act in returning the check and note was a violation of his agreement and even though the question of specific enforcement of the oral agreement is impossible under the present conditions, plaintiffs are nevertheless entitled to damages for its breach.

In Rabe v. Danaher, D. C., 51 F.2d 777, it was held that a protested check of a buyer is not "part payment" within the Statute of Frauds, because it was not so received by the sellers and that accordingly nothing was given by the defendant in earnest or in part payment.

In Central Trust Co. v. Cassidy, D.C., 300 F. 386, it was held that the question as to whether or not a payment has been made is largely a question of the intention of the parties.

In 30 Cyc. p. 1180, regarding payment, it recites: "As used in its strict legal sense, there must be a delivery by the debtor or his representative of money or something accepted by the creditor as the equivalent thereof, with the intention on the part of the debtor to pay the debt in whole or in part, and accepted as payment by the creditor."

In the instant case, however, defendants apparently rejected the deal, not because of the payment by check, but for other reasons. Defendants returned the check and note as written, after which plaintiff Dessert tore his signature from each document and then immediately began bargaining with defendants about a new deal or transaction involving a better price to be paid by plaintiffs for the onion seed (not the onion crop). In support of the judgment and finding, though plaintiffs' evidence may indicate otherwise, we may well conclude that the trial court believed that if there had been an oral agreement to sell the onion crop there was a mutual abandonment or rescission of that transaction, or at least that defendants considered the contract for the purchase of the crop at an end and that plaintiffs acquiesced in defendants' refusal to comply with the oral agreement, which acquiescence was followed by an attempt to negotiate a new and different agreement. In support of this conclusion it is interesting to note that plaintiffs prepared a proposed finding that "in an effort to compromise the differences between the parties and not by way of waiver of said oral contract, subsequent negotiations were carried on. * * * That in the carrying on of said subsequent negotiations the intent of the plaintiffs was to make an effort to compromise the matter and not to waive or abandon said oral contract." The trial court refused to sign such a finding but drew its own findings as indicated. Plaintiffs stood by, watched Garbus, who had actual possession of the onion crop, harvest it, pay all expenses attendant thereon, pay the percentages due under the contract with the workmen, and then when the seed was about to be taken, plaintiffs levied an attachment and placed a receiver in charge.

[9] It is well settled that an abandonment of a contract may be implied from the acts of the parties and this may be accomplished by the repudiation of the contract by one of the parties and by the acquiescence of the other party in such repudiation. This doctrine is supported by many cases. 6 Cal.Jur. p. 382, § 230; Mettler v. Vance, 30 Cal.App. 499, 158 P. 1044; Carter v. Fox, 11 Cal.App. 67, 103 P. 910.

[10] In support of the court's findings and judgment, the evidence would warrant a conclusion that there had been a mutual abandonment or rescission of the oral contract. Gibula v. Sause, 173 Md. 87, 194 A. 826; Thompson v. Municipal Bond Co., 23 Cal.App.2d 402, 73 P.2d 274.

[11] In view of this conclusion, it becomes unnecessary to determine whether, as a matter of law, a part payment had been made on the oral agreement or something in earnest to bind the contract had been given. The conclusion that there had been a mutual abandonment or rescission of that contract would dispose of the question whether there had been an acceptance by the buyer of a part of the goods contracted to be sold or sold, within the meaning of section 1973a of the Code of Civil Procedure, and the claimed purchaser had actually received the same. The evidence on this point, nevertheless, was sufficient to support the conclusion that there never had been a bona fide delivery and an actual acceptance of the onion crop. Rabe v. Danaher, supra.

It is true, as contended by plaintiffs, that the facts of a particular case may give rise to an equitable estoppel against the parties seeking to set up the Statute of Frauds and foreclose such parties from relying thereon. Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770; Grant v. Long, 33 Cal.App.2d 725, 92 P.2d 940.

[12-14] The contention that there arose an equitable estoppel whereby the defendants were precluded from raising the Statute of Frauds as a bar to the action is equally untenable in view of the conclusion reached, because the court found that the consideration agreed upon in the oral agreement was not only unfair and unreasonable but did not fairly represent the value of the onion seed at the time the contract was made. In addition thereto, and in support of the judgment, we concluded that there had been a subsequent abandonment or rescission of the oral contract. Under the findings in the present action this court could not direct the lower court to apply the estoppel suggested. Whenever a party seeks to set judicial machinery in motion and obtain some equitable remedy, and violates conscience or good faith or other equitable principle in connection therewith, the court will refuse to intervene in his behalf and award him any remedy. Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296. The doctrine of equitable estoppel should not be enforced when it would compel the performance of a contract found to be abandoned or rescinded or to be unfair and unreasonable as to the consideration involved.

Plaintiffs, on May 13, 1943, made application to this court for leave to produce additional evidence of facts occurring subsequent to the entry of judgment. This application bore upon the question of plaintiffs' contract with the government for the sale of onion seed and the higher price he was compelled to pay for other seed to fill the contract, which loss he claimed was due to the breach of the oral contract between plaintiffs and defendants. We heretofore denied that application. Plaintiffs renewed such application in their reply brief. Under the conclusions above reached, we have not changed our view as to the materiality of such evidence or the necessity of granting such an application.

The application is denied. Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

66 Cal.App.2d 778

MILLER v. LEE et al.

Civ. 14471.

District Court of Appeal, Second District, Division 2, California.

Nov. 14, 1944.

Hearing Denied Jan. 11, 1945.

1. Appeal and error 🔑930(1)

On appeal from judgment for plaintiff, conflicting evidence must be viewed in light most favorable to plaintiff indulging such reasonable inferences in plaintiff's favor as jury could draw therefrom.

2. Principal and agent 🔑23(2), 24

That automobile conditional sale contract was assigned by used car dealer's agent to dealer's mother "with recourse" did not prevent a finding by jury that such agent was in fact agent of the dealer and his mother since an agency may be proved by circumstantial evidence.

3. Principal and agent 🔑24

In action for malicious prosecution, whether person was acting in course of his employment as defendants' agent when he swore to complaint upon which warrant of plaintiff's arrest was issued was for jury.

4. Malicious prosecution 🔑71(4)

In malicious prosecution action whether defendants' agent who swore to complaint upon which warrant of plaintiff's arrest was issued made a full and fair disclosure of all the facts to justice of the peace before the warrant was issued was for jury.

5. Appeal and error 🔑1099(2)

A decision on former appeal that jurisdiction of superior court had not terminated before commencement of trial of malicious prosecution action was binding on subsequent appeal in the same action.

6. Evidence 🔑208(6)
Witnesses 🔑379(7)

In action for malicious prosecution wherein defendants testified that they had nothing to do with issuance of criminal complaint and knew nothing about it, verified amendments to answer to first amended complaint wherein defendants admitted that they had consulted a lawyer before defendants' agent swore to the criminal complaint were properly admitted not only as containing admissions but also for purpose of impeaching defendants' testimony.

7. Malicious prosecution 🔑58(1)

In action for malicious prosecution by causing arrest of plaintiff for theft of automobile which he had purchased from defendants under a conditional sale contract, the ledger sheet furnished to the justice of the peace by defendants was properly admitted to corroborate the evidence as to agency of person swearing out the warrant and condition of the account which was kept of plaintiff's transactions, and to show whether plaintiff had been given credit for old automobile which he turned in, no credit for such automobile being shown on the ledger sheet. Pen.Code, § 504a.

Malicious prosecution 🔑58(1)

In action for malicious prosecution by causing arrest of plaintiff for theft of automobile which he had purchased under a conditional sale contract from defendants, evidence showing plaintiff's financial inability to make payments was properly admitted as bearing on plaintiff's intent and as showing necessity for plaintiff's change of residence and of location of the automobile concerning which defendants were notified. Pen.Code, § 504a.

9. Malicious prosecution 🔑67

In action for malicious prosecution, damages may be recovered for injuries to feelings as well as for bodily harm.

10. Malicious prosecution 🔑62

In action for malicious prosecution, evidence that a report was circulated in neighborhood where plaintiff lived that plaintiff was a jailbird and had stolen an automobile was properly admitted, notwithstanding its hearsay nature, as showing injury which plaintiff had suffered. Pen. Code, § 504a.

11. Appeal and error 🔑1060(1)

In malicious prosecution action, plaintiff's counsel was not guilty of prejudicial misconduct in asking a defendant if he had not at a time shortly before arrest of plaintiff for theft of automobile caused the arrest of another man to whom an automobile had been sold where court promptly instructed jury not to consider information conveyed in such question.

12. Malicious prosecution 🔑71(2)

In malicious prosecution action, court must determine as matter of law what constitutes probable cause but it is function of jury to determine on conflicting evidence whether facts exist which must be established to constitute want of probable cause.

13. Trial 🔑234(3)

As regards issue of probable cause in malicious prosecution action, approved method is for court to instruct jury that if they find certain questions of fact properly submitted to them to be true or untrue their verdict must be for plaintiff or for defendant as the case may be.

14. Trial 🔑199

In malicious prosecution action, instructions were not erroneous as leaving for jury to determine whether there was probable cause for plaintiff's arrest where jury was told substantially that if evidence disclosed certain named facts, plaintiff could not recover.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by A. W. Miller against Maurice Lee and others for malicious prosecution. From a judgment for plaintiff, the defendants Myrtle I. George and another appeal.

Affirmed.

A. W. Brunton, of Los Angeles, for appellants.

Wendell W. McCanles, of Los Angeles, for respondent.

W. J. WOOD, Justice.

In this action for malicious prosecution, which was tried with a jury, plaintiff obtained a judgment in the sum of $5,000 against Maurice Lee, Myrtle I. George, Raleigh George and Richard F. George. The motion of Richard F. George for a new trial was granted and the motion of the other defendants for a new trial was denied upon the remittance by plaintiff of the sum of $2,000, which the court had required as a condition of the denial of the motion. Defendants Myrtle I. George and Raleigh George have appealed from the judgment. Defendant Lee has not appealed.

The litigation arose from the arrest on February 15, 1940, of plaintiff and his incarceration for nine days, under a warrant issued by Frank K. Carrell, a justice of the peace, on charges of the grand theft of an automobile and of the violation of section 504a of the Penal Code, which provides that one is guilty of embezzlement who fraudulently removes or conceals chattels leased to him by an instrument in writing under a contract to purchase. When the action was first called for trial defendants moved the court for judgment on the pleadings, claiming that it affirmatively appeared on the face of the complaint that there was probable cause for the arrest of plaintiff. This motion was granted because the trial court was of the opinion that under the decision of Wilson v. Troy, 19 Cal.App.2d 156, 64 P.2d 1141, the complaint did not set forth facts sufficient to sustain an action for malicious prosecution, especially with reference to the allegations on the issue of the termination of the criminal proceeding. After the motion for judgment on the pleadings had been granted the Supreme Court of California filed its decision in Jaffe v. Stone, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775, and upon reading this decision the trial court concluded that it had erred in granting the motion for judgment on the pleadings. Thereafter, the court granted plaintiff's motion to vacate the order for judgment on the pleadings and for permission to file a second amended complaint. Appeal from this order was prosecuted by defendants and on May 8, 1942, the District Court of Appeal affirmed the order from which the appeal was taken, holding that plaintiff's amended complaint contained sufficient allegations to state a cause of action. Miller v. Lee, 52 Cal.App.2d 10, 11, 125 P.2d 627.

[1] The appealing defendants now contend that the evidence is insufficient to sustain the implied finding of the jury that defendant Lee was acting in the course of his employment as their agent when he swore to the complaint upon which the warrant of arrest was issued. The evidence on the subject was conflicting and under well

established principles it must be viewed by us in the light most favorable to plaintiff, indulging such reasonable inferences in plaintiff's favor as the jury could draw therefrom. Defendant Richard F. George, an attorney at law, was the owner of a lot which was leased by defendant Raleigh George, his son, a used car dealer. Defendant Lee was the agent of Raleigh George in the business of buying and selling cars. He was the agent of defendant Myrtle I. George, Raleigh's mother, in signing sales contracts and collecting payments on the contracts. Lee sold to plaintiff on June 29, 1939, under a conditional sale contract a Plymouth car for the cash purchase price of $145 and took an Essex car in trade for which a credit was to be allowed of $15. A sale contract was prepared showing payments in the aggregate sum of $186.80. Appellants' ledger sheet showed the contract price to be $171.80 and the installment payments were to be in monthly sums of $6.31. The contract was made in the name of defendant Lee but was assigned by him to defendant Myrtle George. Lee testified that he did not own the car that was purchased by plaintiff but that it was owned by Raleigh George. In answer to the question why he signed the sale contract in his own name he answered: "That was the usual way we did those things as agent for Mr. Raleigh George; I usually signed the pink slip and he signed all the other things. I usually signed M. M. Lee as their agent, my contract going to Mrs. George." Myrtle George received payments and gave receipts therefor in her own name. She testified that Lee was the collector. The contract provided that in case of a default in any installment payment the matter of collection could be referred to any person for collection, the purchaser to pay a reasonable collection charge. Lee testified that he was to receive $2.50 for each trip he made to collect from plaintiff. When at a later period he attempted to repossess the car Raleigh George said to plaintiff's wife, "this happens to be my car".

Plaintiff was delinquent on two monthly installments on October 15, 1939, and soon thereafter about midnight Lee pounded on the door of his residence and said to plaintiff: "You are lucky Mr. George doesn't have you arrested". A few days later plaintiff made a payment and signed a new agreement. At about 9 o'clock p. m. on November 15, Lee called at plaintiff's residence and talked to his thirteen-year-old daughter, who told him that her parents were in Glendale visiting a sick aunt. Although the girl was crying at the time, Lee said, "you are nothing but a liar like your Dad". He also said, "Well, I am going to wait for your father. If he isn't here in so long I am going down and swear out a warrant for his arrest because he stole my car". On her return from Glendale Mrs. Miller called at the residence of Mr. and Mrs. George and paid them $6, which was all the money she had. This sum was at first refused because there should be an additional sum of $2.50 for Lee's trip but the payment was accepted with the statement that the extra thirty-one cents and the $2.50 for Lee's collection trip would be added at the end of the contract. In his wife's presence Richard F. George said to Mrs. Miller, "I have been very lenient with your husband not having him arrested before".

Plaintiff went to the residence of the Georges to make a payment on December 12, and while he was there Mrs. Miller drove to a nearby market to get groceries and take the children to a rest room. While she was parked at the market Raleigh George and Lee came up in an automobile. Lee said, "I am taking the car" and Mrs. Miller replied, "I don't believe I have to give it to you". Lee then said, "I am going to Justice Carrell and will have you both locked up for stealing the car". Raleigh George then called a police officer, who refused to interfere. George then got in the car and shoved Mrs. Miller out of the driver's seat and drove to Mrs. George's residence, saying, "This happens to be my car". Shortly thereafter and on the same date plaintiff gave Mrs. George $12.62. He was given a receipt in full to January 1, 1940, and was allowed to retain possession of the car. This was the date, December 12, 1939, on which it was later charged that plaintiff was guilty of theft and fraudulent concealment of the car.

Plaintiff lost his job with the Wilmington Boat Works and the family broke up housekeeping. Plaintiff went to live with a brother-in-law and his wife and the children went to live with her mother. Plaintiff informed defendant of his change of address. On the agreement executed on December 12, plaintiff gave his address as 342½ West 56 Street. This was the correct address where he then kept the car. On

December 30 he notified defendants he had moved with the car to 1015 East 76 Place, where from that time to the date of his arrest he lived with his family. Plaintiff told defendants he could not make the payments but he was not asked to return the car. In February, before plaintiff was arrested, Mrs. Miller called defendants and asked them to get the car. They did so. On February 15, 1940, the criminal complaint was sworn to before the justice of the peace, in which it was stated that the offense had been committed by plaintiff on December 12, 1939.

At the preliminary hearing on the criminal complaint the charge of grand theft was dismissed for insufficiency of the evidence but plaintiff was bound over to the superior court on the other count. The matter was submitted to the superior court on the transcript of the evidence taken at the preliminary hearing and the court dismissed the action for insufficiency of the evidence.

[2, 3] The fact that the sale contract assigned by Lee to Mrs. George contained the words "with recourse" does not prevent a finding by the jury that Lee was in fact the agent of the two appealing defendants. An agency may be proved by circumstantial evidence. MacDonnell v. California Lands, Inc., 15 Cal.2d 344, 347, 101 P.2d 479. But here we have both direct and circumstantial evidence of Lee's agency and of his authority to follow the course pursued by him in furtherance of his endeavors to collect from plaintiff. The receipt by Lee of $2.50 for each collection visit is wholly inconsistent with the claimed liability under the "recourse" feature of the assignment. In finding that Lee was acting within the scope of his authority in causing plaintiff's arrest the jury doubtless took into consideration the fact that Raleigh George had called a police officer when he forcibly took the car; the fact that Richard F. George in the presence of defendant Myrtle George threatened plaintiff with arrest; and the fact that the appealing defendants furnished Lee with their sale contract and ledger sheet to show to the justice of the peace. In an amendment to the answer to the first amended complaint the appealing defendants stated that on February 10, 1940, and before the commencement of the criminal prosecution they had consulted an attorney at law and had related to him all of the facts of the transaction with plaintiff. The facts set forth in this pleading indicate that said defendants then had in mind the arrest of plaintiff. They alleged in the amendment to the complaint that "whatever they did in the premises they did in good faith, and without malice, and upon the express advice of said attorney, and upon a full, complete, and truthful statement of the facts in the case, and in no other manner". It is significant that Richard F. George appeared as attorney for Lee in all the proceedings up to the entry of the judgment against Lee, including the former appeal.

In Diggs v. Arnold Bros., Inc., 132 Cal. App. 518, 524, 23 P.2d 71, 74, a case involving the sale of an automobile in which a credit man caused the arrest of the plaintiff, the court in holding the employer liable used language which could well be applied to the facts of this case, when it stated that the agent had "adopted the all too common practice of credit men of resorting to the criminal courts to coerce debtors into making further payments."

[4] The appellants may not escape liability under the claim that Lee made a full and fair disclosure of all of the facts to the justice of the peace before the warrant was issued. Whether Lee did in fact make such disclosure was an issue to be determined by the jury. The jury's implied finding on this point adverse to appellants is sustained by the evidence, including the testimony of the justice of the peace, from which the jury could have reasonably concluded that Lee falsely represented to the justice that he was the owner of the automobile; that he falsely stated to the justice that plaintiff had concealed the car; and that he failed to disclose to the justice that on December 12, 1939, plaintiff was not in default in his payments.

[5] There is no merit in the contention of appellants that the jurisdiction of the superior court had terminated before the commencement of the trial which resulted in the verdict for plaintiff. This point was decided adversely to the contention of appellants on the former appeal. In their brief appellants state: "Appellants are aware of the fact that these same contentions were made by them and the other defendants in the instant action in the briefs filed in Miller v. Lee, 52 Cal.App.2d 10, 11, 125 P.2d 627, but appellants respectfully submit that the opinion in said previous appeal overlooks the fundamental law that the

maintenance of established procedure is absolutely necessary to our system of government." The decision in the former appeal is binding at this time and we see no occasion for further discussion on this point.

[6-10] The court did not err in its rulings on the admission of evidence. Appellants complain particularly of the ruling permitting the introduction in evidence of the amendments to the answer to the first amended complaint, claiming that these amendments were superseded by later pleadings. Appellants testified at the trial that they had had nothing to do with the issuance of the criminal complaint and knew nothing about it. In their verified amendments to the answer to the first amended complaint appellants admitted that they had consulted a lawyer before Lee swore to the criminal complaint, giving him the facts in detail in such manner as to indicate their purpose to have plaintiff arrested. These amendments were clearly admissible not only as containing admissions by appellants but also for the purpose of impeaching their testimony. Neither did the court err in receiving in evidence the ledger sheet furnished to the justice of the peace by appellants. The ledger sheet provided corroborating evidence as to the agency of Lee and the condition of the account which was kept of plaintiff's transactions. The ledger sheet was also admissible to show whether plaintiff had been given credit for the Essex car which he turned in, no credit for this car being shown on the ledger sheet. Lee testified that plaintiff had not been given credit for the $15 allowance on the Essex car. Nor did the court err in receiving evidence showing the financial inability of plaintiff to make his payments. This evidence had a bearing on the intent of plaintiff and it showed the necessity for plaintiff's change of residence and of the location of the car, concerning which appellants were notified. The court did not err in receiving evidence that a report was circulated in the neighborhood where plaintiff lived that plaintiff was a jailbird and had stolen a car. This report was brought home to plaintiff. In an action for malicious prosecution damages may be recovered for injuries to feelings as well as for bodily harm. Shatto v. Crocker, 87 Cal. 629, 25 P. 921. The evidence was admissible, notwithstanding its hearsay nature, as showing the injury which plaintiff had suffered. It has been held that newspaper articles are admissible in an action for malicious prosecution to prove damages. Burke v. Watts, 188 Cal. 118, 204 P. 578.

[11] Appellants assert that plaintiff's counsel was guilty of misconduct in asking defendant Lee if he had not at a time shortly before the arrest of plaintiff caused the arrest of another man to whom a car had been sold. Plaintiff asserts that this question was asked in good faith and that the court erred in sustaining an objection to it. However, the court promptly instructed the jury that they must not "consider the information conveyed in that question at all". We are satisfied that defendants were not prejudiced by the incident.

Appellants contend that the court in its instructions erroneously left to the determination of the jury the question whether there was probable cause for the arrest of plaintiff. They particularly complain of a lengthy instruction in which the court specifically mentioned the important facts which it was plaintiff's duty to establish in order to obtain a verdict and included in the instruction the statement, "and if you further find and believe from the evidence that the instigation, institution and prosecution of said action on the part of defendants was malicious and without probable cause, then it will be your duty to find the issues in favor of the plaintiff and against the defendants." But the court also instructed the jury that the verdict must be for the defendants if defendant Lee informed the justice of the peace that plaintiff had given defendants the address on 342½ West 56 Street as his address on December 12, 1939, and that defendants had made diligent efforts to find the automobile sold to plaintiff after the giving of said address and could not find the automobile or plaintiff and if they further found that plaintiff did not live at 342½ West 56 Street on December 12, 1939, and that he never informed defendants of his true address. The court further instructed the jury that plaintiff could not recover if defendant Lee honestly believed that defendant had committed a crime and that he sought the legal advice of the justice of the peace and in good faith fully and fairly disclosed to the justice of the peace all of the information he possessed and was then advised that a crime had been committed.

[12, 13] It is unquestionably the rule that the court must determine as a matter of law what does and what does not con-

stitute probable cause but it is the function of the jury to determine on conflicting evidence whether or not those facts exist which must be established to constitute want of probable cause. The approved method is for the court to instruct the jury that if they find and determine certain questions of fact properly submitted to them to be true or untrue their verdict must be for the plaintiff, or for the defendant, as the case may be. In Scrivani v. Dondero, 128 Cal. 31, 60 P. 463, 464, the court had before it a question similar to the question being discussed. We quote: "The jury were instructed that plaintiff, in order to recover 'has only to show to your satisfaction, by a preponderance of the evidence, the following: (1) That the prosecution was without probable cause; (2) that the prosecution was malicious; (3) that plaintiff has been damaged thereby. You are the exclusive judges of all the questions of fact.' It is now claimed that this instruction declares probable cause to be a question of fact. This court has repeatedly held that probable cause is a question of law, but that the existence of sufficient facts to constitute probable cause is a question of fact. Ball v. Rawles, 93 Cal. 222, 28 P. 937, [27 Am. St.Rep. 174] * * *. The instruction we have quoted is not perfect in form. At the same time, we do not consider it seriously objectionable, especially in view of the other instructions given upon the question of probable cause. The jury were told, strictly in accordance with the law, that, if they found the evidence disclosed certain facts (naming them), then there was no probable cause for the arrest. Under these circumstances, we cannot be brought to believe that the jury were in any way misled by the instruction heretofore quoted."

[14] The instruction now before us, like the instruction mentioned in the Scrivani case, is not "perfect in form". But it can be properly stated that here also the instruction is not "seriously objectionable". The jury was told substantially that if the evidence disclosed certain facts, naming them, plaintiff could not recover. We are satisfied that the jury were not misled and that they were in effect told that they were to be the arbiters of questions of fact. There has been no miscarriage of justice.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; SHENK, J., dissenting.

STEELDUCT CO. v. HENGER-SELTZER CO. et al.

Civ. 14475.

District Court of Appeal, Second District, Division 1, California.

Nov. 10, 1944.

Rehearing Denied Nov. 29, 1944.
Hearing Granted Jan. 8, 1945.

1. Appeal and error ⚷635(2)

Where appellant appealed from orders and rulings made but clerk's transcript on appeal disclosed no such orders and rulings, attempted appeal therefrom was dismissed.

2. Appeal and error ⚷1099(4)

Where District Court of Appeal on former appeal established validity of agency selling contract between parties and that such contract was not mutually abandoned, and that no just or legal cause existed for cancellation by agents and there was no claim that evidence produced on second trial in regard to these issues was not substantially the same as at first trial, decision on former appeal became the law of the case.

3. Appeal and error ⚷1097(1)

Even though evidence upon retrial is different from evidence upon former trial, doctrine of law of the case applies unless on second trial evidence is substantially different in a material respect, notwithstanding that in previous decision evidence contained in record was not quoted or cited in opinion on former appeal.

4. Appeal and error ⚷1097(1)

The doctrine of "law of the case" is not confined to that portion of decision of appellate tribunal which can be said to be strictly essential to disposition of case.

See Words and Phrases, Permanent Edition, for all other definitions of "Law of the Case".

5. Principal and agent ⚷44

Evidence established that there was no mutual abandonment of agency selling contract and that agents terminated contract in violation of the terms thereof.

6. Principal and agent ⚷44

Where agents allegedly breached agency contract forbidding agents to sell any similar competitive material, measure of damages was the profits principal would have made if agents had not sold products of competitor and since competitor's products were similar, such measure was profit principal would have made from sale of like quantity of its own products by agents.

7. Principal and agent ⚿44

Agents could not complain of uncertainties of measure of damages for alleged breach of agency contract where damage existed only because of their wrongful act.

8. Injunction ⚿58

Equity will not interfere to prevent by injunction a breach of negative covenants of contract, when its affirmative covenants cannot be specifically enforced by judicial decree.

9. Injunction ⚿61(1)

Where affirmative covenants of agency contract were unenforceable by principal because requiring constant and protracted supervision of court, principal was not entitled to prohibitory injunctions to restrain agents from breaching negative covenants forbidding the selling of competitive products.

10. Appeal and error ⚿999(1)

Where a jury trial is a matter of right and has not been waived, an appellate court will not make findings contrary to the conclusions of the jury. Code Civ.Proc. § 956a; Const. art. 6, § 4½.

11. Appeal and error ⚿1178(6)

In principal's suit for breach of agency contract, where amount of damages was put in issue, and jury returned verdict for agents based on finding that contract had been mutually abandoned, District Court of Appeal which upheld contract, on principal's appeal, was required to reverse judgment on verdict for retrial, notwithstanding principal had proved its damage by preponderance of evidence. Code Civ.Proc. § 956a; Const. art. 6, § 4½.

* * *

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Suit by the Steelduct Company against Henger-Seltzer Company and others for an accounting for damages and injunction. From an adverse judgment with respect to the two first causes of action, and from orders and rulings, plaintiff appeals. Appeal from orders and rulings dismissed. Judgment reversed and cause remanded for a retrial.

See, also, 50 Cal.App.2d 475, 123 P.2d 100.

Evans, Pearce & Campbell and Daly B. Robnett, all of Los Angeles, for appellant.

Walter Lyon and Derthick, Cusack & Ganahl, all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff is a corporation with its principal place of business at Youngstown, Ohio, and authorized to do business in the State of California. It is engaged in the sale and merchandizing of rigid steel conduit, rigid steel elbows and couplings.

Defendant is a copartnership consisting of Edward W. Henger and Ira R. Seltzer, doing business under the firm name and style of Henger-Seltzer Company, with its principal place of business in the City of Los Angeles, California, where it acted as a manufacturers' agent.

On September 1, 1928, plaintiff and defendants entered into an agency contract, by the terms of which the former agreed that the latter would act as the exclusive agents of plaintiff in marketing its products in the State of California. Subsequently, on May 11, 1934, by mutual agreement the agency contract was revised by limiting defendants' exclusive territory to Southern California and the State of Arizona.

So far as pertinent to the determination of this appeal, the agency contract provided that defendants would faithfully and honestly, to the best of their ability "carry out and perform the obligations imposed upon them by the fiduciary relationship for which provision is made in this agreement"; and further that defendants "shall neither sell nor attempt to sell, any of such material outside of said territory, nor any similar and/or competitive material either in or out of said territory".

The Seventh paragraph of said contract provided "That either party to this contract may terminate the same upon ten days written notice of its intention so to do to the other party".

In March of 1938, defendants, through correspondence, urged upon plaintiff that the contract be further revised so as to provide for a definite and certain term for the duration of such agreement. In support of their request that the contract be made for a definite term, defendants wrote plaintiff in part as follows: "Since we have so much more of an investment than the average so-called manufacturers' agency in our business, we feel that we would like to have an assurance in writing of continued cooperation with concerns such as yours". In this correspondence, defendants gave expression to their fear that a change in the officer personnel or management of plaintiff corporation might, on account of the ten day termination clause in the contract, result in defendants finding themselves "out on a limb without anything to hang onto", if such new or changed officer personnel decided to take advantage of such ten day termination provision.

In a letter dated April 4, 1938, defendants submitted to plaintiff a letter contract embodying a suggested revision of the agreement so that defendants would be appointed as plaintiff's exclusive agent in Southern California for a definite period of five years. On May 31, 1938, plaintiff adopted the language contained in defendants' letter and forwarded to the latter a communication amending the original contract by appointing defendants exclusive agents for the territory of Southern California and Arizona for a definite period of five years without the right to terminate upon notice of such intention. The letter reads as follows:

"This is to confirm our agreement appointing the Henger-Seltzer Company as our exclusive agents for Southern California for a period of five years on such lines of our manufacture as they have been regularly handling heretofore.

"It is understood that they will, throughout this period, maintain an organization sufficient to adequately represent us in that market and that they will handle no lines conflicting with our own.

"The basis of remuneration will be the same as is now in effect, or as may be mutually agreed upon from time to time.

"The purpose of this agreement is to continue the mutually satisfactory relationship we have had with each other for some years with an understanding for a definite period of time which we hope may be further extended at the end of this period."

In reply to the foregoing letter, defendants, under date of June 7, 1938, in confirmation of the amended contract, wrote plaintiff as follows:

"We very much appreciate your letter of May 31st confirming our understanding in regard to representing you in Southern California.

"We sincerely hope that our very pleasant relations continue for many many times five years."

However, less than one year thereafter, defendants negotiated a contract with Central Tube Company of Pittsburgh, Pennsylvania, a competitor of plaintiff, and by the terms of which contract defendants became the exclusive agents of plaintiff's competitor and placed orders for the merchandise of such competitor. The contract between defendants and plaintiff's competitor was dated March 20, 1939, and provided that defendants would call upon "all buyers of rigid steel conduit" in Southern California and Arizona and, by such agreement, defendants agreed not to "carry a stock of rigid steel conduit, manufactured by * * * any other manufacturer of such product".

After their appointment as agents for plaintiff's competitor the defendants, under date of March 10, 1939, wrote plaintiff: "It is with extreme regret that we find it necessary to advise you that we are terminating our agreement * * * on conduit, and that we are making other arrangements".

On March 16, 1939, plaintiff, in a telegram to defendants, advised them "Cannot accept cancellation and expect you to maintain contract".

Thereafter plaintiff commenced this action for an injunction, accounting and damages. The cause proceeded to trial before the court sitting without a jury, resulting in a judgment for defendants herein. From such judgment plaintiff prosecuted an appeal which resulted in the reversal of such judgment by Division Two of this court. Steelduct Company v. Henger-Seltzer Company, 50 Cal.App.2d 475, 123 P.2d 100, 101, hearing denied by the Supreme Court.

After stating that "The primary question is whether the agents had a right to cancel the contract, which was made for a definite period, and if not, what are the rights and remedies of the manufacturer." Division Two of this Court said in its decision:

"It is abundantly clear from the letter of respondents, which induced appellant to execute the letter contract, that respondents desired a definite term contract without a right of cancellation. A contract that was to endure for a term of five years with a right of cancellation on ten days written notice with or without cause, would have left them 'out on a limb', exactly as they felt they were by the terms of the contract of September 1, 1928. The letter contract did not in terms adopt or reject the provisions of the earlier contract, but it is plain from the language used that the terms thereof were to govern, except the provision for cancellation, which we think was impliedly eliminated. The respondents were responsible for the terms of the letter contract, and so all ambiguities therein are to be resolved against them. The court's finding that the contract was validly terminated ten days after the notice was given is not sustained by the record.

"Respondents' further contention that they had just cause for cancellation is plainly an afterthought. Such cause, if any, was not made the basis for cancellation. Moreover, the evidence does not sustain the contention and there is no finding on it."

Upon the going down of the remittitur, plaintiff filed an amended complaint containing three causes of action, and wherein they prayed for damages; an accounting; and an injunction restraining defendants from representing, during the term of the contract, within the territory therein defined, any competitor of plaintiff.

By their answer to the amended complaint, defendants denied all allegations of wrongdoing on their part and, as separate defenses, alleged that any and all agreements existing between plaintiff and defendants were mutually abandoned by them on or about April 17, 1939, by reason of plaintiff's appointment of Tri-State Supply Corporation as its exclusive agent in said territory in the place and stead of defendants and with the latters' consent thereto. And that any and all agreements existing between plaintiff and defendants for the sale of plaintiff's merchandise in the territory involved were breached or revoked by plaintiff in the months of November and December 1938 and January and February 1939 in that plaintiff refused and continued to refuse to permit its products "to be sold in the territory in competition with products of like character and quality, and said plaintiff further refused like or equal discounts to the purchasers of its materials in said territory, but was giving and continued to give greater discounts or rebates to one or more purchasers of its materials, than it gave or allowed to other purchasers of its said materials purchasing similar quantities and under similar conditions in said territory".

The cause proceeded to a retrial on June 4, 1943, before the court sitting with a jury. Plaintiff offered no evidence in support of the third cause of action in its amended complaint and, as to such cause of action, a nonsuit was granted.

[1] The issues presented by the first and second causes of action were submitted to the jury, resulting in a verdict for defendants.

From the judgment entered upon such verdict and "from the orders and rulings made in the above entitled action * * * entered on or about the 20th day of July, 1943," plaintiff prosecutes this appeal. Reference by us to the Clerk's Transcript on Appeal discloses no such "orders and rulings", nor are the same referred to in the briefs. Consequently, the attempted appeal from such "orders and rulings" must be dismissed.

[2] Appellant's first contention on this appeal is that, by its decision in the former appeal, this court established the validity of the contract between the parties; that such contract was not mutually abandoned by the parties thereto; and that no just or legal cause existed for cancellation of the contract by defendants. Appellant's contention in this regard must be sustained, and there being no claim that the evidence produced at the second trial in regard to these issues was not substantially the same as was offered at the first trial, the decision on the former appeal became the law of the case, and it was the duty of the trial court to proceed with the second trial upon the theory that the aforesaid issues were determined in favor of plaintiff by the former decision on appeal and that such determination was binding upon the trial court and conclusive of those questions at the second trial.

[3, 4] With reference to defendants' right to terminate the contract, the District Court of Appeal, on the former appeal, in plain and unequivocal language states "Respondents' further contention that they had just cause for cancellation is plainly an afterthought. Such cause, if any, was not made the basis for cancellation. Moreover, the evidence does not sustain the contention and there is no finding on it". Even though it be conceded that, upon the retrial, the evidence was different, the doctrine of the law of the case applies unless on the second trial the evidence was substantially different in a material respect. And this is the rule notwithstanding the fact that in the previous decision evidence contained in the record was not quoted or cited in the opinion. In re Estate of Baird, 193 Cal. 225, 236, 223 P. 974. The case of People's Lumber Co. v. Gillard, 5 Cal.App. 435, 438, 90 P. 556, is authority for the statement that the doctrine of the law of the case is not confined to that portion of the decision of the appellate tribunal which can be said to be strictly essential to the disposition of the case.

From the foregoing, it follows that the defendants are precluded by the "law of the case" now to attack the validity of their contract, or to maintain that such contract was mutually abandoned, or that there existed any just or legal grounds for their cancellation of such agreement. Davis v. Edmonds, 218 Cal. 355, 358, 359, 23 P.2d 289; Sorensen v. Pyrate Corporation, 9 Cir., 65 F.2d 982, 984, 985; Wells v. Lloyd, 35 Cal.App.2d 6, 94 P.2d 373; Coats v. General Motors Corp., 11 Cal.2d 601, 81 P.2d 906.

[5] Furthermore, the evidence clearly establishes the fact that at no time was there a mutual abandonment of the contract, but, on the contrary, abundantly establishes the fact that defendants terminated and breached the contract in violation of the terms thereof.

There is, therefore, left for consideration but two questions: (1) Did appellant fail to prove by a preponderance of the evidence that it lost profits or sustained damages? and (2) If lost profits and damages were proven, did appellant fail to prove, by a preponderance of the evidence, the amount of the damages with reasonable certainty?

To us it clearly appears that there can be no question but what appellant proved by a preponderance of the evidence the net profits it would have made on the business done by respondents for the competitor of appellant after respondents had breached their contract. However, respondents raise the question as to the correct measure of damage. Respondents epitomize appellant's contentions in that regard as follows: "You breached your contract with us. You represented a competitor thereafter. We appointed a new agent in your place. Nevertheless, everything you sold for the competitor you sold for us. You are estopped to deny that our merchandise would have been satisfactory to all buyers of your new principal's products and you are also estopped to deny that you could have sold for us all of the material that our new agent sold as well as all that you sold for our competitor."

It is respondents' contention that if appellant sustained any damage in this case, it would be the difference, if any, between the profits it would have realized had respondents performed throughout the term of their contract, and the amount of profits appellant realized during said term through the activities and performance of its new agent, appointed after respondents had abandoned their contract with appellant. In other words, respondents contend that when the contract was breached the legal duty devolved upon appellant to do, as it did,—appoint a new agent in the territory and thereby minimize its damages. Respondents further argue that appellant's failure to offer proof as to the results achieved through its new agent created a fatal defect in its proof of damage. At the trial, respondents were prepared to prove that appellant's sales were greater in volume and amount than were the sales made by respondents, and that appellant's profits were greater in the years in which it was served by the new agent than in the preceding years when it was served by respondents, but that such evidence was excluded by rulings of the court sustaining objections thereto, as well as to respondents' offers of proof in that regard.

[6, 7] By the terms of their contract with appellant, the respondents accepted the exclusive agency for appellant's products and specifically agreed not to sell or attempt to sell "any similar and/or com-

petitive material in or out of said territory". When respondents breached their contract and sold the merchandise of appellant's competitor in the territory wherein they had agreed not to, we are convinced that the measure of appellant's damage was the profits it would have made had respondents, in accordance with their contract, sold appellant's merchandise as they had agreed to do. In other words, the products of appellant and its competitor being similar and the appellant having proved its ability to furnish such products to the respondents and it being the duty of respondents to sell only appellant's merchandise, it follows that whatever would have been the profit to appellant from the sale of a like quantity of its products by respondents would be the measure of damage. The evidence showed that appellant was able to supply to respondents the same type and character of merchandise which the latter sold for the former's competitor. As to the claimed uncertainty of the amount of damage sustained by appellant we are impressed that the difficulties with which such an issue is beset do not afford a ground upon which respondents can complain since such uncertainties, if any, existed only because of the wrongful act of respondents themselves in breaching the contract. Our view of the measure of damages in this case is supported by the holdings in Long Beach Drug Co. v. United Drug Co., 13 Cal.2d 158, 88 P.2d 698, 89 P.2d 386; Sorensen v. Pyrate Corp., 9 Cir., 65 F.2d 982, 985, 986; Hollywood Cleaning & Pressing Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709; Ahlers v. Smiley, 163 Cal. 200, 205, 124 P. 827; Oakland California Towel Co., Inc., v. Sivils, 52 Cal.App.2d 517, 126 P.2d 651. We hold that appellant was entitled to recover as damages the profits it proved it would have made on the competitive products which respondents, as agents, sold for a competitor in violation of their contract with appellant. What we have herein said is determinative of both the measure of damage and the question of whether such damage was proved with reasonable certainty.

From the foregoing, it is obvious that the judgment appealed from by plaintiff must be reversed. However, there is no reason for the retrial of any issues, except those of damage. All other issues were determined by the law of the case established in the previous decision on appeal.

[8, 9] With regard to the injunctive relief sought in the case at bar, it appears that the contract here in question contains both affirmative and negative stipulations and is a contract of such a nature that specific performance could not be decreed. Therefore, equity will not interfere to prevent a breach of the negative covenants when the affirmative covenants cannot be specifically enforced by judicial decree. To enforce affirmative covenants of the contract with which we are here concerned would require constant and protracted supervision by the court because such covenants provide for a succession of acts and their performance cannot be consummated by one transaction. Manifestly an injunction could not properly be granted herein. Long Beach Drug Co. v. United Drug Co., supra.

Appellant urges that, because there can be no dispute in this case of its right to recover judgment against respondents, and because "there is absolutely no conflict in the evidence as to the amount of the damage suffered by appellant" that in reversing the judgment herein this court should direct the entry of judgment by the court below in appellant's favor for the amount of damages allegedly proved.

[10, 11] As hereinbefore noted, the instant action was not only one in which a jury trial was a matter of right, but the cause was actually tried before a jury. The amount of damages due from defendant was expressly put in issue by the pleadings. By its verdict in favor of the defendants, the jury impliedly found that no amount of damages was due plaintiff from defendants. While section 4½, article 6, of our State Constitution and section 956a of the Code of Civil Procedure gives to the appellate courts, in proper cases, the power to make findings in nonjury cases, the rule seems to be that, in cases where a jury trial is a matter of right and has not been waived, an appellate court will not make findings contrary to the conclusions of the jury. Tupman v. Haberkern, 208 Cal. 256, 280 P. 970. In the instant case, where the parties were entitled to and actually had a jury trial, if this court should direct the trial court to render a judgment in favor of plaintiff after an adverse verdict

by the jury, such judgment would be unsupported either by verdict or findings, and on appeal thereafter would be reversed.

For the foregoing reasons the attempted appeal from "the orders and rulings made in the above entitled case * * * entered on or about the 20th day of July, 1943" is dismissed. The judgment is reversed and the cause remanded for a retrial of the issues of damage only.

YORK, P. J., and DORAN, J., concurred.

66 Cal.App.2d 813

SATARIANO v. GALLETTO.

GALLETTO v. SATARIANO.

Civ. 12715.

District Court of Appeal, First District, Division 2, California.

Nov. 17, 1944.

Hearing Denied Jan. 15, 1945.

1. Adverse possession 🔑74

Even if probate court order setting aside estate to deceased's widow and subsequent decree quieting her title were void, either was sufficient to give widow, and those claiming under her, color of title to the property, sufficient to form basis for acquisition of title by adverse possession.

2. Adverse possession 🔑61, 62(3)

Widow's act in seeking and obtaining probate court order setting aside estate to her, her act in seeking and obtaining decree quieting her title, and her subsequent acts in dealing with property as her own, gave notice of hostility of her claims as against estate of her deceased husband and all persons claiming any interest therein sufficient to form basis for acquisition of title by adverse possession notwithstanding widow had been previously appointed administratrix of husband's estate.

3. Trusts 🔑138

A trustee of an express trust, who openly repudiates trust, may hold adversely to beneficiary and start running of statute of limitations.

4. Husband and wife 🔑14(3)

Where widow acquired title to deceased husband's realty by adverse possession, conveyances were executed whereby undivided one-half interest therein was conveyed to widow and other undivided one-half interest was conveyed to widow and her second husband as joint tenants, on widow's death, her second husband became vested with an undivided one-half interest in the premises as surviving joint tenant and the estate of the widow became vested with remaining undivided one-half interest which was subject to probate.

Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action to quiet title to realty and to recover rent by Joseph Satariano, Jr., as administrator of the estate of Joseph Satariano, deceased, against Joseph Galletto, individually and as administrator of the estate of Maria Satariano Galletto, deceased, wherein the defendant, individually and as administrator, filed a cross-complaint seeking to quiet title to the realty. From an adverse judgment, the defendant, individually and as administrator, appeals.

Reversed with directions.

Charles R. Collins, of San Francisco, for appellant.

Simeon E. Sheffey, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, as the administrator of the estate of Joseph Satariano, deceased, sought to quiet title to a parcel of real property and to recover rent from defendant Joseph Galletto, individually and as administrator of the estate of Maria Satariano Galletto, deceased, formerly Maria Satariano. Said defendant, individually and as such administrator, filed a cross-complaint whereby he sought to quiet title to said parcel. The trial court's findings with respect to the ownership of the parcel were that Joseph Satariano, deceased, was the owner of the parcel at the time of his death in 1921 and that plaintiff, as administrator, was entitled to possession thereof; that the probate court was without jurisdiction to make an order made by it in 1922 setting aside the entire estate of said deceased to Maria Satariano, the widow of said deceased; that certain deeds thereafter made and in which defendant was a grantee were void and of no effect as Maria Satariano had no title to convey as an individual; and that neither Maria Satariano, who was the widow of said deceased and who had later married defendant, nor defendant, had acquired any title by adverse possession. The trial court's conclusions of law were solely to the effect that plaintiff was entitled to judgment for the recovery of possession of said real property together with the sum of $36 as rental. Judgment was entered accordingly and defendant appeals from said judgment.

The facts are undisputed. The real property involved was acquired by Joseph Satariano, deceased, during his lifetime and was used as a dwelling house for himself and family. Joseph Satariano died in 1921. He left surviving him his widow, Maria Satariano, and three minor children. Maria was duly appointed administratrix of his estate, whch estate had a net value, over encumbrances, of $2400. The real property was community property and was so returned in the inventory. In 1922, the probate court made its order setting aside the entire estate to Maria as an estate having a net value not exceeding $2500. Shortly thereafter and when Maria sought to renew a mortgage on the premises, the title company questioned her title. Maria as an individual thereupon filed a quiet title action naming the minor children as defendants. A guardian ad litem was duly appointed for the minor children, an answer was filed and the trial of the cause resulted in a decree quieting Maria's title.

In 1927, Maria married Joseph Galletto, the defendant in this action. Defendant then took up his residence with the family on the property in question and has since resided there at all times. Each of the minor children of Maria left the family home upon attaining the approximate age of twenty years. Maria resided on said property with defendant at all times until her death in 1940. She did not work at any time after her marriage to defendant. The family group, including the minor children, was supported entirely by the earnings of defendant while residing at the family residence.

At the time of Maria's marriage to defendant, the property was encumbered to the extent of $1600. The only property then owned by Maria was the real property in question and about $700 in money. By arrangement with defendant, said $700 belonging to Maria together with $900 belonging to defendant was used to pay off the encumbrance. Thereupon and in 1930, Maria conveyed a one-fourth interest in the property to defendant. Thereafter in 1931, both Maria and defendant executed a deed to the property to a title company which in turn executed a deed to an undivided one-half interest therein to Maria and another deed to an undivided one-half interest therein to Maria and defendant as joint tenants. No further conveyances were made and, after Maria died intestate in 1940, defendant was appointed administrator of her estate. From the time of the order setting aside the estate to Maria in 1922 and until her marriage to defendant in 1927, Maria made all payments for taxes, assessments, repairs and insurance. Since her marriage to defendant in 1927, Maria and defendant made all such payments from the earnings of defendant.

Following the death of Maria in 1940, plaintiff, who was one of Maria's sons by her former marriage, procured his appointment as special administrator of the estate of his deceased father, Joseph Satariano, who had died in 1921. He then brought this action in 1942 and has since procured his appointment as general administrator of said estate. The complaint was in two counts. The first count was in the ordinary form of an action to quiet title. The second count was one for rent claimed to be due from defendant at the rate of $50 per month for nineteen months next preceding the commencement of the action. Defendant filed an answer and cross-complaint denying the material allegations of the complaint; alleging the ownership of Maria and himself; specifically alleging the making of the above mentioned order assigning the property to Maria; the entry of the above mentioned decree in the quiet title action, and the making of the above mentioned conveyances; and further alleging the necessary facts to show adverse possession under color of title by Maria and defendant for a period of more than twenty years prior to the commencement of plaintiff's action. The trial court made the findings hereinbefore mentioned among which were the findings against defendant on the claim that Maria and defendant had acquired title by adverse possession.

On this appeal, defendant urges several points in support of his claim that the judgment should be reversed. We are of the opinion, however, that a reversal is required because of the erroneous findings relating to adverse possession and we are further of the opinion that correct findings on that subject, based upon the conceded facts, will dispose of this litigation.

Plaintiff seeks to support the judgment upon the following claims: (1) That the 1922 order of the probate court setting aside the estate of Joseph Satariano to Maria was void and that it therefore did not have the effect of setting aside the estate or terminating the probate thereof; (2) that the decree entered in the quiet title action was void as the jurisdiction to determine conflicting claims between the heirs of Joseph Satariano, deceased, remained vested solely in the probate court; and (3) that Maria remained administratrix of the estate of Joseph Satariano, deceased, up to the time of her death and therefore could not hold adversely to said estate.

[1-3] We may assume, without deciding, that both the 1922 order setting aside the estate to Maria and the subsequent decree quieting her title were void, but nevertheless either was sufficient to give Maria, and those claiming under her, color of title to the property. Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404; Baker v. Baker, 4 Cal.2d 235, 48 P.2d 685; Brind v. Gregory, 120 Cal. 640, 53 P. 25; 1 Cal.Juris. 571. It seems to be conceded that if Maria had not been the administratrix of the estate of her deceased husband, her conduct and acts during the eighteen years intervening between the entry of the 1922 order and her death in 1940 would have been sufficient to give her title by adverse possession (1 Cal.Juris. 522), but it is contended by plaintiff that the mere fact that she had been previously appointed administratrix prevented her from acquiring such title. Plaintiff has cited no authority supporting this contention and we know of none. It seems clear that her act of seeking and obtaining the order setting aside the estate to her, her act of seeking and obtaining the decree quieting her title and her subsequent acts in dealing with the property as her own gave unquestioned notice of the hostility of her claims as against the estate of her deceased husband and all persons claiming any interest therein. We believe these acts were sufficient to permit her to acquire title by adverse possession for even a trustee of an express trust, who openly repudiates the trust, may hold adversely to the beneficiary and start the running of the statute of limitations. 1 Cal.Juris. 538, sec. 31; 2 Corp.Juris. 166, sec. 314; 2 C.J.S., Adverse Possession, § 91; 1 Am.Juris. 835, sec. 72. Authorities from other jurisdictions clearly show that an administratrix is not barred from acquiring title by adverse possession, at least after the probate court has made an order or decree which purports to make final disposition of the property and which serves to furnish the administratrix, as an individual, with color of title. Mason v. Odum, 210 Ill. 471, 71 N.E. 386, 102 Am.St.Rep. 180; Hysmith v. Patton, 72 Ark. 296, 80 S.W. 151; Reid v. Reid, 206 N.C. 1, 173 S.E. 10; Oxford v. Estes, 229 Ala. 606, 158 So. 534.

Plaintiff cites In re Grider, 81 Cal. 571, 22 P. 908, but that case is sufficiently distinguished in Gregory v. Gregory, 102 Cal. 50, at page 54, 36 P. 364. Plaintiff also cites Blair v. Hazzard, 158 Cal. 721, 112 P. 298, but that case may be distinguished upon the ground that there the probate court had not purported to dispose of the property in question. Plaintiff also cites Estate of Sweitzer, 215 Cal. 489, 11 P.2d 633, but if any question was raised in that case which might have had a bearing upon the question before us, such question was not determined. See page 494 of 215 Cal., page 635 of 11 P.2d. As this court pointed out in Nelson v. Sweitzer, 22 Cal.App.2d 382, at page 385, 71 P.2d 85, at page 87, the supreme court, in Estate of Sweitzer, supra, "left open the question whether Emma Sweitzer had acquired adverse title against the sons."

[4] In view of our conclusion that Maria could and did acquire title by adverse possession, which conclusion requires a reversal of the judgment, we need not discuss the effect of the joint possession of the premises by Maria and defendant over the years following 1930, during which time defendant had at least color of title to an undivided interest by virtue of the conveyances previously mentioned. The due execution of those conveyances is conceded and we are in accord with defendant's claim that, upon the death of Maria, defendant became vested with an undivided one-half interest in the premises as the surviving joint tenant of said one-half interest and that the estate of Maria became vested with the remaining undivided one-half interest which is subject to probate. It therefore appears appropriate to reverse the judgment and to direct a judgment in favor of defendant.

The judgment is reversed with directions to the trial court to reframe its findings and to enter judgment in favor of defendant in conformity with the views herein expressed.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

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66 Cal.App.2d 849

LEONG v. POSTAL TELEGRAPH-CABLE CO.

Civ. 12693.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1944.

1. Workmen's compensation 🔑2146

Generally, a parent of deceased minor whose death arose out of and in course of his employment has no cause of action against employer under section 376, since the Workmen's Compensation Act superseding such statute makes remedy before Industrial Commission exclusive regardless of whether surviving parent was dependent upon minor. Code Civ.Proc. § 376; St. 1937, p. 269, §§ 3600, 3601.

2. Workmen's compensation 🔑2146

The fact that employment of plaintiff's minor son, whose death arose out of and in course of employment, was unlawful because minor was under age of 16 years and employed to deliver messages in city of more than 15,000 inhabitants did not make inapplicable Workmen's Compensation Act provision that Industrial Accident Commission should have exclusive jurisdiction of such cause of action so as give Superior Court jurisdiction of mother's action for son's death under section 376. Code Civ.Proc. § 376; St.1937, pp. 220, 222, 267, 269, §§ 1297, 1303, 3351, 3600, 3601.

◆

Appeal from Superior Court, City and County of San Francisco; Theresa Meikle, Judge.

Action by Grace Leong against the Postal Telegraph-Cable Company for death of her minor son Leland Eng, whose death arose out of and in the course of defendant's employment. From a judgment for defendant, plaintiff appeals.

Affirmed.

Hilary H. Crawford, of San Francisco, for appellant.

Francis R. Stark and Homer Brockett, both of New York City, and Keith & Creede, of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff, who was the mother of Leland Eng, a deceased minor, brought this action against defendant company, which was the employer of the deceased minor, seeking to recover damages for the death of said minor. Defendant demurred to plaintiff's amended complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action and upon the further ground that the court had no jurisdiction of the subject of the alleged action. Defendant's demurrer was sustained without leave to amend and judgment was thereupon entered in favor of defendant. Plaintiff appeals from said judgment.

In our opinion the trial court's ruling must be affirmed upon the ground that the court had no jurisdiction of the subject of the action and we shall therefore confine our discussion to the jurisdictional question.

[1] It is conceded that the allegations of the amended complaint affirmatively showed that the deceased minor was employed by defendant and that his death arose out of and in the course of the employment when he was run over by a truck and killed while engaged in delivering a message for said defendant. Under these circumstances the general rule is that the parent of the deceased minor does not have a cause of action against the employer to recover damages for the death of the minor under section 376 of the Code of Civil Procedure as the provisions of said section 376 are superseded by the provisions of the law relating to workmen's compensation which make the remedy before the Industrial Accident Commission "the exclusive remedy against the employer for the injury or death." Labor Code, sections 3600, 3601, St.1937, p.

269; Gerini v. Pacific Employers Ins. Co., 27 Cal.App.2d 52, 80 P.2d 499; McLain v. Llewellyn Iron Works, 56 Cal.App. 60, 204 P. 869. This general rule has been held applicable regardless of whether the surviving parent was or was not dependent upon the deceased minor. Treat v. Los Angeles Gas, etc., Corp., 82 Cal.App. 610, 256 P. 447.

[2] Plaintiff contends, however, that "The Workmen's Compensation Act does not apply here for the reason that the employment was unlawful". Plaintiff points to the allegations in her amended complaint showing that the minor was under the age of 16 years, being of the age of 14 years and 7 months, and that he was employed by defendant to deliver messages in the City and County of San Francisco, being a city of more than 15,000 inhabitants. It may be conceded that the allegations of the amended complaint were sufficient to show that the employment of said minor was unlawful under the provisions of section 1297 of the Labor Code, St.1937, p. 220, but we do not believe that these allegations were sufficient to render inapplicable the general rule above mentioned which makes the remedy before the Industrial Accident Commission the exclusive remedy against the employer.

Section 3351 of the Labor Code, St.1937, p. 267, provides, " 'Employee' means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written, *whether lawfully or unlawfully employed, and includes: (a) Aliens and minors.* * * *" (Italics ours.) We had occasion to deal with similar language in Massachusetts, etc., Co. v. Industrial A. Comm., 19 Cal.App.2d 583, 65 P.2d 1349. That case did not involve the unlawful employment of a minor but it did involve the unlawful employment of persons in violation of section 303 of the Penal Code. We there referred to the diversity of opinion in the authorities in the several states concerning the effect of so-called illegal or unlawful employment and we expressed the view that the 1917 amendment to section 8(a) of the Workmen's Compensation Act (Stat.1917, Chap. 586, p. 835), had been enacted to set at rest the question of whether minors and other persons, whose employment was unlawful "merely because of some provision of law dealing with such contracts of employment", were entitled to compensation benefits and came within the exclusive jurisdiction of the Industrial Accident Commission. In that case it was urged that said 1917 amendment was intended to apply only to minors who might be unlawfully employed and we held that under the liberal construction which should be adopted, the amendment should be held to apply to other persons as well.

When the affirmative allegations of the amended complaint in the present case are read in the light of the above mentioned authorities, we see no escape from the conclusion that the exclusive remedy against the employer for the death of the deceased minor was in a proceeding before the Industrial Accident Commission and that the trial court was without jurisdiction to entertain an action against the employer for damages for such death. Plaintiff points to section 1303 of the Labor Code, St.1937, p. 222, which imposes a misdemeanor penalty not alone upon the employer but also upon any parent or guardian of a minor who is illegally employed but we cannot attach any significance in this discussion to the provisions of that section. Plaintiff also cites and relies upon several authorities from other jurisdictions but none of the cited cases was decided under statutory provisions similar to those found in section 3351 of the Labor Code. We are therefore of the opinion that the trial court committed no error in sustaining defendant's demurrer without leave to amend.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

66 Cal.App.2d 795

THOMPSON v. LEVEREAU.

Civ. 14438.

District Court of Appeal, Second District, Division 3, California.

Nov. 16, 1944.

Rehearing Denied Dec. 14, 1944.

Hearing Denied Jan. 12, 1945.

1. Partnership 🔑95

An agreement between two of three partners that one of them should represent the other in conduct of partnership business so far as her interest therein required and pay her stated sum monthly from earnings of such interest in consideration of it going to paying partner or his estate on other partner's death did not constitute present assignment of such interest to paying partner.

2. Partnership 🔑95

A provision that agreement between two of three partners for conduct of partnership business by one of them and his payment of monthly sum to other party from earnings of her partnership interest in consideration of such interest going to paying partner or his estate on such party's death was binding on parties' heirs, executors, administrators and assigns did not indicate intention to make present assignment of such interest to paying partner.

3. Partnership 🔑95

Evidence was insufficient to support court's finding that parties to agreement between two of three partners for conduct of business by one of them and payment by him of stated sum to other party from earnings of such party's partnership interest intended to transfer and assign such interest to paying partner.

4. Contracts 🔑170(1)

The practical construction of contract by parties thereto is strong evidence of their intention.

5. Partnership 🔑95

Evidence as to conduct of parties to agreement between two of three partners for management of partnership business by one of them and his payment of specified sum monthly to other party from earnings of her interest was insufficient to support court's finding that parties interpreted agreement as assignment of such interest by one party to the other.

6. Appeal and error 🔑1008(3)

Where there is no extrinsic evidence as to intention of parties to agreement, reviewing court must determine meaning of agreement as matter of law.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by Rosalyn E. Thompson, as executrix of the estate of Louis W. Thompson, deceased, against Anna Belle Thompson Levereau for a declaratory judgment interpreting an agreement between deceased and defendant as partners. Judgment for plaintiff, and defendant appeals.

Reversed.

James T. Boyle, McLaughlin & McGinley, and James A. McLaughlin, all of Los Angeles, for appellant.

Rollin L. McNitt and Edythe Jacobs, both of Los Angeles, for respondent.

FOX, Justice pro tem.

For some years prior to March 24, 1935, Charles and Louis Thompson, who were brothers, operated in the city of Los Angeles a business known as the United States Burglar Alarm Company. On that date Charles died. On April 18, 1935, Louis, Marie Thompson, the widow of Charles, and Anna Belle Thompson Levereau, sister of Louis, entered into a partnership agreement for the purpose of conducting the said burglar alarm business. It was agreed that Marie had a fifty per cent interest in the business and that Louis and Mrs. Levereau each had a twenty-five per cent interest. The partnership agreement specified that profits and losses should be allocated in the proportion of their respective interests. It provided that Marie and Louis were to be the active partners. They agreed to "give their entire time and attention to the conduct of said business." Mrs. Levereau signed a letter, bearing the same date as the partnership agreement, authorizing the payment of any profits from her interest in the business to her brother Louis, and stating that they were "to be shown on the books of the company as having been paid to" him. In April, 1937, a more elaborate partnership agreement was signed by the parties. It specified their interests in the same proportions and gave an option to the partners to buy the interest of another partner before it could be sold to anyone else. In addition to the above provisions of the 1937 agreement, it also allocated the specific duties to be performed by the two active partners—Marie and Louis. It further provided that if either Louis or Marie were absent from the city, ill, or for any other reason was unable to perform his or her duties, then the other would perform them. No duties were assigned Mrs. Levereau.

Louis lived in the home of his sister, Mrs. Levereau, for over twenty years prior to his marriage on November 12, 1938. She was in ill health for a period of some ten years and had been taking care of her mother, who was paralyzed. During that time Louis took care of her business affairs. She had "absolute confidence in him" according to her testimony.

On November 11, 1938, the day before Louis married the plaintiff, he and Mrs. Levereau executed an agreement reading as follows:

"This agreement, made and entered into this 11th day of November, Nineteen Hundred and Thirty-eight (1938), in the City of Los Angeles, County of Los Angeles, State of California

"By and between Belle Thompson Levereau, of the City of Los Angeles, County of Los Angeles, State of California, Party of the First Part, and Louis W. Thompson, of the same place, Party of the Second Part,

"For and in consideration of Ten ($10.00) Dollars in hand paid each to the other, receipt of which is hereby acknowledged, and the further consideration of the covenants herein contained,

"The said parties hereto agree as follows, to-wit:

"That whereas the party of the first part is a co-partner to the extent of a quarter interest in that certain business known and designated as the United States Burglar Alarm Co., sometimes designated as the U. S. Burglar Alarm Co., located at 1315 West Pico Street, in the City of Los Angeles, County of Los Angeles, State of California, and whereas the said party of the first part is unable to devote any time or take any active part in the conduct or management of said business,

"Now, therefore, the said party of the first part, and the party of the second part, covenant and agree as follows, to-wit:

"The said party of the second part agrees to act for and represent the said party of the first part in the conduct and management of said business so far as her interest therein requires, and pay to the said party of the first part from the earnings of her interest in said business during the period of her lifetime not less than One Hundred ($100.00) Dollars each and every month for the said period of her life.

"The said party of the first part agrees to accept the said sum of not less than One Hundred ($100.00) Dollars each and every month for the period of her life as hereinbefore provided, and in consideration therefor, upon her the first party's death the said quarter interest which she has in said business shall go to the said Louis W. Thompson, party of the second part, as his separate property, and in the event of his death prior to the death of the said party of the first part then upon the death of the said Belle Thompson Levereau, party of the first part, said quarter interest in said business shall pass to the Estate of Louis W. Thompson.

"It is further covenanted and agreed, between the parties hereto that in the event of the sale or other disposition of said business during the lifetime of said party of the first part, the parties hereto shall agree to a fixed sum to be paid to the party of the first party by the party of the second part, or his representative, such sum to be based upon a fair and reasonable proportion of the sale price received as her quarter interest bears to the price received for said business.

"This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto.

"Belle Thompson Levereau,
"Party of the First Part
"Louis W. Thompson,
"Party of the Second Part

"Witnesses:
"Fred J. Spring
"Marie K. Thompson

"As a Co-partner, I have no objection to this agreement.

"Marie K. Thompson
"Co-partner."

On the same day an agreement was signed by all the partners giving Louis a credit of $1,339, which was the amount he had overdrawn his share of the income, for the use of his private automobile in the company's business.

Louis died May 20, 1942. Plaintiff, as executrix of the estate of Louis, claimed that the quoted agreement of November 11, 1938, between Louis and Mrs. Levereau, was an assignment of the one-fourth interest therein mentioned, subject to the payment to Mrs. Levereau during her lifetime of at least $100 per month from the earnings of said one-quarter interest. Mrs. Levereau contended that the agreement did not transfer her interest in the partnership but was merely a working agreement between her and Louis which terminated on his death. Following this controversy plaintiff filed a complaint for declaratory relief. The court interpreted the agreement in accordance with plaintiff's contention and further held that in the event of a sale of the business during the lifetime of the defendant the amount she would be entitled to receive for her interest would be based on its value on November 11, 1938, the date of the agreement.

Two principle questions are involved: (1) Does the agreement of November 11, 1938, constitute a present assignment (i. e., an assignment as of that date) of defendant's quarter interest in the partnership; (2) do the circumstances surrounding the execution of the agreement and the subsequent conduct of the parties indicate an intent to make such an assignment? Both of these questions must be answered in the negative.

[1] Taking the agreement "by its four corners", it is first observed that there are no words of present assignment therein. Nor do we find any language which implies such an intent. On the other hand, certain of the language indicates quite the contrary. At the outset the agreement recognizes that defendant has "a quarter interest" in the burglar alarm business and that she "is unable to devote any time or take any active part in the conduct or management of said business." Louis then agrees to act for and represent her "in the conduct and management of said business so far as her interest therein requires." This language plainly indicates that she has an interest in the business and that because of her inability to devote any time to, or to take any active part in, the conduct and management of the business, Louis is "to act for and represent" "her interest therein." Certainly there is nothing in this language which indicates an intention to then assign her interest in the business. The agreement then provides that Louis will pay defendant "from the earnings of her interest in said business" not less than $100 per month for the balance of her lifetime. These payments are to be made from the earnings of her interest in the business, not from his. The clear implication is that she was retaining her acknowledged "quarter interest." If this agreement had been intended as a present assignment of her interest in the business to Louis there would have been no point to his agreeing to make the specified future monthly payments "from the earnings of her interest in said business" because she would no longer have had a partnership interest therein. Her interest in the business which was capable of producing earnings would have become Louis' property. On this point plaintiff poses the inquiry: "If no present assignment was intended by the instrument, how could Louis Thompson pay appellant [defendant] from the earnings of said interest the sum of $100.00, or any sum, as obviously he would not receive the earnings from that interest unless the interest were assigned to him?" The simple answer to this question is that pursuant to defendant's letter of authorization under date of April 18, 1935, the earnings from defendant's interest in the business were then being paid to Louis and had been so paid from the beginning except for a few months when the bookkeeper was unaware of the existence of this letter. No assignment of defendant's interest in the business was necessary for him to receive the earnings from her interest. This agreement by Louis to pay defendant $100 per month "From the earnings of her interest in the business" fixed the amount of those earnings he would be required to pay over to her. It permitted him to keep as compensation for representing defendant's quarter interest in the conduct and management of the business all the earnings from said interest over $100 per month. This was no doubt one of the purposes of the agreement. It is interesting here to note that the profits of the company in 1938 were in excess of $12,000 and in 1941 in excess of $24,000.

Plaintiff asserts that under the assignment theory the interest which defendant would have for Louis to look out for "is the life estate in and to this partnership interest created by the instrument." Obviously the parties were not referring to such an interest when they were agreeing that Louis would "act for and represent" defendant's interest "in the conduct and management" of the business. The interest of the defendant there referred to is the same interest that is referred to in the previous paragraph. It is there recited that defendant has "a quarter interest" in the business and that she "is unable to devote any time or take any active part in the conduct or management of said business." Hence Louis is to represent that interest for her in the conduct and management of the business.

In the next paragraph of the agreement defendant agrees to accept $100 per month for the balance of her lifetime and that upon her death "the quarter interest which she has in said business shall go to" Louis "as his separate property." It is then provided that in the event of his death prior to hers "said quarter interest in said business shall pass" upon Mrs. Levereau's death to the estate of Louis. Certainly no intent to presently assign defendant's "quarter interest" in the business can be gleaned from this language or from the entire paragraph. On the contrary the clear implication is that defendant retained the ownership of her "quarter interest." Otherwise, she would not have any "quarter interest" to "go to" Louis in the event he survived her or to "pass to" his estate if she survived him.

The next paragraph deals with the situation in the event of a sale of the business during defendant's lifetime. It again recognizes that she has a "quarter interest" in the business and provides the basis by which she is to be compensated for "her quarter interest." The amount she is to receive is to be agreed upon. It is "to be based upon a fair and reasonable proportion of the sale price received as her quarter interest bears to the price received for said business." This language must be considered to see if it indicates an intention to presently assign her interest to Louis. We find no such intention. On the contrary, the amount she is to receive for her quarter interest is dependent upon the "price received for said business." This implies that she still has her quarter interest therein. Otherwise, there would be no point to fixing the amount defendant is to receive for her interest based upon its relation to the price received for the business. Whatever implication there is in this language is against rather than in support of plaintiff's contention of a present assignment of defendant's interest. Nor is there anything in the language here used to indicate that the amount defendant is to receive for "her quarter interest" in the event of a sale is to be based upon its value as of November, 1938.

Plaintiff points to the provision that in the event of a sale Louis agrees that he or his representative will pay defendant a fixed sum, to be agreed upon as therein specified, as indicating a present assignment, since it shows that the parties contemplated that the proceeds of a sale of the business would be paid to Louis or his representative and not to defendant. This provision does not indicate such an intent. It is to be first noted that it is her quarter interest, not his, that is here mentioned. The fact that the money she would have received for "her quarter interest," had there been a sale, would have come through Louis or his representative rather than directly to her, is not significant. The significant fact is that defendant was to be paid for her interest in the business in the event of a sale. It must also be remembered in this connection that Louis was undertaking to act for and represent defendant, who was in ill health and whose business he had been looking after for some years, in the conduct and management of the business. The natural and reasonable interpretation, therefore, in light of these circumstances, is that Louis was undertaking to represent and act for defendant in the event of a sale.

[2] Plaintiff seems to argue that the provision making the agreement binding on the heirs, executors, administrators and assigns of the parties indicates an intention to make a present assignment. The purpose of such a provision is not to define or determine the character or extent of an obligation created by an instrument but to show that whatever obligation is created by the document is binding on those who claim under or through the parties thereto.

Plaintiff also argues that the fact that the third partner, Marie Thompson, signed a statement at the end of the document stating that as a co-partner she had no objection to this agreement indicates that a present assignment of defendant's interest was intended. This proposition is lacking in foundation because in the partnership agreement between these parties consent of other partners was required only in the event of the sale of a partner's interest to an outsider.

Whether we consider the agreement in its entirety or analyze it paragraph by paragraph, we are unable to find an intention expressed therein to make a present assignment of defendant's interest in the business to Louis.

[3] Plaintiff argues that the circumstances surrounding the parties at the time the agreement was executed show an intention to make a present assignment of defendant's interest. Bearing in mind the defendant's physical condition, her lack of active participation in the business, the fact that Louis had looked after her affairs for some years and was to be married the next day, it seems clear that the parties were undertaking to work out an arrangement whereby Louis would represent defendant's interest in the business, receive the earnings as he had virtually from the inception of the partnership and pay defendant therefrom a fixed minimum per month. They were also attempting to cover the situation that would arise in the event of a sale of the business or upon the death of the defendant. Finally, by the agreement executed at the same time by all three of the partners giving Louis certain credit for the use of his personal automobile in the business, they were attempting to settle up and adjust their partnership affairs. In this connection it is proper to note that the agreement between Louis and defendant was prepared by the company attorney at the former's direction. Assignments are among the most common of legal documents, and it is a simple matter to find language to express an intention to make an assignment of a property interest. The absence, therefore, of words of assignment, in view of the situation and relation of the parties, is not without significance. The record does not disclose any discussions between the parties with respect to said agreement or the purpose thereof prior to its presentation by the attorney for execution. As to what was said at that time, defendant testified:

"The Court: * * * Just tell what he [Louis] said or did.

"Q. By Mr. McLaughlin: Just say what he said and did and what the others said and did. A. Well, he said—I told him I did not want to sign it, and he said I had to. 'You know,' he said, 'it is only until we sell the business.' They often talked about selling the business. And so he insisted on my signing it, and so I did."

Plaintiff points to this testimony of defendant that she did not want to sign the agreement as indicating that she must have understood she was parting with something more than the income from the one-quarter interest. There is no basis for such an inference, for it is unmistakably clear that the defendant's reluctance to sign the agreement was because she was not satisfied with $100 per month. If the agreement effected a transfer of defendant's quarter interest it was for all time; if it concerned only the income, it would, of course, not endure after a sale should be made. The impression we gain from this testimony is that the parties had in mind only the arrangement with respect to the income from defendant's share until a sale should be made. We fail to find in the circumstances surrounding the execution of the agreement any evidence of an intention to make an agreement different from the one expressed by the language used therein. We therefore fail to find any evidentiary support for the finding "That defendant understood by the agreement of November 11, 1938, that she had assigned the one-fourth interest in the partnership standing in her name to Louis W. Thompson, subject to the payments therein provided." There is likewise insufficient evidentiary support, insofar as the defendant is concerned, for the finding that under the agreement of November 11, 1938, the parties thereto intended to transfer and assign the interest in the partnership which then stood in the name of Mrs. Levereau to Louis Thompson.

[4, 5] Plaintiff also seeks to bring to her assistance the well settled rule that the practical construction placed upon a contract by the parties is strong evidence of their intention. See McCartney v. Campbell, 1932, 216 Cal. 715, 719, 720, 16 P.2d 729; Long Beach Drug Co. v. United Drug Co., 1939, 13 Cal.2d 158, 167, 88 P.2d 698, 89 P.2d 386; Roy v. Salisbury, 1942, 21 Cal.2d 176, 184, 130 P.2d 706. In line with this principle the court found that subsequent to the execution of the agreement the parties thereto interpreted it as an assignment of the interest to Louis Thompson. Then follows a series of facts which presumably are intended to support such finding. The first of these is that "the profits from the said one-fourth interest in the partnership were paid to Louis W. Thompson." There was no change in the handling of the profits from defend-

ant's quarter interest either after or as a result of the agreement. They had been paid to Louis all along, except for a few months in 1935, pursuant to defendant's written authorization dated April 18, 1935. The next recited fact is that "income tax returns filed by the partnership subsequent to the execution of the document reflected Louis W. Thompson as a half owner in the business." But there is no evidence that defendant ever saw one of these returns or knew of this practice. The finding then recites that "no statements of the business were furnished defendant subsequent to the execution of the agreement in question." While the failure of the other members of the partnership to furnish defendant such statements may have some bearing on their interpretation of the agreement, it can certainly have none on the defendant's. She of course is not responsible for what others may have failed to do. Furthermore, Louis had looked after defendant's affairs for years and by the agreement here under consideration had undertaken to act for and represent her interest in the conduct and management of the business. The next statement is that "defendant received only such amount as was necessary to pay her bills which exceeded the sum of $100.00 per month." This is simply in accordance with the provisions of the agreement. It has no significance whatever as to any practical interpretation, by the defendant, of the agreement as an assignment of her interest. The final statement in the finding is that "during the period intervening between the execution of the agreement of November 11, 1938, and some time after the death of Louis W. Thompson in May, 1942, defendant never asserted any claim to the one-fourth interest in the partnership or the profits therefrom and never attempted to exercise any authority or participate in any way in the partnership affairs." Of course defendant never asserted any claim to the profits. Under her written authorization of April 18, 1935, they were to be paid to Louis and to be so shown on the books of the company. Nor was there any occasion for her to assert any claim to the quarter interest in the partnership because no one had challenged her ownership of such interest until Louis died. When plaintiff sought to claim this interest as part of the estate of Louis, defendant promptly asserted her claim of ownership. Just why defendant's failure to attempt to exercise any authority or participate in the partnership affairs has any significance on the question of the practical interpretation of the agreement by defendant as an assignment of her interest is not apparent. She had not attempted to exercise any authority or to participate in the partnership affairs even before the agreement in question. To have attempted such thereafter would have been in contravention of that agreement. It was Louis' duty to act for and represent her interest in the partnership. It should be noted in this connection that the bookkeeper who opened the books of the company on August 1, 1935, and has since handled them, testified that the books at all times showed under the proprietorship account a capital investment of Marie K. Thompson, $1,000, Louis W. Thompson, $500, and Belle Levereau, $500, and it was stipulated that all statements prepared by the bookkeeper showed this proprietorship account as it thus appeared upon the books of the company. The testimony is that the last statements relating to the partnership business were furnished defendant "About four years ago." This testimony was given on June 22, 1943. This would indicate that she saw such statements after the agreement of November 11, 1938. (The court's finding to the contrary on this point does not appear to be supported by the evidence.) Her examination of such statements would have immediately revealed that the books, which she never examined, reflected that she owned a quarter interest in the business. Such reflection would have been in accordance with the testimony of witness Horn that Louis told him, when they were discussing company financing, that Mrs. Levereau had a 25% interest in the business. This was subsequent to the date of the agreement. We are unable to find anything in the conduct of the defendant subsequent to the agreement of November 11, 1938, which can be said to indicate an intention on her part to thereby and then assign her quarter interest in the partnership business to Louis. The finding to that effect is therefore lacking in evidentiary support.

[6] As we have already pointed out, there was no evidence of any negotiations leading up to the agreement in which the terms of a proposed agreement were discussed and there was nothing in the circumstances of the parties at the time they made the agreement, or in their subsequent conduct in carrying out the agree-

ment, which tended in any degree to show that either one of them had in mind that defendant was transferring her interest to her brother or that in the event of a sale her share was to be valued as of November, 1938. The case then is one, in effect, without extrinsic evidence of any nature as to the intention of the parties. The reviewing court is therefore called upon to determine the meaning of the agreement, as a matter of law. Estate of Platt, 1942, 21 Cal.2d 343, 352, 131 P.2d 825; Moffatt v. Tight, 1941, 44 Cal.App.2d 643, 648, 112 P.2d 910; Mitchel v. Brown, 1941, 43 Cal. App.2d 217, 222, 110 P.2d 456; Estate of Janes, 1941, 18 Cal.2d 512, 515, 116 P.2d 438; Estate of DeLano, 1944, 62 Cal. App.2d 808, 814, 145 P.2d 672.

The views herein expressed make it unnecessary for us to pass upon other questions discussed by counsel in their briefs.

The judgment is reversed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; SHENK, CARTER, and SCHAUER, JJ., dissenting.

66 Cal.App.2d 935

HARTMAN v. SAN PEDRO COMMERCIAL CO. et al.

Civ. 14493.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

Hearing Denied Jan. 18, 1945.

1. Contracts 🔑9(3), 10(1)

Conditions subsequent in a contract whereby the contract may be terminated do not destroy the mutuality of the contract, or make the term of the contract uncertain.

2. Contracts 🔑10(2)

A contract, by which plaintiff was employed by defendant for a term of three years, was not unenforceable for lack of mutuality in that the contract could be terminated in the event defendants sold their business or plaintiff entered the armed forces of the United States and did not return.

3. Appeal and error 🔑1010(1)

An award of damages for loss of profits will be sustained if there is a satisfactory basis for estimating the probable earnings that would have been received if the contract had been performed.

4. Damages 🔑40(2)

Where defendant by breaching a contract makes it impossible for plaintiff to realize profits, the probable profits must of necessity be estimated.

5. Master and servant 🔑80(11)

In action for breach of a contract whereby plaintiff was employed to act as manager of defendant's business for a period of three years at a salary of $650 a month and 24 per cent of the net operating profits, evidence as to plaintiff's average monthly income from his own business and while operating defendant's business and as to his average income following his unauthorized discharge and as to the operating profits justified finding that plaintiff's loss was $29,698.67.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by George O. Hartman against San Pedro Commercial Company and others to recover damages for breach of a contract of employment.

From judgment for plaintiff, defendant appeals.

Affirmed.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for appellants.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff after trial before the court without a jury, in an action to recover damages for breach of a contract of employment, defendants appeal.

The evidence being viewed in the light most favorable to plaintiff, and pursuant to the rules set forth in Estate of Isenberg, Cal.App., 146 P.2d 424, the essential facts are:

In the latter part of September, 1942, plaintiff entered into a contract with defendant, San Pedro Commercial Company, hereinafter referred to as defendant, to act as the manager of defendants' hog ranches for a period of three years. The contract was to terminate if (1) defendants sold their business; or (2) plaintiff entered the armed forces of the United States and failed to return.

Plaintiff was to receive as compensation for his services $650 per month and 24% of the net operating profits of defendants. Plaintiff entered into the performance of the contract and continued to perform it until he was discharged by defendants on February 1, 1943.

The present suit was instituted to recover damages for breach of the contract and resulted in a judgment in favor of plaintiff in the sum of $29,698.67.

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

[1, 2] First: *Was the contract unenforceable because of (1) a lack of mutuality due to the fact that the contract could be terminated in the event (a) defendants sold their business or (b) plaintiff entered the armed forces of the United States and did not return; (2) uncertainty in the length of the term of the contract?*

This question must be answered in the negative. The law is established that conditions subsequent in a contract whereby the contract may be terminated do not (1) destroy the mutuality of the contract; or (2) make the term of the contract indefinite or uncertain. Vitagraph, Inc. v. Liberty Theatres Co., 197 Cal. 694, 701, 242 P. 709; McMullan v. Dickinson Co., 63 Minn. 405, 65 N.W. 661, 663. See also Thomas v. Anthony, 30 Cal.App. 217, 222, 157 P. 823.

In the present case the contract was to run for the term of three years subject to termination upon the happening of either of the contingencies set forth above. Thus there was a definite term for the contract and under the rules of law stated above the condition subsequent whereby the term of the contract might be ended did not destroy the mutuality of the contract.

Shortell v. Ewans-Ferguson Corp., 98 Cal.App. 650, 277 P. 519, relied on by defendants, is inapplicable to the facts of the present case. In the Shortell case, the vendor of real property reserved the right to terminate the contract by returning a deposit which had been made by the vendee at any time before the contract of sale was signed, thus the vendor was not bound to do anything and the contract lacked mutuality. In the instant case, both parties to the contract were bound unless and until one of two future events occurred. Neither party had the sole power to cause either event to take place.

Second: *Was there substantial evidence to sustain the trial court's finding that plaintiff had been damaged in the sum of $29,698.67?*

This question must be answered in the affirmative, and is governed by the following rules:

[3] 1) An award of damages for loss of profits will be sustained if there is a satisfactory basis for estimating the probable earnings that would have been received if the contract had been performed. Sobelman v. Maier, 203 Cal. 1, 9, 262 P. 1087. See also Natural Soda Products v. City of Los Angeles, 23 Cal.2d 193, 199, 143 P.2d 12.

[4] 2) When defendant by breaching a contract makes it impossible for plaintiff to realize profits, the probable profits must of necessity be estimated. Sobelman v. Maier, supra; Natural Soda Products v. City of Los Angeles, supra, 200.

[5] The record discloses in the present case that plaintiff from May 1, 1942, to January 31, 1943, while operating defendant's business and his own business as a public accountant, received an average monthly income of $2,268.75, exclusive of his percentage of profits under his contract with defendant; that from February 1, 1943, after his discharge by defendants, to September 30, 1943, his average monthly income was $1,757.48; that he thus sustained an average monthly loss of $511.29, exclusive of profits under the contract he had with defendants.

The evidence also shows that plaintiff sustained a loss in connection with his contract which called for 25% of the net operating profits.

His loss on his contract, so far as his salary was concerned, during the remainder of the period of the contract totaled $16,105.10. His loss of profits, averaging the profits earned during the period of time that he was employed to the time of trial, showed a loss of $21,478.59, or a total loss of salary and profits amounting to $37,583.69.

Applying the rules set forth above to the facts in the instant case, it is thus apparent that there was substantial evidence to sustain the trial court's finding that plaintiff's loss due to defendant's breach of contract was the sum of $29,698.67.

For the foregoing reasons the judgment is affirmed.

W. J. WOOD, J., concurs.

MOORE, P. J., deeming himself disqualified, did not participate in the foregoing decision.

Hearing denied; EDMONDS and SCHAUER, JJ., dissenting.

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66 Cal.App.2d 938

HARTMAN v. SAN PEDRO COMMERCIAL CO. et al.

Civ. 14494.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

Appeal and error 🔑1075

Where appellants in their opening brief waived any objection to the judgment from which they appealed, judgment was affirmed.

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Action by George O. Hartman against San Pedro Commercial Company and others to recover damages for breach of contract of employment. Judgment for plaintiff, and defendants appeal.

Affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for plaintiff.

Oliver O. Clark and Robert A. Smith, both of Los Angeles, for defendants.

McCOMB, Justice.

Defendants appeal from a judgment in favor of plaintiff after trial before the court without a jury in an action to recover damages for breach of a contract of employment. The trial court gave judgment in the sum of $707.47.

Defendants in their opening brief waived any objection to the judgment, therefore it should be affirmed.

It is so ordered.

W. J. WOOD, J., concurs.

MOORE, P. J., deeming himself to be disqualified, did not participate in the foregoing decision.

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66 Cal.App.2d 714

PEOPLE v. BARNHART.

Cr. 3804.

District Court of Appeal, Second District, Division 1, California.

Nov. 6, 1944.

Hearing Denied Dec. 4, 1944.

1. Gaming 🔑75(1)

Violation of statute penalizing the keeping and occupancy of house with paraphernalia used for purpose of registering bets on horse races is complete when accused occupies place with papers and paraphernalia for such purpose, and actual making of bets need not be shown. Pen. Code, § 337a, subd. 2.

2. Gaming 🔑98(5)

In prosecution for keeping and occupying place or room with paraphernalia used for purpose of registering bets on horse races such purpose need not be established by direct evidence, but may be gathered from all surrounding circumstances shown by evidence. Pen.Code, § 337a, subd. 2.

3. Criminal law 🔑1159(6)

Where circumstances in evidence reasonably justify trial court's finding of accused's guilt of offense charged, reviewing court is not warranted in disturbing such finding.

4. Gaming 🔑98(5)

Evidence was sufficient to sustain conviction of keeping and occupying house with paraphernalia used for purpose of registering bets on horse races. Pen.Code, § 337a, subd. 2.

5. Gaming ⇐98(3)

Evidence was sufficient to sustain conviction of recording and registering bets on horse races. Pen.Code, § 337a, subd. 4.

6. Telegraphs and telephones ⇐79

One accused of occupying house with equipment for registration of bets on horse races is not "sender" of telephone communications, intercepted by police officers in such house, within Federal Communications Act prohibiting interception of communications without authorization by sender. Pen.Code, § 337a, subds. 2, 4; Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

See Words and Phrases, Permanent Edition, for all other definitions of "Sender".

7. Criminal law ⇐419(11)

A police employee's testimony as to her telephone conversations with persons seeking to place bets on horse races at house of one accused of keeping and occupying house with paraphernalia for purpose of registering such bets was inadmissible as hearsay. Pen.Code, § 337a, subds. 2, 4.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Marjorie P. Barnhart was convicted of keeping and occupying a house with paraphernalia used for registering bets on horse races and of recording and registering such bets, and she appeals.

Affirmed.

Franklin B. MacCarthy, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for respondent.

YORK, Presiding Justice.

Following a trial upon an information containing two counts charging that plaintiff on July 28, 1943, (1) kept and occupied a house at 1809 North Marengo Avenue, Pasadena, with paraphernalia used for the pupose of registering bets on horse races; and (2) recorded and registered bets on horse racing, in violation of subdivisions 2 and 4, respectively, of section 337a of the Penal Code, plaintiff was found guilty as charged and sentenced to the County Jail for a term of thirty days as to each count, sentences to run concurrently.

This appeal is prosecuted from the judgment of conviction, it being contended that the evidence is insufficient to sustain the judgment, and that the trial court committed errors of law in the admission of evidence.

By stipulation, the cause was submitted to the trial court upon the transcript of the preliminary examination, which discloses that on July 28, 1943, around 12:10 p. m., Paul De Falla, a deputy sheriff of Los Angeles County, accompanied by another deputy sheriff, went to the premises in question, and, according to De Falla's testimony, he knocked at the back door and told appellant, who answered the summons, that he had come "to check some suspected gas leaks." Said premises consisted of a five room house where appellant and her husband resided, and a small house in the rear occupied by appellant's grandmother. Appellant was alone in the house, and as the officers walked through the front room and down a hall to a smaller room containing some bookmaking paraphernalia and two telephones, appellant preceded the officers at which time "One of the telephones was on its cradle and the other telephone was off its cradle. She (appellant) took one off while I was there. I saw her do it." At the instant trial, it was stipulated that "there were two phones in the rear house and one was connected with the telephone in her (appellant's) house."

In addition to the telephones (Exhibit A), a yellow sheet (Exhibit B) referred to as a betting marker; a Metropolitan scratch sheet (Exhibit C); two telephone bills (Exhibit D); and an exemplar of appellant's handwriting (Exhibit F), were introduced in evidence.

Officer De Falla immediately placed appellant under arrest at which time the following conversation took place between him and appellant, in the presence of deputy sheriff Kapic, officers Hand and Hughes of the Pasadena Police Department, and Mrs. Sherman, a clerk in said department.

"I asked Mrs. Barnhart how long she had been book-making there at that address and she said she wasn't booking at all. I asked her who she was working for or if she was working for herself. She replied that she wasn't working. I then asked her if she lived there and she said she did. I asked her for how long she had been living there and she said she had lived there for three years. I asked her if she was the owner of the house and she said she was the owner of it. I asked her in whose name were the telephones there, and who paid the bills, and she gave me the name of Ethel Barnes and Stanley C. Barnhart. I asked her if Stanley C. Barnhart was her husband, and she said he was. I asked her where he was, and he was out of town, according to her. I asked her who was the elderly lady in the little house in the rear of the lot, which was numbered 1811 North Marengo Avenue, and she said the elderly lady was her grandmother. I then asked her how she got the race results, whether over the radio, and she said, 'How could I when the radio isn't turned on?' I asked her if she got service over the telephone and she said 'I don't know what you are talking about.' I asked her if she had written these records there, and she replied that she would rather not talk until she had an opportunity to see somebody about it. Then I accused her of being a book-maker and she denied it."

This witness qualified as an expert on book-making and testified that the betting marker, Exhibit B, "is ruled off in pencil and under various names there are listed columns of figures"; that these represented "bets made by the people under whose names they appear. The names on the sheet are Dad, Bob, A.B., Charlie, R.E.C., Knight—turn the page over—there is the name MacGore, which is an abbreviation for something. Then Rex, Teddy, Don, Edna, Bailey and Barnes. Under these names some numbers appear." Then referring to the scratch sheet, Exhibit C, bearing the date of July 28, 1943, the witness testified that the scratch sheet "has the entries, or purported entries, running at race tracks through the United States, such as Saratoga, New York, Suffolk Downs in Massachusetts, and Arlington Park, in Illinois. Under each of these race tracks there are several races listed, running from 1 to 8 or 9. Now, in each of these races there has been a number placed and it is those numbers of each race that compare to the numbers under the various names I just stated." As the result of a check of the scratch sheet with the numbers and marks appearing upon Exhibits B and C, the witness testified: "Under the name 'Teddy' there appears the figures 302 dash 10 dash 5 dash zero. The 302 refers to the horse purported to be running in the second race at Saratoga, New York, said horse being named 'Royal Nap'. That is what the 302 means. * * * And the figures '10' after it, in my opinion means $10.00 to win; and the figure '5' after that means $5.00 to place; and the figure '0' after that means nothing to show. * * * The next column down and still under the name Teddy there appears to be the following figures, 650 dash 10 dash 5 dash zero. The number 650, in my opinion— * * * The 650, in my opinion, referring to the horse named 'Liberanti', purported to be running in the third race at Arlington Park, Illinois. The 10 after that means a $10.00 wager to win; the 5 after that means $5.00 to show—no, $5.00 to place, and the zero means nothing to show." Taking the name Edna, the witness testified, "There are the figures 281 dash 10. The 281, in my opinion, refers to a horse by the name of 'Hasteville' purported to be running in the fifth race at Saratoga, New York. The figure 10 after that means a $10.00 wager was made for the horse to win." He then testified that his opinion was based upon the customs and usages incident to the book-making fraternity in Los Angeles County; and that he made an individual check of all of the enumerated numbers under these respective names with the scratch sheet, Exhibit C.

When officers Hand and Hughes arrived at the scene the telephone receivers were replaced on the hooks and Mrs. Sherman, a clerk in the Pasadena Police Department, answered the telephones as they rang, to-wit: "There was one 'phone on a chair and the other one was on the desk. And so I answered the one on the chair, and I said 'Go ahead', and a man's voice * * answered and said 'Who is this?' and I said 'Jane', not knowing the first name of Mrs. Barnhart. And he said, 'How are you?' and I said, 'I am fine'; and then he said, 'Do you know who this is?' and I said 'No'. I then said, 'Go ahead if you want to place any bets'. * * * And he said, 'What are you talking about?' and I said, 'Go ahead'. Then he said, 'I just wanted to ask you for a date tonight', and I said 'What are you talking about'; I said 'you know I won't go out with you'. And he said, 'Well, never mind then', and hung up. In the meantime the other telephone was ringing and I answered that, and as soon as I answered that Officer De Falla asked Mrs. Barnhart her name and I overheard the conversation and she told him her name was Marjorie. So I answered the phone and I said 'Hello', and the voice on the other end of the line said 'Hello' and I said 'Hello', and he said 'Who is this?' and I said 'This is Marjorie', and he said, 'No, it isn't'. He said, 'I know her voice'. Then I said, 'No, this isn't Marjorie, she is busy; can I help you?' He said, 'Yes, in the 5th race at Saratoga', and I said 'which horse'? and he said 'the same', and I said 'how much'? and he said 5, 5 and 8. * * * Then the next time the 'phone rang I said 'Hello', and a voice said 'This is Charlie', and it then said, 'Hi, Marj.,' and he said, 'Give me one across on Diggie in the first race at New York.' I said 'Any others?' and he said, 'One across on Number 17, the second at Washington.' Then the 'phone on the chair rang and I said 'Hello', and a voice said, 'Is this Marj.?' and I said, 'Yes', I said 'This is Marj.' and a woman's voice said, 'What's the matter?' and I said, 'Nothing', and then I said, 'Who is this?' and she said, 'This is Erma, don't you recognize my voice?' and I said, 'O. Hello, Erma, how are you?' and she said 'Fine'. In the meantime the telephone on the desk rang and I said, 'Will you hold the 'phone as I want to take another call', and I answered that by saying 'Hello', and a voice said, * * 'This is Ann and I want to place a bet for Katherine'. I said, 'Which race?' and she said, 'In the third at Arlington', and she wanted two across on Bellmand and two across on Trust Buster and four across on Bitter End. Then she hung up and I returned to the telephone where Erma had been holding on and I said 'Okey', and she said 'I thought you were in trouble as it sure didn't sound like you at first', and so I coughed and said, 'I have a very bad cold'. I said, 'I am kind of rushed if you want to give me any wagers you better hurry with them', and she said 'Okey, give me the fifth at New York, number 1, two across, and number 10, one across.' Then the last bet I got, or the last party I talked to was a man named Dave, and that was also when I hung up after talking to Erma on the same 'phone. He said, 'This is Dave', and he started right out and said 'Give me the third at Suffolk, number 1, two across the board.' He then said, 'At Arlington Park, Margin in the 5th, two across, and Roiter in the sixth, two across, and Fortress in the second, two across,' and then he said, 'Suffolk in the eighth, two across'."

The witness Hughes testified as to People's Exhibit F for Identification, that it was an exemplar of the handwriting of appellant and that she wrote it in his presence.

A handwriting expert, Officer Don E. Mier of the Los Angeles Police Department, testified that in his opinion "the pencil writing on the face of the paper marked People's Exhibit F, and the pencil writing on the reverse side of People's Exhibit F, was made by the same person that made the pencil writing, that is, most of the pencil writing on People's Exhibit B (the betting marker). * * * In my opinion, the pencil writing on People's Exhibit F, the front and reverse sides of it, and most of the pencil writing on People's Exhibit C (the scratch sheet) was made by the same person. Q. Is there some writing by someone else on that People's Exhibit C for Identification? A. Yes, there is; I have some writing of my own on there. Q. Well, then, how much of the writing on that exhibit— A. (interrupting) I would say practically all of the figures on the inside relating to the race at Saratoga. Q. You refer to the figures on the left-hand margin. A. That is correct; and also here, the second column where it says 'Odds', in my opinion, all that writing in each one of the races was made by the same person that wrote People's Exhibit F for Identification." On cross-examination, said witness in answer to the question: "Now, referring to that marker (Exhibit B) you said that most of the handwriting thereon was put there by the person that wrote the exemplar * * * You say that most of it is in the same handwriting? A. That is correct. Down in the lower righthand corner there are some initials, and it looks like W.T. and W.K., and there is also some pen and ink writing, and also I have some writing, my initials 'D.M.' and the number 81743, meaning 8/17/43, that I put on there. All the rest of the writing with the exception of that, in my opinion, was made by the same person that wrote People's Exhibit F for Identification. Q. Is it your opinion then that there are three or more different handwriting on the marker; is that correct? A. I wouldn't say how many, but there are different writings on there. Q. There are more than the defendant's and yourself; is that correct? A. Yes, I would say so."

Appellant urges that "the Metropolitan scratch sheet and the betting marker, while they contained some writings of defendant, did not establish that defendant registered a bet. Neither did the presence of these documents at the home of defendant and her husband constitute a violation of subdivision 2 of section 337a of the Penal Code."

While it is true that mere presence of these documents in the house, standing alone, might not constitute a violation of said subdivision 2, their presence under the circumstances above recited, both of them bearing appellant's handwriting, the betting marker containing thirteen entries of bets on horseraces being run at various tracks throughout the United States on the day in question, and the fact that appellant, in order to prevent the telephones from ringing while the officers were in the house, removed the receivers from the hooks,—considered altogether, present a situation that is inconsistent with innocence and consistent with the hypothesis of guilt, not only of a violation of subdivision 2 of section 337a of the Penal Code, but of subdivision 4, thereof, as well.

[1-3] It is now well settled that a violation of subdivision 2, supra, is complete when it is shown that the accused occupied a place with papers and paraphernalia for the purpose of registering bets. The offense denounced by that subdivision is the occupancy of the place with the necessary equipment for recording bets, not the actual making of bets. People v. Kabakoff, 45 Cal.App.2d 170, 173, 113 P.2d 760; People v. Manning, 37 Cal.App.2d 41, 43, 98 P.2d 748; People v. D'Angelo, 60 Cal.App.2d 73, 78, 140 P.2d 113; People v. Hinkle, 64 Cal.App. 375, 380, 221 P. 693. Moreover, the purpose for which the place or room was being used and occupied need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the evidence. People v. D'Angelo, 60 Cal.App.2d 73, 78, 140 P.2d 113; citing People v. Tuttle, 27 Cal. App.2d 647, 649, 81 P.2d 571; People v. Tepper, 36 Cal.App.2d 525, 527, 97 P.2d 1002. If the circumstances shown in evidence reasonably justify the finding of guilt by the trial court, a reviewing court is not warranted in disturbing the finding. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Allen, 22 Cal.2d 191, 137 P.2d 439; People v. Vertlieb, 22 Cal.2d 193, 137 P.2d 437. See, also, People v. D'Angelo, supra, 60 Cal.App.2d at page 79, 140 P.2d 113.

Under the authority of People v. Joffe, 45 Cal.App.2d 233, 235, 113 P.2d 901, and People v. Reifenstuhl, 37 Cal.App.2d 402, 405, 99 P.2d 564, evidence of telephonic conversations between arresting officers and persons calling the establishment are properly admitted as tending to establish the fact that the premises were occupied for the purpose of bookmaking.

[4] Applying the foregoing principles of law to the facts disclosed by the record herein, the evidence is sufficient to sustain the conviction of a violation of subdivision 2, section 337a, supra.

[5] Subdivision 4 of the statute provides: That every person "Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result", of a horserace, "is punishable" etc.

It was held in the recent case of People v. Newman, 24 A.C. 162, 168, 148 P.2d 4, quoting from the syllabus, that the evidence therein presented sustained a finding that defendant had registered an actual bet, contrary to the provisions of said subdivision 4 of section 337a of the Penal Code, "where scratch sheets, on which the names of numerous horses were checked off or erased, were under his coat and in the room in which he was arrested; where papers on which were figures and words, known as betting markers, were found in a nearby room; and where a memorandum book which he deposited at the police station after his arrest contained many similar entries of names, dates and amounts." It was further stated in the cited case: "All the paraphernalia used by bookmakers was found in the possession of the appellant at the time of his arrest, and no explanation is to be found in the record as to any reason why he had these articles or was using them in the manner shown by the evidence. Then his attempt to conceal from the arresting officers the National Scratch Sheet under his coat, and the group of papers found in Room 18 tend to show that he was not using them for a legal purpose."

In the instant case, there was present and in the possession of appellant all the paraphernalia used by bookmakers; likewise appellant did not explain innocently or at all its possession. Moreover, guilty action was present in that appellant tried to stop incoming telephone calls by taking and leaving the telephone receivers off the hooks, and as soon as the telephones were restored to operation bets were received by the witness Sherman, as hereinbefore narrated. Suffice to say, there is sufficient evidence in the record to sustain the judgment of conviction of a violation of subdivision 4, section 337a, supra.

[6] At the time of the trial, appellant urged that the narrative of a series of telephone conversations given by a police employee, Mrs. Elizabeth Sherman, which are quoted verbatim in this opinion, violated the Federal Communications Act of 1934, 48 Stat. 1064, 1103, 47 U.S.C.A. § 605, and the cause was submitted to await the outcome of People v. Kelley, 22 Cal.2d 169, 137 P.2d 1, which was then pending before the United States Supreme Court on a "Petition for Appeal" which has since been denied.

Appellant here contends that her conviction based upon "the divulgence of intercepted telephone conversations" in violation of said Federal Communications Act "constitutes the deprivation of defendant's liberty without due process of law, in violation of the 14th Amendment to the Constitution of the United States."

In the Kelley case, supra, it was held by our Supreme Court that, assuming that the Federal Communications Act of 1934 which declares that no person not authorized by the sender shall intercept or divulge the contents of a communication, applies to evidence offered in a state court, such statute does not render inadmissible the testimony of police officers as to telephone calls received by them in an apartment which accused occupied with equipment for the purpose of recording bets, as the accused was not a party to the intercepted communications and hence was not a sender entitled to the protection of the statute.

For the reasons stated, the judgment is affirmed.

DORAN, Justice.

[7] I concur in the judgment. But I know of no rule or principle of law that authorizes or justifies a relaxation of the hearsay rule for expediency. The evidence of the telephone conversations was pure hearsay. Evidence of the fact that a conversation was received would be admissible for the purpose of proving that the telephone was in order and functioning, but for no other purpose; the substance of the conversation is unnecessary for this purpose. The argument in People v. Joffe, 45 Cal.App.2d 233, 235, 113 P.2d 901, 902, namely, that such evidence is admissible because "it tended to establish the fact that the premises were occupied for the purpose of recording wagers on horse races", clearly permits a consideration of hearsay for the purpose of proving the very offense charged. And the same inaccurate reasoning appears in People v. Reifenstuhl, 37 Cal.App.2d 402, 405, 99 P.2d 564, 566, where the court declared, referring to such evidence, that "It was not subject to the hearsay rule. The conversation was not admitted for the purpose of proving its own contents (16 Cor. Jur. 624) but to prove the use to which the telephone was subjected by the public and to demonstrate the reaction of the defendant at the time. The use of the room occupied by defendant was in issue and the nature of the telephonic call was a circumstance to establish the truth. The uses to which a telephone is put reveal more truthfully the character of the establishment that houses the instrument than do the words of description attached to the listing."

It is futile to argue that such evidence is not hearsay. In my judgment the preservation of the hearsay rule is not only important but vital in the administration of justice. To relax the rule just to uphold the conviction of a bookmaker, or for any other purpose, is nothing short of judicial stupidity.

WHITE, J., concurs.

Hearing denied; CARTER and SCHAUER, JJ., dissenting

25 Cal.2d 259

RICE v. SCHMID et al.

L. A. 19018.

Supreme Court of California.

Nov. 24, 1944.

1. Sales 🔑152

Provision in contract for sale of 6,000 barrels of flour, that buyer was to furnish seller, at least ten days before time for shipment, complete shipping instructions indicated that parties did not contemplate that seller should at all times have on hand in warehouse sufficient flour to fulfill contract but that he was to have at least ten days in which to make any delivery requested by buyer.

2. Sales 🔑181(11)

Where contract for sale of 6,000 barrels of flour provided for deliveries over a period of 90 days at instructions of buyer upon ten days' notice or for later delivery upon same terms unless seller terminated contract for delivery, that seller had only 200 barrels on hand on 91st day although contract called for an eventual delivery of 2,755 more barrels did not authorize a finding that seller could not deliver flour as required by contract, and did not sustain judgment limiting recovery to difference between market and contract price for 200 barrels.

3. Appeal and error 🔑1212(4)

Where Supreme Court on first appeal in seller's action for breach of contract to buy flour reversed judgment for buyers and directed trial court to determine seller's damages in accordance with rules, set forth in opinion, on remand, trial court erred in considering issue of seller's ability to perform.

4. Appeal and error 🔑1212(4)

Where a reviewing court reverses a judgment with directions to determine damages in accordance with the rules set forth in its opinion and to enter judgment for plaintiff, trial court is bound by directions given and has no authority to retry any other issue or to make any other finding.

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In Bank.

Appeal from the Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by R. L. Rice against John Schmid and others for breach of contract to purchase flour from plaintiff, wherein Augusta Schmid, as administratrix of the estate of John Schmid, deceased, was substituted as a party defendant. From a judgment for defendants, plaintiff appeals.

Reversed with directions.

Prior opinion, 145 P.2d 638.

H. M. Lineman, Mab Copland Lineman, and Benjamin Lewis, all of Los Angeles, for appellant.

W. W. Wallace, of Los Angeles, for respondents.

GIBSON, Chief Justice.

On a prior appeal by plaintiff (18 Cal.2d 382, 115 P.2d 498, 138 A.L.R. 589) a judgment for $712.45 for breach of a contract to purchase flour was reversed with directions, and thereafter a second judgment for $190 was entered. Plaintiff, asserting the trial court failed to follow such directions, has appealed for the second time.

On July 16, 1937, plaintiff, a wholesale flour merchant, entered into a written contract with John Schmid, the proprietor of the Eagle Bakery, in which he agreed to sell to Schmid 6,000 barrels of flour at the following prices:

Barrels	Price per barrel
2,000 "Ravalli" brand wheat flour at..	$7.10
2,750 "Gold Cross" brand wheat flour at	7.65
1,250 "Isis" brand wheat flour at....	7.15

The contract provided that shipment was to be made upon instructions from the buyer within ninety days from the date of the contract. The contract was to be automatically extended if, on account of the fault of the buyer, not all of the flour was shipped within the ninety-day period unless the seller chose to terminate it upon that ground. At the time plaintiff made his contract with Schmid, he (plaintiff) entered into a second contract with a mill for the purchase of the flour at a price which would leave him a margin of profit.

A portion of the flour had been delivered under the terms of the contract when John Schmid sold the Eagle Bakery to the defendants Anthony Marik, Felix Marik, John A. Dull and E. A. Osterman, who assumed the obligations of Schmid's contract with plaintiff. Further deliveries of flour were made to the Eagle Bakery under the contract until a total of 3,245 barrels had been delivered. On December 2, 1938, defendants having failed and refused to order the balance of the flour, plaintiff elected to terminate the contract, pursuant to its terms, and to hold defendants liable for the breach.

After the commencement of this action, defendant John Schmid died, Augusta Schmid was substituted as administratrix of his estate, and a supplemental complaint was filed alleging the presentation and rejection of a claim against the estate.

On the first trial, the court found that defendants had breached the contract and gave judgment for the plaintiff against all defendants. In arriving at the amount of damages, the court rejected plaintiff's claim for liquidated damages as specified in the contract, and computed plaintiff's damages on the basis of the difference between the price Schmid agreed to pay plaintiff and the price plaintiff agreed to pay the mill.

Plaintiff, being dissatisfied with the judgment, appealed. We held (18 Cal.2d 382, 115 P.2d 498, 501, 138 A.L.R. 589) that although the trial court correctly determined that this was not a proper case for liquidated damages it used an erroneous measure of damages in arriving at its decision. We pointed out that plaintiff was entitled to recover the difference between the contract price and the *market price* at the time when the goods should have been accepted. The judgment was reversed "with directions to the trial court to determine the damages in accordance with the rules herein set forth and thereafter to enter judgment in favor of plaintiff." Defendants, stating they were in agreement with the principles of law enunciated in our opinion, petitioned for a change in the form of our order from a reversal with directions to outright reversal. But as defendants had not appealed, and as the only issue raised by plaintiff in his appeal was the determination of the proper measure of damages, the petition was denied.

After the remittitur was filed, plaintiff made a motion in the trial court to have damages computed pursuant to the ruling of this court, and for judgment for plaintiff in accordance with such determination. The motion was denied, the matter was set for hearing, and additional evidence was received over the objection of plaintiff. A second judgment, from which this appeal is taken, was then entered for plaintiff, apparently based on the finding that plaintiff should have made delivery on October 15, 1937, the ninety-first day after the contract was made, that the difference between the market price and the contract price on October 15, 1937, was 95 cents per barrel, and that plaintiff then had on hand only 200 barrels. The court concluded that plaintiff was entitled to recover only the difference in price for 200 barrels.

The interpretation of the contract by the court on the second trial and the conclusions of law with reference thereto are in direct conflict with our decision in 18 Cal. 2d 382, 115 P.2d 498, 138 A.L.R. 589, and are contrary to well-established rules of law. See 18 Cal.2d 382, at page 388, 115 P.2d 498, 138 A.L.R. 589; and cases cited in annotations in 44 A.L.R. 215, 108 A.L.R. 1482 and 120 A.L.R. 1192.

It was held on the prior appeal that under the terms of the contract defendants' obligation to accept the flour continued until the termination of the contract; that "the damages should be the difference between the contract price and the market price on the date of the final termination of the contract"; and that plaintiff was not bound to keep on hand at all times sufficient flour to fulfill the terms of the contract but that he "was free to wait and procure flour at the market price when ordered by the buyer."

[1-3] The contract provided that "The buyer shall furnish the seller, at least ten (10) days before the time for such shipment, complete shipping instructions." This provision and the conduct of the parties show that it was never intended that the seller should at all times have on hand in his warehouse sufficient flour to fulfill the contract, but that he was to have at least ten days in which to make any delivery requested by the buyers. Since there is no claim of any default on the part of plaintiff in making deliveries as requested, the fact that he had only 200 barrels on hand, or that he did not have any flour on hand at a given time, is wholly immaterial and cannot furnish any basis for a finding that he could not deliver the flour as required by the contract. As was held on the prior appeal (18 Cal.2d 382, 388, 115 P.2d 498, 501, 138 A.L.R. 589), "plaintiff's only obligation was to procure flour of the specified brands, whether from the miller or on the market, for delivery in accordance with shipping instructions to be furnished him by the defendants. He was free to enter into a contract with a manufacturer to protect himself or to speculate upon a decline in the market before delivery would be required." Defendants, having obtained extensions of time and having finally refused to give shipping instructions as requested, were in no position to complain because plaintiff refrained from adding to his damages by warehousing flour which defendants were not prepared to accept. There was no evidence whatever to indicate that plaintiff was or might have been unable to perform but, on the contrary, the facts, including the making of a contract with the miller, show that the plaintiff was ready, able and willing to perform and would have done so if defendants had given the requested instructions. This matter should not have been considered on the second trial which, as pointed out herein, should have been limited to the issue of damages; but even if it had been properly raised, there was no evidence to support a finding that plaintiff was unable to perform his part of the contract.

On the second trial, the court made a further finding to the effect that there was no breach of the contract by John Schmid, deceased, and concluded that judgment should be entered in favor of the estate. This is, of course, directly contrary to the findings and judgment in the first case which was in favor of plaintiff against all defendants. Moreover, there was no evidence introduced at the second trial which would justify releasing the estate from liability under the contract made by the deceased.

[4] Where a reviewing court reverses a judgment with directions to determine damages in accordance with the rules set forth in its opinion and to enter judgment for the plaintiff, the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings. Its authority is limited wholly and solely to following the directions of the reviewing court. Cowdery v. London, etc., Bank, 139 Cal. 298, 307, 73 P. 196, 96 Am.St.Rep. 115; Weaver v. San Francisco, 146 Cal. 728, 732, 81 P. 119; English v. Olympic Auditorium, Inc., 10 Cal.App.2d 196, 201, 52 P.2d 267. The trial court should have followed the directions of this court and entered judgment for plaintiff against all the defendants for the difference between the contract price and the market price of the flour on December 2, 1938, for the total number of undelivered barrels of flour.

It is undisputed that prior to December 2, 1938, defendants had ordered and received a total of 3,245 barrels of flour, leaving 2,755 barrels to be delivered, consisting of 688 barrels of "Ravalli" brand, 1,593 barrels of "Gold Cross" brand, and 474 barrels of "Isis" brand. It appears, however, that there is a conflict in the evidence as to the market price of each of the brands of flour on December 2, 1938, and since no finding is made by the court resolving this conflict the case must be remanded a second time for the purpose of ascertaining that price. The trial court may, of course, take such additional evidence as may be necessary to determine this issue.

The judgment is reversed, with directions to the trial court (1) to ascertain the difference, on December 2, 1938, between the market price and the contract price for each brand of flour specified in the contract; (2) to compute the amount of plaintiff's damages by multiplying the total number of undelivered barrels of each brand of flour by the difference in price so found for that brand of flour; and (3) thereafter to enter judgment in favor of plaintiff and against all defendants for the amount of such damages.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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25 Cal.2d 177

PEOPLE v. McCOY.

Cr. 4552.

Supreme Court of California.

Nov. 14, 1944.

1. Assault and battery 🔑92

Evidence sustained conviction of an assault with a deadly weapon. Pen. Code, § 245.

2. Criminal law 🔑1160

Questions of identity, discrepancies in testimony, and uncertainties of witnesses are for jury, and for trial court on motion for new trial, and an approved finding would not be reversed on appeal unless there is no evidence to support conviction.

3. Criminal law ⚷739(2)

In prosecution for assault with a deadly weapon, defendant's alibi was for jury.

4. Criminal law ⚷775(3)

The jury were properly instructed on issue of alibi to determine whether claim, when considered with other evidence, was sufficient to raise a reasonable doubt as to defendant's guilt to justify acquittal.

5. Criminal law ⚷451(1)

Where proper foundation was laid establishing witnesses' knowledge of "condition of light" at night near lighted street intersection where assault occurred, in relation to agreed factual setting and relevancy of direct observation, on issue of defendant's identification, testimony as to visibility was competent. Pen.Code, § 245.

6. Criminal law ⚷469

Where an expert witness from weather bureau had testified from his official records as to moon and weather conditions on night an assault occurred near a lighted street intersection, as respects defendant's identification by other witnesses, expert's opinion as to degree of light or darkness prevailing was not competent. Pen. Code, § 245.

7. Criminal law ⚷737(1)

Question of accused's identification at night of assault was for jury.

8. Witnesses ⚷379(1), 383

A witness may be impeached by evidence that he has made inconsistent statements regarding a material issue. Code Civ.Proc. § 2052.

9. Criminal law ⚷396(2)

Where officer called in rebuttal testified that defendant's wife had, in conversation with him, made statements which on cross-examination to impeach her testimony she had denied making, and which were inconsistent with her direct testimony, and entire conversation was not shown to have any bearing on wife's credibility, entire conversation was not admissible in surrebuttal. Code Civ.Proc. §§ 1854, 2052.

10. Assault and battery ⚷96(1)

The court may refuse to instruct upon simple assault where it is clear, if defendant is guilty at all, he is guilty of higher offense. Pen.Code, §§ 240, 1159.

11. Assault and battery ⚷95

In prosecution for assault with a deadly weapon, whether a knife is an inherently dangerous or deadly instrument is a mixed question of law and fact which jury must determine under instructions. Pen.Code, § 245.

12. Assault and battery ⚷95

In prosecution for an assault with a deadly weapon, where defendant had a knife, intent with which defendant acted as manifested by circumstances connected with offense, and ability to commit a violent injury upon another, were properly submitted to jury by instructions, on question of deadly character of knife for the occasion. Pen.Code, § 245.

13. Assault and battery ⚷92

To warrant conviction of an assault with a deadly weapon, where defendant was near prosecutrix with a knife and threatened her, prosecution was not required to prove that defendant attempted to strike or use knife upon prosecutrix. Pen. Code, § 245.

14. Assault and battery ⚷82

Whether instrument used be inherently dangerous or deadly as a matter of law or one that may assume such character from attendant circumstances, intent may be implied from manner of defendant's use of instrument. Pen.Code, § 245.

15. Assault and battery ⚷56

In prosecution for assault with a deadly weapon, fact that defendant was thwarted in threatened use of knife and did not inflict serious injury upon prosecutrix did not warrant his conviction of a simple assault instead of offense of assault with a deadly weapon. Pen.Code, §§ 245, 1159.

16. Assault and battery ⚷56

To constitute an assault under statute relating to assault with a deadly weapon, serious injuries to victim are not required. Pen.Code, § 245.

17. Assault and battery ⚷48

Under statute defining assault, word "violent" is not synonymous with "bodily harm", but includes any wrongful act committed by means of physical force against person of another, and is synonymous with "physical force", the kind of physical force being immaterial. Pen.Code, § 240.

See Words and Phrases, Permanent Edition, for all other definitions of "Bodily Harm", "Physical Force" and "Violent".

18. Assault and battery ⚷95

In prosecution for an assault with a deadly weapon, defendant's intent to use a knife as evidenced by his actions was for jury. Pen.Code, § 245.

19. Assault and battery ⚷56

In prosecution for an assault with a deadly weapon, fact that knife was exhibited in connection with a qualified threat to prosecutrix, "Don't make any noise or I'll use this knife," would not preclude defendant's conviction. Pen.Code, § 245.

20. Criminal law ⚷761(2)

In prosecution for assault with a deadly weapon, where defendant was either guilty of offense more serious than a simple assault or not guilty, court's assumption that offense was not the lesser one in refusing instructions upon simple assault was not a violation of constitutional prohibition against charging jury with respect to matters of fact. Pen.Code, §§ 245, 1159.

21. Assault and battery ⚷56

Specific intent is not an element of assault with a deadly weapon. Pen.Code, § 245.

22. Assault and battery ⚷82

In prosecution for assault with a deadly weapon, where evidence establishes character of instrument as charged, prosecution is not required to prove specifically that defendant intended to injure victim, since intent may be implied from doing of unlawful act. Pen.Code, § 245.

23. Criminal law ⚷730(1)

Where, after prosecutor during closing argument to jury in answer to defendant's summary of case accused defendant's attorney of misstating and improperly commenting upon evidence "in violation of his oath" as a lawyer, court sustained defendant's objection to attack on counsel's integrity and admonished jury to disregard reference to "sanctity of the attorney's oath", there was no misconduct which deprived defendant of a fair and impartial trial.

24. Criminal law ⚷655(5), 730(1)

Where, after prosecutor during closing argument to jury in answer to defendant's summary of case accused defendant's counsel of misstating and improperly citing record to show evidence in case, court refused to cite prosecutor's conduct as misconduct but instructed that statements of counsel not supported by evidence should be disregarded by jury, there was no misconduct of prosecutor or court which deprived defendant of a fair and impartial trial.

In Bank

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Samuel McCoy was convicted of an assault with a deadly weapon, and he appeals. Affirmed.

Prior opinion, 147 P.2d 54.

Albert G. Bergman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener and Frank Richards, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., and Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

CURTIS, Justice.

The defendant was tried upon an information charging in count I an assault with intent to commit rape and in count II an asasult with a deadly weapon. The jury returned a verdict of not guilty as to the first charge and guilty as to the second. From the judgment of conviction and the order denying his motion for a new trial the defendant prosecutes this appeal.

As grounds for reversal the defendant urges the following points: (1) Insufficiency of the evidence to sustain the verdict of guilty; (2) errors of law committed by the court during the trial; (3) refusal of the trial court to give certain proposed instructions; and (4) prejudicial misconduct on the part of both the deputy district attorney who prosecuted the cause and the trial judge.

The factual background of the assault charge upon which the defendant was convicted appears from the record to be as follows: The alleged offense occurred about 11:45 o'clock in the evening of March 28, 1943, when the defendant, a Negro, approached the prosecutrix on the sidewalk a few minutes after she had alighted from a streetcar at the corner of West Adams Street and Sixth Avenue, in the city of Los Angeles, and was walking alone toward her home. As the defendant came abreast of her he flourished a knife but said nothing. She backed away, but the defendant continued toward her and knocked her to the pavement by physical contact with the weight of his body. While she lay prone on the sidewalk, the defendant stood in a bent position over her holding the knife suspended a few inches above her face. As she started to scream the defendant placed his other hand over her mouth with such force and violence as to cause the inside of her lip to bleed, and he said, "Don't make any noise or I'll use this knife (or words to that effect)." Finally, she did succeed in working herself free enough to scream for help, and then, while the defendant was standing a bit to the right, she kicked him in the groin, whereupon he straightened up and ran away. Following this encounter with the defendant—some few minutes in duration—the prosecutrix had various scratches on her hands as evidence of her struggle.

[1] With regard to his first point, the appellant urges that the evidence was insufficient to establish his identity as the perpetrator of the alleged crime. The record does not support his contention. At the trial the prosecutrix, in identifying the appellant as her assailant, expressly referred to the place of the attack as near the intersection where she alighted from the streetcar and stated that the lighting standard there permitted her, though the evening "was dark as any evening would be around midnight," to observe the appellant's features as he ran from the scene toward said intersection, exposing his face to the light. The appellant challenges the force of this identification testimony in relation to alleged uncertainties appearing in her account at the preliminary hearing in this matter, as developed in the course of the prosecutrix' cross-examination at the trial. Thus he refers to her doubtful statement made to police officers on two different occasions shortly following the attack: (1) In the early morning of March 29th when the appellant, found wandering in the neighborhood, was brought to the prosecutrix' home for identification and (2) at a later interview that same day—that she was not sure that appellant was her assailant. But her purported uncertainty at those times was not unqualified as appears from her full testimony on the subject: "Q. And you told the officers at that time, in the presence of this defendant, who is now present in court, that you couldn't identify him as the man, that you were not sure? A. I again made the same statement I have made about three times, that I identified him on certain points. Q. Well, didn't you tell the officers on the following day, March 29th, in the presence of the defendant, that you were not sure that he was the man? A. I told them that I didn't know if I could identify him from a large group of Negroes, other men, Negro men." Thus it appears that the prosecutrix, *sure* of certain characteristics of the appellant which she was able to detail to the police officers, was only expressing a cautious concern as to her ability to "distinguish him from other men who might look something like him."

Moreover, the witness Garrett positively identified the appellant at the trial, and it appears that he was in an exceptionally good position to do so. Garrett testified that a few minutes after he alighted from a streetcar a short distance from the designated place of attack, he heard a woman scream and then saw the appellant running down the street; that he gave chase and they met at the lighted intersection; that he took a "swing" at the appellant but only grazed the latter's shoulder; that the street light permitted him to see clearly the appellant's features and certain peculiarities of his clothing. It further appears from the record that as the result of these circumstances, when the appellant was arrested and brought to Garrett's home in the early morning of March 29th, Garrett was able without hesitation to recognize the appellant—upon the basis of face, bearing and style of dress—as the person he had encountered a short time previously on the street in question. Nor was Garrett's account shaken in cross-examination on any substantial points.

[2] In short, the claimed inconsistencies in the testimony of the prosecutrix and the witness Garrett are of such a trivial nature that they are ineffective to weaken the positive character of their statements as above outlined. As stated in People v. Farrington, 213 Cal. 459, 463, 2 P.2d 814, 815: "The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial. It has approved the finding of the jury, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction. People v. Erno, 195 Cal. 272, 283, 232 P. 710. On the record

before us, we cannot say that this is such a case." See, also, People v. Harsch, 44 Cal.App.2d 572, 575, 112 P.2d 654; People v. Knight, 44 Cal.App.2d 887, 891, 113 P.2d 226; People v. Holquin, 48 Cal.App.2d 551, 555, 120 P.2d 71.

[3, 4] While the appellant denied that he was the offender and two witnesses at the trial testified in support of his alibi claim that at the time of the assault upon the prosecutrix he was just leaving a used car lot in another distant section of Los Angeles where he was employed as an attendant, this line of testimony merely operated to produce a conflict in the evidence on the point of the appellant's presence at the scene of the attack, and it was for the jury to resolve. People v. Spillard, 15 Cal. App.2d 649, 652, 653, 59 P.2d 887. The trial court properly instructed the jury on the issue of alibi for determining whether such claim, when "considered with all other evidence, [was] sufficient to raise a reasonable doubt as to the guilt of the defendant" and so "justify an acquittal." 8 Cal.Jur. § 382, p. 336; People v. Foster, 198 Cal. 112, 127, 128, 243 P. 667; People v. McNeese, 40 Cal.App.2d 97, 101, 104 P.2d 370. Other matters presented to the jury as bearing upon this feature of the case were the following: (1) The appellant's arrest in the neighborhood some thirty minutes after the attack and at that time his possession of a knife, which the prosecutrix identified at the trial as like the one she had observed in the hand of her assailant; (2) shortly after the appellant's apprehension, the police officers' discovery of his car parked across the street from the place of the assault, its brake bands and radiator still warm; and (3) the police officers' immediate search of the appellant's car and their finding concealed in the interior thereof a knife sheath which fitted the knife that the appellant was then carrying on his person. In this condition of the record there was ample evidence before the jury to sustain the identification of the appellant as the person who committed the assault upon the prosecutrix.

[5-7] With this phase of the case the appellant correlates his second ground for reversal of the judgment—errors of law committed by the court with reference to the admission and rejection of testimony during the trial. In this regard he complains first of the trial court permitting prosecution witnesses, over objection, to testify upon the matter of visibility at the time and place of the alleged assault. But such statements were competent to go before the jury for consideration under recognized rules of evidence. In each instance a proper foundation was laid establishing the particular witness' knowledge of the "condition of light" in relation to the agreed factual setting and the relevancy of such direct observation on the issue of visibility as affecting the matter of the appellant's identification. 10 Cal.Jur. § 238, p. 980, and cases there cited. Nor with reference to this same subject did the trial court err, after the appellant's expert witness from the Weather Bureau had testified from his official records as to the moon and weather conditions on the pertinent evening, in sustaining objection to his giving his *opinion* as to the degree of light or darkness prevailing at the particular time in question. The scientific data within the peculiar knowledge of said witness had been introduced in evidence and in relation thereto the jury was qualified to determine the *ultimate fact* of whether or not it was sufficiently light or dark that night to permit the appellant's identification under the circumstances of the alleged attack. 10 Cal. Jur. § 218, p. 959. Moreover, apart from the records of the Weather Bureau and bearing upon the materiality of said expert's opinion as to visibility under *natural* lighting conditions at the place of the alleged crirme was the added factor of the presence of a street light at the nearby intersection which, according to the prosecutrix' testimony as previously noted, shone upon the assailant as he fled from the scene. Thus the ultimate fact of the prevailing lighting condition was correlated with an *artificial* element as to which said appellant's expert witness was, of course, in nowise qualified to testify. In this state of the record the issue of the appellant's identification was properly submitted to the jury for its determination.

[8] The appellant next claims that certain testimony by his wife was erroneously excluded from evidence by the trial court. The record shows the following matters in connection with this objection: The appellant's wife was called as a witness in his behalf and to offset the effect of the following statement made at the trial: (1) The account of two police officers that shortly after the alleged assault on the night in question they found the appellant on the street "out of breath [with] a knife clutched in his right hand, with the blade up his sleeve"; and (2) the prosecutrix' identifica-

tion of the knife in evidence as like the one used by her assailant. Upon direct examination the appellant's wife stated that she had never before seen said knife, and that her husband did not carry or own one. To discredit this testimony the appellant's wife was interrogated on cross-examination as to inconsistent and contradictory statements made by her to a police officer when she went to see her husband at the Detective Bureau on the day following the alleged assault. Thus, after the proper foundation was laid as to the time and place in question (Code Civ.Proc. § 2052; People v. Greenwell, 20 Cal.App.2d 266, 267, 66 P. 2d 674), she was asked if she had not stated on said prior occasion that she believed her husband had "at home what was known as a hunting knife," and that "somebody gave it to him." She denied having made these remarks. Thereupon the police officer was called in rebuttal, the impeaching testimony was read to him, and he attested to the prior inconsistent statements having been made to him. As was said in People v. Brazil, 53 Cal.App.2d 596, 599, 128 P.2d 204, 206: "The law is established in this jurisdiction that a witness may be impeached by evidence that he has made at another time inconsistent and contradictory statements regarding a material issue, which statements are in conflict with his testimony at the trial. People v. Crow, 48 Cal.App.2d 666, 671, 120 P.2d 686."

[9] The appellant then sought in surrebuttal to introduce in evidence the *entire* conversation had by his wife with the police officer at the time and place in question, but, upon objection, such additional testimony was excluded by the trial court. This ruling was proper under the circumstances. The issue was whether the appellant's wife had or had not made the contrary statement in her interview with the police officer, and his rebutal testimony was introduced not to establish the truth of the fact asserted—the appellant's ownership of the knife—but solely for the purpose of showing the contradictory account given by the appellant's wife on the previous occasion out of court. Disclosure of the *entire* conversation was not shown to have any bearing on this limited point of challenge of the witness' credibility. In such situation involving no question of clarification of the direct matter in issue, the appellant unavailingly cites section 1854 of the Code of Civil Procedure. "The rule that where part of a conversation has been shown in testimony the remainder of that conversation may be brought out by the opposing party * * * is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced." People v. Kiser, 24 Cal.App. 540, 546, 141 P. 1078, 1081; see, also, People v. McHugh, 62 Cal.App. 17, 19, 216 P. 76.

The third point urged by the appellant as ground for reversal concerns the instructions to the jury upon submission of the case for decision. The trial court refused to instruct to the effect, as requested by the appellant, that a defendant charged with the crime of assault with a deadly weapon may be convicted of simple assault; nor did the court submit to the jury a form of verdict whereby it might have found the appellant guilty of the lesser included offense. The appellant relies on section 1159 of the Penal Code, which provides as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." The record does not sustain the appellant's specification of error.

[10] The law is well settled in this state that the trial court may properly refuse to instruct upon simple assault where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the higher offense. People v. Lopez, 135 Cal. 23, 24, 25, 66 P. 965; People v. Rogers, 163 Cal. 476, 482, 483, 126 P. 143; People v. Albori, 97 Cal.App. 537, 540, 541, 275 P. 1017; People v. Thomas, 100 Cal.App. 82, 84, 85, 279 P. 826; People v. Galloway, 104 Cal.App. 422, 429, 430, 286 P. 476; People v. Lain, 57 Cal.App.2d 123, 134, 135, 134 P.2d 284. In a criminal case instructions are always to be given or refused with reference to the facts introduced before the jury. The evidence of the prosecution disclosed that the appellant flourishing a knife made an assault upon the prosecutrix; that from the inception of the attack he used said instrument—first thrusting it toward her face as he accosted her on the street and knocked her to the pavement by the impact of his body against her; and then holding it within a few inches of her face as she lay prone on the sidewalk and threatening to use it on her if she made an outcry. In other words, it is apparent that the gist of the prosecutrix' recital of the assault was her assailant's employment of

a *knife* to enforce his attack, one continuous transaction which could not be divorced from the accompanying instrument. The appellant merely denied that he was the perpetrator of the crime and attempted to establish an alibi as to his whereabouts at the time and place in question, but the *mode* of the attack upon the prosecutrix was in nowise contested at the trial. As above noted, the jury upon substantial evidence resolved adversely to the appellant's claim the issue of his identity as the offender.

[11] In assault with a deadly weapon, the character of the particular agency employed is the substance of the offense. While a knife is not an inherently dangerous or deadly instrument as a matter of law, it may assume such characteristics, depending upon the manner in which it was used, and there arises a mixed question of law and fact which the jury must determine under proper instructions from the trial court. 3 Cal.Jur. § 21, pp. 205-206; People v. Valliere, 123 Cal. 576, 579, 56 P. 433; People v. Cook, 15 Cal.2d 507, 516, 517, 102 P.2d 752; People v. Petters, 29 Cal.App.2d 48, 50, 51, 84 P.2d 54. Pertinent in this connection is the case of People v. Raleigh, 128 Cal.App. 105, 108-110, 16 P.2d 752, 753, where the court pointed out the distinction between instrumentalities which are "weapons" in the strict sense of the word, such as guns, dirks, etc., and those instrumentalities which are not weapons in that sense, such as ordinary razors, pocket-knives or other sharp objects. With reference to the latter classification the court said: "When it appears * * * that [such] an instrumentality * * * is capable of being used in a 'dangerous or deadly' manner, and it *may be fairly inferred from the evidence that its possessor intended on a particular occasion to use it as a weapon should the circumstances require, we believe that its character as a 'dangerous or deadly weapon' may be thus established, at least for the purposes of that occasion.*" (Italics ours.)

[13] The trial court properly instructed the jury defining a deadly weapon (Pen. Code, § 245) and an assault in relation thereto (Pen.Code, § 240). In its charge on this phase of the case, the court stated that "the intent or intention with which an act is done is manifest by the circumstances connected with the offense," and it correlated therewith the "present ability to commit a violent injury upon the person of another" as a matter for consideration in establishing the character of the instrumentality for the occasion in question. These were esssential points for the jury's deliberation of the appellant's guilt of an assault with a deadly weapon. People v. Raleigh, supra, 128 Cal.App. at pages 109, 110, 16 P.2d 752. To warrant conviction of such offense it was not necessary that the prosecution introduce evidence to show that the appellant *actually made an attempt to strike or use the knife upon the person of the prosecutrix* (People v. Bird, 60 Cal. 7; People v. Hunter, 71 Cal.App. 315, 235 P. 67), and the court properly refused the appellant's request to so instruct the jury. Thus, in the Bird case evidence tending to prove that the defendant "rushed" toward the prosecuting witness with a loaded pistol and that he gestured "menacingly" was deemed sufficient to establish his commission of an assault with a deadly weapon. In commenting upon the charge to the jury in relation to the facts in the case, the court observed at pages 8, 9 of 60 Cal.: "It is said that the Court below erred in giving the instruction following: 'If the person having the present ability to commit a violent injury upon the person of another, and having with him a deadly weapon, rushes toward such other person with menacing gestures and with a purpose to use such weapon, an assault is committed, though such person is prevented from striking or using the weapon, before he comes near enough to do so.' * * * his 'purpose' or intent was left by the instruction to the jury. * * * The instruction, while expressed in general terms, is not abstract, but is to be construed with reference to the phase of the actual evidence which the jury might adopt."

And in the Hunter case the defendant's conviction of an assault with a deadly weapon was affirmed though the evidence did not show that he attempted to use the loaded gun. Upon this point the court said at page 319 of 71 Cal.App., at page 68 of 235 P.: "The evidence is ample to show that the defendant had the intention and the present ability to kill his wife. The only question remaining is whether he attempted to carry his purpose into execution. To accomplish that purpose, it was necessary for him to take the gun from his sock, to point it at his wife, and to pull the trigger. *Any one of these would constitute an overt act toward the immediate accomplishment of the intended crime.* He was endeavoring to take the gun from his sock when his wife thwarted the attempt to kill her by jumping out of the window. Naturally she did not wait to see whether he succeeded in getting hold of the gun or whether he pointed it at her, and it is immaterial whether he did either. The actual transaction had commenced which would have ended in murder if it had not been interrupted." (Italics ours.)

[14-17] Whether the instrument employed be inherently "dangerous or deadly" as a matter of law or one that may assume such character depending upon the attendant circumstances, the principle as to the *intent* which may be implied from the manner of the defendant's use of the instrumentality involved would apply in either instance. People v. Cook, supra, 15 Cal.2d 507, 516, 517, 102 P.2d 752; People v. Russell, 59 Cal.App.2d 660, 665, 139 P.2d 661. The distinction in the classification of weapons to establish commission of the offense within the meaning of section 245 of the Penal Code merely relates to the sufficiency of the evidence to support the charge. People v. Petters, supra, 29 Cal.App.2d 48, 50, 84 P.2d 54. Thus, pertinent on this aspect of the case as disclosed by the record were the following considerations presented to the jury by the prosecution to sustain the appellant's conviction: His employment of a knife from the inception of his encounter with the prosecutrix; his *threatening language* to enforce her submission—"Don't make any noise or I'll use this knife"; his ability to have then executed his purpose and the frustration of the attack only as the result of the prosecutrix managing to free herself from his grasp so as to scream for help and kick him in the groin, causing him to run down the street. The fact that the appellant was thus thwarted in the act in question and did not inflict serious injury upon the prosecutrix did not render his conduct any the less criminal. As was said in People v. Bumbaugh, 48 Cal.App.2d 791, 796, 120 P.2d 703, 706: "To constitute the crime of assault within the meaning of section 245 of the Penal Code * * * it is not required * * * that the injuries inflicted be of a serious nature. The word 'violent' as used in section 240 of the Penal Code defining an assault, has been held not to be synonymous with 'bodily harm,' but to include any wrongful act committed by means of physical force against the person of another. People v. Bradbury, 151 Cal. 675, 676, 91 P. 497. In the case just mentioned it is said: 'The term "violence" as used here is synonymous with "physical force," and in relation to assaults the two terms are used interchangeably. [citing authorities.] Mr. Bishop says (2 Crim. Law, §§ 32-34): "The kind of physical force is immaterial * * *."'"

[18] The evidentiary factors here involved render distinguishable the case of People v. Dodel, 77 Cal. 293, 19 P. 484, cited by the appellant. There too the defendant was convicted of the crime of an assault with a deadly weapon. The evidence showed that no attempt to use the instrument was made, that "after the knife was drawn defendant was *not at any time near enough to* [the complaining witness] *to strike* him with it, and that he *moved away from* [the complaining witness], and *not towards him.*" (Italics ours.) In that condition of the record, demonstrating that the defendant *lacked ability to consummate the assault at the time in question*, it was held erroneous for the trial court to refuse the proposed instruction that "where * * * the assault is charged to have been committed with a deadly weapon, there must have been an attempt to strike with or to use the deadly weapon." But the present case is in marked contrast where, according to the accredited evidence, the appellant, while holding a knife a few inches above the prosecutrix' face, stood in a bent position over her as she lay on the pavement; only her act of screaming and kicking him in the groin apparently prevented his carrying out his threat and caused him to run from the scene of the assault. Such circumstances certainly would justify the conclusion that at the time of his attack upon the prosecutrix the appellant had the *ability to commit a violent injury with the knife upon her person.* Proof of an attempt to strike or use the knife was then not necessary to make out the alleged offense; the appellant's intent as evidenced by his actions was for the jury to decide. People v. Bird, supra; People v. Hunter, supra.

A situation involving considerations of "striking distance" closely analogous to those here presented to the jury is the case of People v. Rader, 24 Cal.App. 477, 141 P. 958. There the defendant was convicted of an assault with a deadly weapon upon the person of his wife. In reviewing the record the court said at pages 480, 481 of 24 Cal.App., at page 959 of 141 P.: "The evidence introduced on behalf of the people was that furnished chiefly by three witnesses, one being the wife of appellant and the other two her father and sister. This testimony showed that appellant, on the night of the 11th of October, 1913, engaged in a wordy controversy with his wife, the subject being the matter of her persisting in attending a certain church, to which he objected; that finally he became enraged and drew a pocket knife, at the same time seizing her about the head and stating that he was going to kill her. At that moment the sister interfered, and the father entered the room at about the same time; whereupon appellant desisted in his attack and dropped the knife back into his pocket. * * * It is contended that the evidence was insufficient to warrant the conviction of appellant. This claim may be answered briefly: The statement of the general substance of the evidence introduced on behalf of the prosecution, as hereinbefore set forth, shows that there was ample evidence upon which to find the verdict returned by the jury." And at page 484 of 24 Cal.App., at page 961 of 141 P., the court significantly remarked: *"It was not necessary, in order to establish the commission of the crime, that appellant should have actually cut his intended victim with the knife which he exhibited.* People v. Piercy [16 Cal.App. 13, 116 P. 322], and cases therein cited." (Italics ours.)

[19] The fact that here the knife was exhibited in connection with a *qualified threat* would not preclude the appellant's conviction as charged. The relevant principles on this point were considered at some length in the early case of People v. McMakin, 8 Cal. 547, where the assault consisted of drawing a revolver and holding it in such a position that it could be readily used, though if discharged in the position in which it was held the bullet would strike the ground before reaching the person assaulted. In sustaining the conviction of assault with a deadly weapon, with intent to inflict a bodily injury, the court said at pages 548, 549 of 8 Cal.: "The ability to commit the offence was clear. Holding up a fist in a menacing manner, drawing a sword, or bayonet, presenting a gun at a person who is within its range, have been held to constitute an assault. *So any other similar act, accompanied by such circumstances as denote an intention existing at the time, coupled with a present ability of using actual violence against the person of another, will be considered an assault.* * * * But can the offence be committed when the intention is but *conditional?* * * * If the prisoner did not intend to use the pistol at all, except for the sole purpose of intimidation, then, it is apprehended, the offence would not have been complete. *But when the intent is to go further, if necessary, to accomplish the purpose intended, and preparations are actually made, and weapons drawn, and placed in a position to be instantly used offensively, and with effect, against another, and not in self-defence, it would seem to be clear that the offence would be complete.* * * * The prisoner put himself in a position to use the weapon in an instant, having only to elevate the pistol and fire at the same time declaring his intention to do so, unless the prosecutor would leave the ground. *It is true, the threat was conditional, but the condition was present, and not future, and the compliance demanded was immediate. Where a party puts in a condition which must be at once performed, and which condition he has no right to impose, and his intent is immediately to enforce performance by violence, and he places himself in a position to do so, and proceeds as far as it is then necessary for him to go in order to carry out his intention, then it is as much an assault as if he actually struck, or shot, at the other party, and missed him.* It would, indeed, be a great defect in the law, if individuals could be held guiltless under such circumstances. The drawing of a weapon is generally evidence of an intention to use it. Though * * * that evidence may be rebutted * * * when the party draws the weapon, although he does not *directly* point it at the other, but holds it in such a position as enables him to use it before the other party could defend himself, at the same time declaring his determination to use it against the other, the jury are fully warranted in finding that such was his intention." (Italics ours.)

[20] In the light of the foregoing discussion, the conclusion is inescapable that under the evidence as above detailed the appellant was either guilty of an offense more serious than a simple assault, or he was not guilty, and such was the position of the prosecution throughout the trial. Accordingly, the appellant's request for an instruction that the jury might find him guilty of the lesser included offense was properly refused, for such charge would have been wholly inimical to the facts and

the law with reference thereto. There was no room for a compromise verdict. In such case it is no violation of the constitutional prohibition against charging the jury with respect to matters of fact for the trial court to assume that the offense is not a lesser included one. People v. Welch, 49 Cal. 174, 181; People v. Watts, 198 Cal. 776, 794-796, 247 P. 884; People v. Albori, 97 Cal. App. 537, 541, 275 P. 1017. It was said in People v. McNutt, 93 Cal. 658, 659, 29 P. 243, referring to People v. Madden, 76 Cal. 521, 18 P. 402, and other cases, that "These decisions of the court are not in conflict with section 1159 of the Penal Code; for that section contemplates the conviction of a defendant for the lesser offense, *when the evidence is insufficient to justify a conviction for the greater offense charged.*" (Italics ours.)

[21, 22] The authorities cited by the appellant as holding it reversible error for the trial court to refuse to give an instruction authorizing a conviction of a lessor included offense are readily distinguishable upon the factual considerations involved. People v. Demasters [assault with *intent to commit mayhem*], 105 Cal. 669, 39 P. 35; People v. Mock Ming Fat [assault with *intent to commit murder*], 82 Cal.App. 618, 256 P. 270; People v. Foss [assault with *intent to commit robbery*], 85 Cal.App. 269, 259 P. 123; People v. Cicerelli [assault with *intent to commit rape*], 123 Cal.App. 48, 10 P.2d 792. In each of these cases the *evidence as to the specific intent* charged against the defendant in connection with the assault *was insufficient to sustain conviction of the higher offense,* and accordingly in each instance the refusal of the trial court to give the proposed instruction covering lesser offenses was improper. But contrary to those situations, *specific intent* is not an element of the crime of assault with a deadly weapon, People v. Lim Dum Dong, 26 Cal.App.2d 135, 140, 78 P.2d 1026, and so where the evidence is sufficient to establish the character of the instrument as charged, it is not necessary for the prosecution to prove specifically that the defendant intended to injure the complaining witness. Such intent may then be implied from the doing of the unlawful act. 3 Cal.Jur. § 14, pp. 196-197; People v. Bumbaugh, supra, 48 Cal.App.2d. 791, 796, 120 P.2d 703. As above recited, the facts here in evidence fully justified the trial court's instruction confining the possible verdicts to guilt of the higher offense or acquittal, and accordingly the charge to the jury is not open to attack on the record.

[23, 24] The appellant's final argument concerns the claim of misconduct on the part of the deputy district attorney and the trial judge which operated to deprive him of a fair and impartial trial by discrediting his counsel before the jury. The record does not support the appellant's position on this point. The asserted impropriety is said to have been committed (1) by the deputy district attorney when he, during his closing argument to the jury in answer to the summary of the case just made by the appellant's counsel, accused the latter of misstating and improperly commenting upon the evidence "in violation of his oath" as a lawyer; and (2) by the court when it denied the assignment of misconduct as made with respect to *all* of such remarks. But there is no basis for assuming an injury accrued thereby to the appellant. The court sustained the appellant's counsel as to that part of his objection relating to an attack on his personal integrity and removed the sting contained therein, for it promptly admonished the jury to disregard the reference to the "sanctity of the attorney's oath." The remainder of the deputy district attorney's remarks as to defense counsel's improper citation of the record to show what was and was not evidence in the case apparently was regarded by the trial court as no more than the direct and natural result of a heated exchange of views in the course of a forensic struggle, and accordingly it refused to cite them as misconduct. However, in so ruling, the court expressly stated "the jury has been following the proceedings and knows [the record]"; and in addition, it gave a general instruction to the effect that all statements of counsel, if they were not supported by evidence, should be wholly disregarded by the jury. These circumstances clearly demonstrate that the appellant's right to a fair determination of his case by the jury upon the facts involved was fully protected by the trial court, and that his claim of prejudice suffered under the contested ruling on the asserted misconduct is wholly without merit. People v. Mayes, 113 Cal. 618, 622, 623, 45 P. 860; People v. Hodges, 116 Cal.App. 61, 76, 2 P.2d 174; People v. Knight, 44 Cal.App.2d 887, 895, 113 P.2d 226.

From a careful survey of the entire record, it is apparent that the evidence is amply sufficient to justify the verdict, and no prejudicial errors appearing, the judgment and order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

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25 Cal.2d 226

PASHLEY v. PACIFIC ELECTRIC CO. et al.

L. A. 19058.

Supreme Court of California.

Nov. 21. 1944.

1. Limitation of actions 🔑174(1)

A statute of limitations is intended to run against those who are neglectful of their rights in failing to use reasonable and proper diligence in enforcement thereof.

2. Limitation of actions 🔑104(1)

When defendant is guilty of fraudulent concealment of cause of action, statute of limitations does not become operative until aggrieved party discovers existence of cause of action. Code Civ.Proc. § 338, subd. 4.

3. Limitation of actions 🔑13

Where defendant by fraud conceals material facts giving rise to cause of action for personal injuries and by misrepresentation hinders plaintiff from bringing an action within statutory period, defendant is estopped from taking advantage of his own wrong by pleading statute of limitations. Code Civ.Proc. § 338, subd. 4.

4. Limitation of actions 🔑13

The rule that defendant having by his own wrongdoing prevented plaintiff from instituting his suit will not be permitted to take advantage of his own wrong by setting up statute of limitations as defense is applicable irrespective whether action itself be based on fraud. Code Civ.Proc. § 338, subd. 4.

5. Limitation of actions 🔑99(1)

Technical rules as to when a cause of action accrues with respect to statute of limitations apply only in those cases which are free from fraud committed by defendant. Code Civ.Proc. § 338, subd. 4.

6. Limitation of actions 🔑13

When defendant under duty of disclosure has concealed known essential facts upon which to base a recovery against him and thereby has hindered plaintiff from bringing his action within time limit of statute of limitation, defendant is estopped from setting up statute of limitation. Code Civ. Proc. § 338, subd. 4.

7. Physicians and surgeons 🔑12

Confidential relationship of physician and patient imposes on physician duty of refraining from fraudulent concealment with respect of matter consulted by patient.

8. Fraud 🔑17

Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress any facts within his knowledge which will materially qualify those stated.

9. Fraud 🔑17

Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle party injured thereby to maintain an action.

10. Limitation of actions 🔑179(2)

A complaint alleging that plaintiff sustained an eye injury while a passenger on defendant's streetcar and that plaintiff submitted to treatment by defendant's physicians, who fraudulently concealed seriousness of injury, resulting in loss of sight about 12 years later, to prevent plaintiff from bringing action for injury within one year statutory time limit and that action was instituted within one year after plaintiff was advised by another physician of loss of eyesight, stated cause of action since one year statutory period would be tolled by physicians' alleged fraud. Code Civ.Proc. §§ 338, subd. 4, 340, subd. 3.

11. Limitation of actions 🔑104(3)

Where physicians were employed by defendant to treat injured plaintiff, their alleged deceit in concealing seriousness of plaintiff's injuries would be imputed to defendant in determining whether statute of limitations against plaintiff's cause of action was tolled. Code Civ.Proc. §§ 338, subd. 4, 340, subd. 3.

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In Bank.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by John W. Pashley against Pacific Electric Company and another to recover damages. From a judgment, plaintiff appeals.

Reversed.

Prior opinion, 147 P.2d 38.

Daniel A. Knapp, of Los Angeles, for appellant.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondents.

SHENK, Justice.

Plaintiff appealed from a judgment entered on an order sustaining a demurrer to his complaint without leave to amend. The complaint alleges the following facts:

On September 3, 1930, the plaintiff was a passenger on a streetcar being operated negligently by the defendant. He suffered an injury from glass splinters which pierced the right eyeball. The defendant directed the plaintiff to go to certain eye specialists employed by it. The plaintiff submitted to treatment by the defendant's employed physicians and at defendant's expense. His eye was examined by them and they removed splinters of glass. They stated to him that he must not go to any other physician; that if he did, they would not be responsible; that his eye wounds would heal quickly and he would have no further trouble; that he was suffering mainly from shock; and that he should return in two years for a final check-up. The plaintiff followed their directions and returned at the end of two years, when he was advised by them that, aside from the need for glasses, the cure was complete and his eye was in perfect condition, when, in fact, they at all times knew that the injury would eventually cause a cataract and the destruction of eyesight.

In October of 1942 the plaintiff perceived for the first time that the vision of his right eye was blurred. On February 5, 1943, he consulted another and independent physician and discovered for the first time that, due to the severance of the cellular system and delicate tissues of the eyeball which occurred at the time of the accident in 1930, and as a proximate result of the injury thereby received, a cataract had completely enveloped the eye and he was totally and permanently blind in the right eye. It is alleged that the defendant's employed physicians knew that the injury would eventually cause a cataract and the destruction of eyesight, but that they falsely and fraudulently made the alleged representations for the purpose and with the intent of preventing the plaintiff from bringing an action within the statutory period of one year; that the plaintiff relied on the defendant's representations and, believing thereby that he was permanently cured, did not consult other physicians sooner and delayed bringing action against the defendant until the discovery of the facts. The action was commenced on June 14, 1943, within one year after the first discovery of the alleged fraud.

By its order sustaining the demurrer, the trial court concluded that the cause of action was barred by section 340, subdivision 3, of the Code of Civil Procedure, providing a one-year period of limitation for the commencement of an action for injury by the wrongful act or neglect of another. The plaintiff relies on the alleged fraudulent concealment to toll the statute.

[1] In resolving the question of the correctness of the court's order the legislative policy in prescribing a period of limitation for the commencement of actions must be borne in mind. "The statute of limitations is a statute of repose, enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. * * * These statutes are declared to be 'among the most beneficial to be found in our books.' 'They rest upon sound policy, and tend to the peace and welfare of society'; * * *. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution." 1 Wood, Limitations, pp. 8, 9.

[2] However, it is provided by statute in this state that when the liability accrues by reason of fraud, the statute will not run until the fraud is discovered. Code Civ.

Proc. § 338, subd. 4. Similarly, when the defendant is guilty of fraudulent concealment of the cause of action the statute is deemed not to become operative until the aggrieved party discovers the existence of the cause of action. Kane v. Cook, 8 Cal. 449; Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39. See statutes and cases cited in articles: Dawson, Undiscovered Fraud and Statutes of Limitation, 31 Mich.L.Rev. 591, at p. 593, notes; Fraudulent Concealment and Statutes of Limitation, id. 875 at 877; also cases collected in Waugh v. Guthrie, etc., Co., 37 Okl. 239, 131 P. 174, 178, L.R.A.1917B, 1253 notes.

The Kane case is the first in this state to deal with the question of fraudulent concealment in tolling the statute of limitations. There the defendant sold goods consigned to him for sale by the plaintiffs. He neglected to report the sale, and knowledge by the plaintiffs was not acquired until shortly before suit and subsequent to the expiration of the statutory period following the sale. It was said (page 458 of 8 Cal.) that the neglect of the defendant not only deprived the plaintiffs of their funds but kept them in ignorance of their rights, and to hold that the statute ran against them under such circumstances would be to permit the defendant to take advantage of his own wrong and to sustain a defense which, in conscience, he ought not to be permitted to interpose. After a review of the diversity of opinion the court adopted the rule deemed best in the interest of justice to prevent the perpetration of fraud. It was held (page 461 of 8 Cal.): "that in all cases a fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good answer to the plea of the Statute of Limitations." In the following additional cases in this state it was held that fraudulent concealment suspended the operation of the statute: Lightner Mining Co. v. Lane, 161 Cal. 689, 120 P. 771, Ann.Cas. 1913C, 1093, involving a secret underground trespass upon real property; Boyer v. Barrows, 166 Cal. 757, 138 P. 354, fraudulent concealment of collection by an attorney; Kimball v. Pacific Gas & Elec. Co., supra, fraudulent concealment of person responsible for personal injuries; Vance v. Supreme Lodge, 15 Cal.App. 178, 114 P. 83, fraudulent concealment of errors in account; Pacific Employers Ins. Co. v. Industrial Acc. Comm., 66 Cal.App.2d 376, 152 P.2d 501, following Kimball v. Pacific Gas & Elec. Co., supra.

In Gregory v. Spieker, 110 Cal. 150, 42 P. 576, 577, 52 Am.St.Rep. 70, involving a secret breach of contract, this court refused to consider the original contract as the obligation to be enforced. It was held that, since the breach thereof was accomplished "underhandedly, by secret confederacy with another, and the use of his name to cloak the movements of the defendant, and by deceit," etc., the fraud charged was not merely for the purpose of excusing delay in the commencement of the action but the deception practiced on one person to the injury of another constituted actionable fraud and the applicable statute of limitations was that providing a period of three years from the discovery of the fraud.

Suspension of the statute has been refused in cases where discovery was late but neither fraud nor fraudulent concealment was involved. Gale v. McDaniel, 72 Cal. 334, 13 P. 871; People v. Melone, 73 Cal. 574, 15 P. 294; Lattin v. Gillette, 95 Cal. 317, 30 P. 545, 29 Am.St.Rep. 115; Lambert v. McKenzie, 135 Cal. 100, 67 P. 6; Wetzel v. Pius, 78 Cal.App. 104, 248 P. 288; Johnson v. Nolan, 105 Cal.App. 293, 288 P. 78; Daily Tel. Co. v. Long Beach Press Pub. Co., 133 Cal.App. 140, 23 P.2d 833; Rose v. Dunk-Harbison Co., 7 Cal.App.2d 502, 46 P.2d 242; Bathke v. Rahn, 46 Cal.App.2d 694, 116 P.2d 640; State Comp. Ins. Fund v. Industrial Acc. Com., —— Cal.App.2d ——, 152 P.2d 505.

It is unnecessary here to distinguish actionable fraud and fraudulent concealment of a cause of action in the application of the time element, for in any event the action was commenced within one year after the alleged first discovery of the fraud.

The defendant contends that in the case of a personal injury resulting from the wrongful act or neglect of another, the cause of action accrues when the breach of duty occurred, and the statute then commences to run. The theory of the defendant is that since the breach of duty of care and consequent impact followed by injury cannot be concealed, the fraud alleged to have been committed by the defendant cannot result in concealment of the cause of action, and therefore there is no fraudulent concealment within the meaning of the decisions in such cases.

Kimball v. Pacific Gas & Elec. Co., supra, involved a breach of duty of care resulting in personal injury. Nevertheless this court held that the connivance of the defendant in concealing the person responsible therefor amounted to a fraud which tolled the statute of limitations. See, also, cases cited in 31 Mich.L.Rev. at p. 914.

In Waugh v. Guthrie, etc., Co., supra, it was held that the employment of artifice in concealing the cause of an explosion from which the plaintiff sustained injuries amounted to fraudulent concealment which tolled the statute, the plaintiff having been diligent in his efforts to ascertain the cause. The court said [37 Okl. 239, 131 P. 179, L.R.A.1917B, 1253]: "It is no sufficient answer to say, as have counsel in their brief, that plaintiff must have known that he was blown up, and realized that he was injured. This he undoubtedly knew; but it was the fact that defendant by its negligence was the cause of the injury that gave rise to the cause of action against it, not the mere fact of the injury. Upon trial the party relying on fraudulent concealment of the cause of action to avoid the statute would have the burden of proving such concealment. Following what we believe to be the great weight of authority, and keeping in mind that the very purpose of the statute of limitations was to prevent fraud and not to make it secure and successful, we conclude that the petition stated a good cause of action, and that the trial court erred in sustaining the demurrer."

[3, 4] If the hypothesis of the defendant in the present case were correct, the result in those cases might have been otherwise. The truth is that the plaintiff's right to relief in such cases is not dependent on technical legal definitions. In reality the ground of relief is that the defendant, having by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong. The statute of limitations was intended as a shield for his protection against stale claims, but he may not use it to perpetrate a fraud upon otherwise diligent suitors. Thus, in 19 Am. & Eng.Ency., p. 243, it is stated that the "defendant, having, by his own wrongdoing prevented the plaintiff from instituting his suit, will not be permitted to take advantage of his own wrong by setting up the statute as a defense." See Pickens v. Merriam, 9 Cir., 242 F. 363, 370, 155 C.C.A. 139, stating that to be the California rule, citing Kane v. Cook, supra. And the rule is applicable in this state whether or not the action itself be based on fraud. Foster & Kleiser Co. v. Special Site Sign Co., 9 Cir., 85 F.2d 742, 752, citing Kimball v. Pacific Gas & Elec. Co., supra.

[5, 6] Technical rules as to when a cause of action accrues apply therefore only in those cases which are free from fraud committed by the defendant. Said section 338, subdivision 4, Code of Civil Procedure, recognizes the nonapplicability of those technical rules where the fraud of the defendant may be so concealed that in the absence of circumstances imposing greater diligence on the plaintiff, the cause of action is deemed not to accrue until the fraud is discovered. Otherwise, in such cases, the defendant, by concealing his fraud, would effectively block recovery by the plaintiff because of the intervention of the statute of limitations. The same conclusion governs when the defendant under duty of disclosure has concealed known essential facts upon which to base a recovery against him and thereby has hindered the plaintiff from bringing his action until after the statute would otherwise have terminated the period of limitation. We are not here called upon to determine what acts of concealment might under the circumstances be deemed a legitimate hindrance to litigation. Whether in itself it is an actionable fraud or merely suffices to toll the statute on the original obligation, the breach of a duty to disclose known facts with the intention to and which does hinder commencement of an action until the action would be outlawed, is a fraud practiced upon the plaintiff which in conscience estops the defendant's reliance on the statute of limitations. The cases relied on by the defendant wherein it has been stated that the cause of action accrues at the time of the injury, and that the late discovery of the person responsible therefor or of the extent of the injury does not postpone the commencement of the statutory period, have heretofore been distinguished by this court as cases where fraud and deceit were not involved. See Kimball v. Pacific Gas & Elec. Co., supra, 220 Cal. page 213, 30 P.2d 39; Lightner Mining Co. v. Lane, supra, 161 Cal. page 296, 120 P. 771, Ann.Cas.1913C, 1093. See, also, Allison v. Missouri Power & Light Co., Mo.App., 59 S.W.2d 771. In Johnson v. Nolan, supra, it was held that concealment by an attorney did not suspend the commencement of the statute, following Lattin v. Gillette, supra, a case which did not involve concealment. This court justified that holding on the ground that the complaint disclosed merely ignorance of the plaintiff and not concealment of the facts by the defendant, saying that otherwise the decision was disapproved. Kimball v. Pacific Gas & Elec. Co., supra, 220 Cal. at page 214, 30 P.2d 39.

The defendant relies on two additional cases as support for its position that fraudulent concealment of the extent of the injury cannot amount to fraudulent concealment of facts giving rise to the cause of action. In one, Maloney v. Brackett, 275 Mass. 479, 176 N.E. 604, the plaintiff sued two physicians for malpractice, alleging fraudulent concealment as excuse for late filing, and the trial court entered judgment on directed verdicts for the defendants. In overruling the plaintiff's exceptions, it was held that the failure of a doctor to disclose a cause of action to a patient could not be found to be a breach of his professional duty without evidence that he knew or believed that a cause of action existed; that there was no evidence that either defendant knew or believed that he had performed or assisted in the performance of an unnecessary operation, and that the prediction as to plaintiff's recovery made before the operation had no tendency to prove that they did not in good faith consider the operation advisable. In the other, Ogg v. Robb, 181 Iowa 145, 162 N.W. 217, L.R.A.1918C, 981, the plaintiff was burned by X-ray treatments administered by the defendant in 1901. The burnt area did not heal but became malignant. In 1915 the plaintiff sued, alleging malpractice and fraudulent concealment by misrepresentations of the temporary character of the burn. A demurrer to the complaint was sustained. In holding that the statute of limitations was not suspended, the court attributed the representation of the defendant regarding the nature of the burn as an expression of opinion only.

On the other hand, the following malpractice cases held that fraudulent concealment would foreclose the defense of the statute of limitations: Groendal v. Westrate, 171 Mich. 92, 137 N.W. 87, Ann.Cas. 1914B, 906; Schmucking v. Mayo, 183 Minn. 37, 235 N.W. 633. In the latter case it was said (page 633 of 235 N.W.) that in the presence of a fiduciary and confidential relation the fraud may more readily be perpetrated, designating that of physician and patient as such relationship, citing Groendal v. Westrate, supra, and that it was well to bear in mind that the statute does not run against actions for fraud until the fraud is discovered. It was also said (page 634 of 235 N.W.): "* * * a person should not be permitted to shield himself behind the statute of limitations where his own fraud has placed him. He should not be permitted to profit by his own wrong, and it would strike the moral sense strangely to permit him to do so. We are not aware of any principle of law or equity which affords immunity to a fraudulent defendant who by his deceitful practice induces a creditor to forbear his efforts to collect his debt until after it has become barred by the lapse of time."

Like Ogg v. Robb, supra, Hudson v. Shoulders, 164 Tenn. 70, 45 S.W.2d 1072, 1073, involved a case of burn by X-ray which developed serious and permanent injury. In the Hudson case, however, in reversing a judgment sustaining a demurrer to the complaint, it was held that the allegations showed knowledge by the physician of the probable result and the concealment thereof by false representations whereby the plaintiff "was thus lulled into ignorant security, and so kept until after the running of the statute." The Ogg case was distinguished as one where the court appeared to have viewed the representation only as an expression of opinion.

In Peteler v. Robinson, 81 Utah 535, 17 P.2d 244, also malpractice, it was held that the case was not one of tort or breach where the parties stood on an equality and dealt with each other at arm's length, or where each had equal means of knowledge; but that the relationship of physician and patient made the case one of trust and confidence to be reposed in the defendant by the plaintiff, and that the latter had the right to rely on the superior knowledge of the former. The court there reversed a judgment entered on an order sustaining a demurrer to a complaint which alleged the defendant's deceit as a bar to the plea of the statute of limitations. It distinguished those cases where nothing more than unskillful and negligent operation was alleged.

[7-10] The present is not a case of malpractice, but the decisions relative to fraudulent concealment in such cases are pertinent to establish the relationship between the actors in resolving the question whether the facts alleged must be deemed to have excused the plaintiff's failure to make earlier discovery and his subsequent delay in commencing the action. As determined in

those cases, the confidence growing out of the relationship of doctor and patient imposed upon the physician the duty of refraining from fraudulent concealment, that is, the duty of disclosure when he had knowledge of the facts. If that is the result in malpractice cases, then all the more was the defendant herein under a duty of disclosure when it voluntarily undertook to treat the plaintiff's injuries caused by its own breach of duty. "Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure." 12 R.C.L. § 71, p. 310. Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action. Kimball v. Pacific Gas & Elec. Co., supra, 220 Cal. page 219, 30 P.2d 39; Vance v. Supreme Lodge, supra. Since its voluntary undertaking placed upon the defendant the duty to disclose to the plaintiff the full extent of his injuries and the probable future disability to be expected therefrom, its false representation designed to conceal facts known to it and intended to prevent plaintiff's consulting other physicians and thus hinder him from bringing action until after the running of the statutory period of limitations, must be deemed to amount to fraud upon the plaintiff and to excuse any greater diligence on his part under the facts disclosed by the complaint. No fact as to the plaintiff's condition is alleged which could be deemed to have put him on earlier notice.

[11] The only remaining question is whether the defendant was bound by the alleged deceit and misrepresentations of its agents. The facts alleged show that the physicians were employed by the defendant and authorized by it to treat the plaintiff's injuries. The agents' alleged deceit was not intended for their own benefit, but for the pecuniary advantage of the defendant, their principal. If its agents' deceit should succeed, the defendant would reap the pecuniary gain therefrom. Thus its agents have employed the alleged deceit for the sole benefit of the defendant, and in such a case the facts must be deemed to be within the defendant's knowledge. The same principles therefore apply to make it unconscionable for the defendant to rely upon the bar of the statute. As was said in Lightner Mining Co. v. Lane, supra, 161 Cal. at page 703, 120 P. 771, Ann.Cas.1913C, 1093, the fraud of the agents will be imputed to the principal for the purpose of preventing the running of the statute of limitations whether the principal was aware of it or not. The injustice of allowing such fraud to become successful by reason of lapse of time and concealment is an injustice to the plaintiff, and it is precisely the same in effect and extent whether the fraud is that of the defendant or its agents. The defendant, having received the benefit of its agents' fraud, has no equity in its favor.

The alleged facts show that the defendant voluntarily undertook, through its agents, to make a fair and full disclosure of the plaintiff's injuries; that through its agents it had knowledge of the full alleged extent of the plaintiff's injuries and disability, and was bound by its agents' failure in the discharge of its duty to make full disclosure thereof; that the defendant, by its voluntary undertaking having placed the plaintiff in a position to rely on its representations, thereby lulled him into a sense of security which excused his failure to seek knowledge from independent sources and his delay in commencing the action. We therefore conclude that on the facts alleged the action was timely brought after discovery of the alleged fraud and that the trial court erred in sustaining the demurrer to the complaint.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

25 Cal.2d 171

BECHTEL McCONE PARSONS CORPORATION v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19075.

Supreme Court of California.

Nov. 14, 1944.

1. Workmen's compensation ⚷940

An "executive" or "managing officer", within provision of Workmen's Compensation Act authorizing additional compensation for injuries resulting from serious and wilful misconduct of executive or managing officer, is a person in corporation's employ, either elected or appointed, who is invested with general control at a particular place of the business of the corporation. St. 1937, p. 281, § 4553.

See Words and Phrases, Permanent Edition, for all other definitions of "Executive" and "Managing Officer".

2. Workmen's compensation ⚷940

A foreman, whose supervisory authority was limited to direction of crew of four or five men operating a truck crane which was performing a specifically directed operation amounting only to a single detail of work which was in progress, and who did not have general supervision over truck cranes or loading operations, was not an "executive" or "managing officer" of corporation, within provision of Compensation Act authorizing additional compensation for injuries resulting from serious and wilful misconduct of executive or managing officer of corporation. St. 1937, p. 281, § 4553.

In Bank.

Proceeding by Bechtel McCone Parsons Corporation to review an order of the Industrial Accident Commission awarding Ira L. Fulmer additional compensation against petitioner on ground that claimant's injuries were caused by serious and wilful misconduct of executive or managing officer of petitioner.

Award annulled.

Thelen, Marrin, Johnson & Bridges and Gardiner Johnson, all of San Francisco, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

SCHAUER, Justice.

Petitioner seeks review and annulment of an award of respondent Industrial Accident Commission. Respondent Ira L. Fulmer, an employee of petitioner corporation, sustained an injury arising out of and occurring in the course of his employment. He claimed increased compensation under section 4553 of the Labor Code, St. 1937, p. 281, which provides that "The amount of compensation otherwise recoverable shall be increased one-half where the employee is injured by reason of the serious and wilful misconduct of any of the following: * * * (c) If the employer is a corporation, on the part of an executive, managing officer, or general superintendent thereof." The commission found that the injury was proximately caused by the serious and wilful misconduct of petitioner (a corporation) and awarded Fulmer increased compensation. We have concluded that such finding and award are unsupported by the evidence in that it was not shown that the misconduct which caused the injury was that of "an executive, managing officer, or general superintendent" of petitioner.

On July 21, 1942, Fulmer was employed by petitioner as a member of a crew of four or five men who operated a truck crane. The foreman of the crew, O. L. Sweet, acting under an oral order of one Chamberlain, directed the crew to proceed to the reclamation yard of the Standard Oil Company, about a mile from the site of the construction job on which they were employed, and there to load certain pipe onto a trailer. The specific capacity in which Chamberlain acted does not appear. Sweet testified that Chamberlain's order was "To get this pipe from the reclamation yard, is all," that he received no specific orders as to how the loading of the pipe was to be done. At Sweet's direction the truck was parked on a sheet metal roadway under high tension electric wires which ran about 35 feet above the ground. Both Sweet and Fulmer knew that the wires were high voltage lines. The boom of the crane, about 60 feet long as then rigged, was lowered under these wires during the loading operation. The boom was so constructed that by the removal of sections it could have been shortened from a length of 60 feet to a length of 5 or 10 feet. While Fulmer was holding the hook attached to the swinging boom such boom contacted the overhead wires and he was burned by electricity. Neither Sweet nor Fulmer, the only witnesses who testified at the hearing, observed the boom approaching the wires immediately before Fulmer was injured.

Sweet testified that he directed the driver to place the truck under the wires because "It was about the only place we could reach the pipe from"; the pipe was stacked among sand dunes and piles of material and the truck could be driven only on the sheet metal roadway which had been laid out, not by petitioner, but by the Standard Oil Company.

Section 7-5050 of the Electrical Safety Orders of the Industrial Accident Commission provides that "No person, firm or corporation, or agent of same, shall require or permit any employee to perform any function in proximity to high-voltage lines; * * * or to * * * operate * * * any tools, machinery * * * (including * * * hoisting equipment) unless and until danger from accidental contact with said high-voltage lines has been effectively guarded against in the manner hereinafter prescribed. * * * The operation * * * of any tools, machinery, or equipment * * * under, over, by or near high-voltage lines, is hereby expressly prohibited, if at any time during such operation * * * it is possible to bring such equipment * * * within 6 feet of such high-voltage lines," except where described precautions have been taken.

Attached to the crane was a metal sign which read:

"California Industrial Accident Commission
Safety Order 7-5050-c
Unlawful to operate
this Equipment
within six (6) feet of
High Voltage Lines."

The commission found that "said injury was proximately caused by the serious and wilful misconduct of the employer, consisting of violation of Section 7-5050 of the Electrical Safety Orders of the Industrial Accident Commission, in that they permitted the operation of a crane within 6′ of high voltage wires."

[1] In order to charge a corporate employer with serious and wilful misconduct, the misconduct must be "on the part of an executive, managing officer, or general superintendent" of the corporation. Lab. Code, § 4553, above quoted. In the present case the foreman Sweet was the only supervisory employee of petitioner guilty of violation of the safety order. He and the members of his crew were the only employees of petitioner who were present at the site where the pipe was loaded. Sweet and Fulmer each testified that one Benner was the general superintendent of the construction job and that he (Benner) was "in charge of" Sweet. Neither Benner nor anyone else except Sweet gave any directions as to the placing of the truck crane. Therefore, unless Sweet himself was an "executive, managing officer, or general superintendent" of petitioner corporation, the finding that petitioner "permitted the operation of a crane within 6′ of high voltage wires" cannot stand.

"An executive or managing officer" is "a person in the corporation's employ, either elected or appointed, who is invested with the *general conduct and control* at a particular place of the business of a corporation." (Italics added.) (E. Clemens Horst Co. v. Industrial Acc. Comm. (1920), 184 Cal. 180, 190, 193 P. 105, 109, 16 A.L.R. 611.) A "managing agent or a managing representative is one who has *general discretionary powers of direction and control*—one who may direct, control, conduct, or carry on his employer's business or any part or branch thereof." (Italics added.) (Gordon v. Industrial Acc. Comm. (1926), 199 Cal. 420, 427, 249 P. 849, 852, 58 A.L.R. 1374.) As stated in Green v. Industrial Acc. Comm. (1933), 130 Cal.App. 337, 340, 19 P.2d 1029, 1030, "While the terms of the section [then § 6(b) of the Workmen's Compensation, Insurance and Safety Act, Stats. 1929, p. 430, on which is based Lab. Code, § 4553] have been broadened with each amendment, the Legislature has refrained from making the employer liable for the misconduct of every person exercising authority on the employer's behalf. On the contrary, the class of persons whose misconduct will result in the imposition of such liability still remains limited."

From the factual situations of the following cases it is apparent that it is the investing of a supervisory employee with general discretionary powers of direction, and not the bestowal on him of the title "foreman," which determines whether he comes within the purview of section 4553 of the Labor Code.

In Gordon v. Industrial Acc. Comm. (1926), supra, 199 Cal. 420, 427, 249 P. 849, 852, 58 A.L.R. 1374, "Schienle [the "foreman"] had full charge of the work of excavating the gravel out of the pit where the accident occurred. At times he was visited by both Russell [one of the copartners-employers] and Cobb [the "general superintendent with general charge of production"], who came to see how the work was getting along and often gave him instructions or suggestions as to the manner of operation of the plant. At all other times, however, he was in full charge and control of the operations exercising his own discretionary powers as to the operation of the cable and the bucket and as to the time, place, and circumstances under which the work of blasting the rock and sides of the pit was carried on. On the morning of the accident neither of his superior officers had been at the pit, and Schienle had been in full charge and control of the work, and he alone gave the orders to the workmen which resulted in the accident. Under such circumstances we are satisfied the evidence fully justifies the finding of the respondent commission that Schienle was a 'managing representative.'"

In Church, etc., Saints v. Industrial Acc. Comm. (1927), 86 Cal.App. 182, 183-185, 260 P. 578, "the misconduct was that of one Taylor, who occupied a position in relation to the work of such description that, at least, he was foreman in charge of the work in which Barnes [the injured employee] was occupied at the time of the accident. Barnes was hired by Taylor. * * * Taylor was foreman in charge of the construction of the scaffold and in the direction of the work of Barnes, at the time when the plank broke, and was in charge of the construction as well as the work that was carried on upon the platform. * * * Taylor hired men to work on the job and was actually present on the job and supervising it; * * * the superintendency by Taylor was general in its nature and covered the actual work of construction * * *." He was responsible only to one Nowell, the "architect and contractor." It was held that Taylor was a "general superintendent."

The "foreman of the carpenter department" was held to be a "managing officer" in First Nat. Pictures, Inc., v. Industrial Acc. Comm. (1927), 87 Cal.App. 537, 262 P. 38; and in General P. Corp. v. Industrial Acc. Comm. (1928), 90 Cal.App. 101, 265 P. 508, 509, the court upheld the finding of the commission that the foreman in charge of making a "change in a gasoline pipe line" was an "executive or managing foreman, or general superintendent" of the employer. In neither case was there any discussion of the extent of the "general discretionary powers of direction" of the foreman.

In Green v. Industrial Acc. Comm. (1933), supra, 130 Cal.App. 337, 340, 19 P. 2d 1029, 1030, it was held that one Cordova, an "assistant foreman" who worked with and directed two other men, was not a "managing officer." "At the place of operation Cordova was only in charge of his small portion of detail and there was in active charge an authority over him, the foreman."

In California Shipbuilding Corp. v. Industrial Acc. Comm. (1944), 64 Cal.App.2d 622, 628, 149 P.2d 432, 436, it was held that "The stage-rigger foremen [on a ship construction job] were undoubtedly 'managing officers' within the meaning of section 4553 of the Labor Code. They had the responsibility of erecting staging to keep up with the progress of the construction work and to see that it followed a routine procedure or pattern. They received no orders from superiors and required none. If they were not 'managing officers' of their own department of the work, that department, so far as the record discloses, had no immediate managing officer."

In Bethlehem Steel Co. v. Industrial Acc. Comm. (1944), 23 Cal.2d 659, 669, 670, 145 P.2d 583, 589 this court upheld an award of the commission based on a finding that petitioner corporation was guilty of serious and wilful misconduct in violating a safety order and stated that "the commission may well have concluded that the acts of misconduct charged against petitioner were those of its admitted superintendent * * * who was actively supervising the job in question, who made frequent tours of inspection, and who was familiar with the safety order, who knew that it was not being observed * * *."

[2] Here, Sweet's supervisory authority was limited to the direction of the crew of one truck crane. That crew was employed in performing a specifically directed operation (loading certain pipe onto a trailer) which was only a single detail of the work which was in progress. Sweet did not have general supervision over truck cranes, or crane crews, or loading operations. None of the other workers and other crews on the construction job—carpenters, electricians, plumbers, steel construction men, etc. —were under his direction. He testified

that he "received orders all day long." Such orders did not come solely and directly from the general superintendent, Benner, for the order under which he was acting at the time of the accident came from Chamberlain. Sweet did not have charge of a "part or branch" of his employer's business comparable to the excavation of an entire gravel pit or the erection of an entire building. It cannot be said that the single truck crane, operating under the conditions related, was a "department" over which he had authority. Manifestly he was an employee occupying a relatively inferior and subservient position. In the circumstances we are of the opinion that the evidence does not support the implied finding of the commission that such minor supervisory employee, Sweet, was an "executive, managing officer, or general superintendent" of petitioner.

The award of additional compensation against petitioner is annulled.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concur.

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25 Cal.2d 202

COONEY v. COONEY et al.

L. A. 18720.

Supreme Court of California.

Nov. 17, 1944.

1. Divorce 🔑303(1)

Superior court granting divorce decree had jurisdiction over subject matter of proceeding for modification of provision affecting custody of minor children, and had power to modify its decree with respect to custody. Civ.Code, § 138.

2. Divorce 🔑303(1)

Superior Court granting divorce decree containing provision affecting custody of minor children has continuing jurisdiction to modify custody provision under proper circumstances. Civ.Code, § 138.

3. Divorce 🔑289

Superior courts have general jurisdiction to award custody of children.

4. Divorce 🔑289

The determination of custody of children may be made in divorce proceeding, but it is not necessary that the issue be there adjudicated, since there are other proceedings available.

5. Divorce 🔑303(1)

The modification of divorce decree awarding custody of children is separate proceeding after judgment and has no effect on portion of decree dealing with issues of divorce. Civ.Code, § 138.

6. Courts 🔑487(1)

Where divorce decree awarded custody of minor children to probation officer with directions to deliver children to various named persons, notice to probation officer of proceeding for modification of custody provision was sufficient, and failure to give notice to person to whom a child had been delivered as agent of probation officer was not fatal to order transferring the proceeding to superior court of another county. Civ.Code, § 138.

7. Courts 🔑488(1)

Where divorce decree granted by Placer county superior court awarded custody of minor children to probation officer with directions to deliver minor children to various named persons, and probation officer had notice of proceeding for modification of custody order, which proceeding was transferred to San Bernardino county superior court, which ordered further hearings with respect to right of person to whom a child had been delivered and order to show cause was served on such person, the San Bernardino county superior court could exercise jurisdiction over custody of the minor children and jurisdiction over person and subject matter was acquired. Civ.Code, § 138.

8. Appeal and error 🔑911(3)

Where appeal had not been taken from order of Placer county superior court transferring proceedings involving custody of minor children of parties to divorce action to San Bernardino county superior court, Supreme Court would assume that the order was based on some appropriate and legal ground and that the requirements of the order were fulfilled. Civ.Code, § 138; Code Civ.Proc. § 397.

9. Trial 🔑1

A "trial" is the examination before a competent tribunal, according to law of land, of facts or law put in issue in case for purpose of determining such issue.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

10. Divorce ⚷303(1)

Order affecting custody of minor children of parties to divorce action is not final and litigation remains pending in trial court so far as custody proceedings are concerned. Civ.Code, § 138.

11. Venue ⚷61

There is no time fixed by statute when an action may be transferred for trial because of convenience of witnesses or to promote justice, but it should be made within a reasonable time after case is at issue on the facts, the determination of which rests largely in discretion of trial court. Code Civ.Proc. § 397.

12. Courts ⚷485

Where divorce decree granted by Placer county superior court awarded custody of minor children to probation officer with directions to deliver children to various named persons, and probation officer was given notice of proceeding for modification of custody order, the proceeding was properly transferred to superior court of San Bernardino county, and, where that court issued order to show cause which was served on person to whom child had been delivered, the San Bernardino county superior court had jurisdiction of the custody proceeding. Civ.Code, § 138; Code Civ.Proc. § 397.

EDMONDS, J., dissenting.

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In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action for divorce by Elna Cooney against Ernest Alfred Cooney, wherein defendant filed a cross-complaint. The cause was transferred to the superior court of San Bernardino County for trial of defendant's petition to modify custody provision of decree awarding custody of four children of parties to probation officer of Placer County with reservation that custody of one of the children should be delivered by probation officer to F. J. Root. From an order of the San Bernardino superior court directing a retransfer of the action to the superior court of county in which the action was filed, defendant appeals.

Reversed with directions.

Prior opinion, App., 145 P.2d 906.

W. H. Weddell and Martin J. Coughlin, both of San Bernardino, for appellant.

No appearance for respondent.

CARTER, Justice.

Plaintiff and defendant are husband and wife and have four minor children consisting of two sons, Ernest and Jack; and two daughters, June and Ella. On September 20, 1939, while both were residents of Placer County, the plaintiff wife commenced an action for divorce in the superior court of that county against defendant and prayed for custody of the children. Defendant filed an answer and cross-complaint for divorce and demanded custody of the children. On November 26, 1940, the superior court of that county granted an interlocutory decree of divorce to plaintiff on the ground of extreme cruelty. The decree recited that "the care, custody and control of the minor children of the parties be awarded to Charles E. Allen, Probation Officer of the County of Placer, State of California, with the following reservations": That the "care, custody and control" of each of said children be "delivered" by the probation officer to the following named persons, to wit: June, to F. J. Root, respondent herein, a resident of Sacramento County; Ella, to J. C. Wiseman, a resident of Napa County; Ernest, to William Miller, a resident of Placer County; and Jack, to George Bettfreund, a resident of Sacramento County. On March 4, 1942, defendant filed a petition in the Superior Court of Placer County requesting a modification of the decree to the end that custody of the children be awarded to him, and an order to show cause was issued on that day fixing March 23, 1942, as the date of hearing for said petition, and same was served on Allen and plaintiff. On March 25, 1942, the Superior Court of Placer County made a minute order transferring "the action" to San Bernardino County "for trial." Apparently after the interlocutory decree was entered defendant became a resident of San Bernardino County and plaintiff a resident of Los Angeles County. At whose request or upon what ground that order was made does not appear. On April 3, 1942, the Superior Court of San Bernardino County granted plaintiff a final decree of divorce and adopted the provisions of the interlocutory decree with respect to the custody of the children. On April 29, 1942, plaintiff filed in the last-mentioned court, her objections to the defendant's petition for modification and a cross-petition for an award of the children to her. Allen waived notice of this proceeding. The petitions were heard on July 24, 1942, by that court, and on August 14, 1942, it ordered that the custody of Ernest, Ella and Jack be awarded to defendant; and the custody of June remain with Mr. Allen, Probation Officer. On motion of defendant the portion of the modification order affecting the custody of June was vacated, and further hearings were ordered with respect to the rights of F. J. Root in the matter of the custody of June, and an order to show cause was issued and served upon Mr. Root. Respondent Root appeared and objected to any further proceeding before that court upon the ground that the court had no jurisdiction of the subject matter or his person. The objection was sustained and the court ordered the proceeding transferred to Placer County. Defendant appeals therefrom.

Respondent Root asserted in the court below, but has filed no brief herein on points of law, that the Superior Court of San Bernardino County did not have jurisdiction of the subject of the proceeding to modify the custody decree or of his person, predicating that contention on the claim that the Superior Court of Placer County had no jurisdiction to transfer the proceeding to the former court.

[1-3] We think it is clear that the Superior Court of Placer County had jurisdiction over the subject matter of the proceeding and had power to modify its decree with respect to the custody of the children. The superior court in which a decree of divorce is granted, which contains an order affecting the custody of children, has jurisdiction to modify the custody order under proper circumstances. Civ.Code, § 138; 9 Cal.Jur. 797. And it has continuing jurisdiction in that respect. Civ.Code, § 138; Rosher v. Superior Court, 9 Cal.2d 556, 71 P.2d 918; Smith v. Smith, 31 Cal.App.2d 272, 87 P.2d 863; Olson v. Olson, 95 Cal.App. 594, 272 P. 1113; Adoption of Kelly, 47 Cal.App.2d 577, 118 P.2d 479; Reynolds v. Reynolds, 21 Cal.2d 580, 134 P.2d 251; Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Moore v. Superior Court, 203 Cal. 238, 263 P. 1009; Swenson v. Swenson, 101 Cal.App. 440, 281 P. 674; Bogardus v. Bogardus, 102 Cal.App. 503, 283 P. 127; Baldwin v. Baldwin, 111 Cal. App. 148, 295 P. 93; Crider v. Crider, 11 Cal.App.2d 594, 54 P.2d 485; Marts v. Marts, 15 Cal.App.2d 224, 59 P.2d 170. It may well be that without a valid order transferring the proceeding from the court making the custody order, another court could not modify it, but that does not mean that a superior court of another county may not have jurisdiction to modify such an order under appropriate circumstances. Superior courts have general jurisdiction to award the custody of children. Barrett v. Barrett, 210 Cal. 559, 562, 292 P. 622; Foster v. Foster, 8 Cal.2d 719, 68 P.2d 719. This court said in Barrett v. Barrett, supra, at page 563 of 210 Cal., at page 623 of 292 P.:

> "* * * statutes conferring jurisdiction on courts to award the custody of children do not confer a new authority or jurisdiction upon them, but merely recognize their original or inherent jurisdiction in the premises. 9 R.C.L. 472, § 286; Cowls v. Cowls, 3 Gilm., Ill., 435, 44 Am.Dec. 708, 711; Hartmann v. Hartmann, 59 Ill. 103, 104. In the exercise of their general chancery powers, courts of equity, even in the absence of statute, have always been held to be invested with power to award and control the custody of infant children of parties in a suit for dissolution of marriage."

[4, 5] We are not concerned here with whether or not the court which grants the interlocutory decree of divorce may transfer the action to the superior court of another county for entry of the final decree, and we express no opinion on that subject. The determination of the custody of children may be made in a divorce proceeding, but there are other proceedings also available and it is not necessary that the issue be there adjudicated. The modification of a divorce decree awarding custody of children is a definite and separate proceeding after judgment and has no effect upon the portion of the decree dealing with the issue of divorce.

Section 138 of the Civil Code provides that in divorce actions the court may modify an order for custody of children. And it has been said that the court which makes the original custody order is the proper one to determine an application for modification of such order. Smith v.

Smith, 31 Cal.App.2d 272, 87 P.2d 863. That is true, but it does not follow that some other court may not become the proper court where the court in which the action is pending orders a transfer of the action to such other court.

[6] Apparently no notice of the modification proceedings was given to respondent Root when they were originally initiated and prior to the order of transfer to San Bernardino County. Assuming that respondent was entitled to be heard in the matter (and it may well be proper to bring him before the court as was done by the Superior Court of San Bernardino County when it ordered a further hearing as to the custody of June Cooney), the failure to give him notice was not fatal to the transfer order. The primary custodian of the children as evidenced by the interlocutory decree of divorce was the Probation Officer of Placer County. He was given notice of the proceeding and waived any further notice. True, the court directed him to deliver the children to various named persons among whom was Root, but they were in effect merely the agents of the probation officer and certainly notice to him was sufficient. It was a reasonable method of giving notice to all concerned other than plaintiff and defendant and would be likely to inform such persons. As far as appears, Root is a total stranger to plaintiff, defendant and the children, and has no natural or legal claim to the children. In all probability the custody of the children was awarded to the probation officer as an arm of the court, and certainly notice to him was sufficient. The original order of modification did not affect June in whom Root is interested and when that portion of the order was vacated, Root was served with notice and appeared. Hence, there is no merit to the claim that Root was not subject to the jurisdiction of the Superior Court of San Bernardino County.

[7] We conclude therefore that the Superior Court of San Bernardino County could as a general proposition exercise jurisdiction over the custody of the minor children and that jurisdiction over both the person and subject matter was acquired.

This brings us to the question of whether the Superior Court of Placer County had authority to transfer the proceeding for modification of the custodial portions of the decree to San Bernardino County.

[8] It must be remembered at the outset that the order made by the Superior Court of Placer County transferring the action to the Superior Court of San Bernardino County is a final order. No appeal has been taken therefrom. We must assume therefore that it was based upon some appropriate and legal ground and that the requirements for the order were fulfilled. In Wessel v. Superior Court, 177 Cal. 308, 170 P. 606, prohibition was sought to restrain a superior court from proceeding in an action which had been transferred to it. This court said at page 311 of 177 Cal., at page 607 of 170 P., quoting from Broder v. Conklin, 98 Cal. 360, 33 P. 211:

"If any condition of facts could exist under which the transfer would be authorized, the action of the court in making the transfer will be upheld whenever collaterally attacked." And at page 312 of 177 Cal., at page 607 of 170 P.:

"It may be conceded that all this appears very improbable in point of fact, but it is a condition of facts that could exist consistently with anything stated in the order, and on any collateral attack on the order must be conclusively assumed to have existed." Hence, in the instant case if any facts could exist under which the Superior Court of Placer County would have had power to transfer the action they must be assumed to have been present.

[9-11] Without expressing any opinion as to other possible grounds, the transfer could have been made upon the grounds of convenience of witnesses and to promote justice. Section 397 of the Code of Civil Procedure provides:

"The court may, on motion, change the place of trial in the following cases: 1. When the court designated in the complaint is not the proper court; 2. When there is reason to believe that an impartial trial cannot be had therein; 3. When the convenience of witnesses and the ends of justice would be promoted by the change; 4. When from any cause there is no judge of the court qualified to act." As we have seen the proceeding for modification is in a sense an independent one. The hearing thereon is tantamount to a trial. A trial is generally defined in City of Pasadena v. Superior Court, 212 Cal. 309, 313, 298 P. 968, 970, as follows:

"'A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial.' " The litigation is still pending in the trial court so far as custody proceedings are concerned either by way of making an order where none has theretofore been made or in modifying an order previously made, and the previous order is not final. Reynolds v. Reynolds, supra; In re De Leon, 70 Cal.App. 1, 232 P. 738; Rosher v. Superior Court, 9 Cal.2d 556, 71 P.2d 918; Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862. There is no time fixed by statute when an action may be transferred for trial because of convenience of witnesses or to promote justice. The courts have said that it must be made within a reasonable time after the case is at issue on the facts, the determination of which rests largely in the discretion of the trial court. Nelson v. Enos, 47 Cal.App.2d 79, 117 P.2d 429; Willingham v. Pecora, 44 Cal.App.2d 289, 112 P.2d 328; 25 Cal.Jur. 899. In the proceeding in the instant case to modify the decree, the order was made after defendant's petition for modification was filed and before any hearing was had. It has been held directly or by analogy that venue may be changed for a hearing on an application to modify the custodial provisions of a divorce decree from the court in which the decree was rendered to another court. See Des Chatelets v. Des Chatelets, 292 Ill.App. 357, 11 N.E.2d 13; and McPike v. McPike, 10 Ill. App. 332; and Jackson v. Jackson, 294 Ill. App. 508, 14 N.E.2d 276, disqualification of judge.

[12] In the case at bar as far as appears, respondent did not even make a motion that the proceeding be retransferred to Placer County. He objected on the ground that the court lacked jurisdiction because the Superior Court of Placer County had no power to transfer the proceeding to San Bernardino County. The superior court of the latter county sustained his objection and retransferred the proceeding back to Placer County solely for that reason. No pretense is made that there was any justification for the order in the law of venue. Inasmuch as we have determined that the proceeding was properly transferred to San Bernardino County, and that the superior court of that county had jurisdiction over same, the order of retransfer must be and the same is reversed and the Superior Court of San Bernardino County is directed to proceed with a determination of the issue of modification with respect to the custody of the minor child, June Cooney.

It is so ordered.

GIBSON, C. J., and SHENK, CURTIS, TRAYNOR and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

In my opinion, for the reasons stated by the District Court of Appeal when this case was there decided [Cal.App., 145 P.2d 906], the Superior Court of San Bernardino County acquired no jurisdiction to modify the terms of the interlocutory decree of divorce and the order appealed from should be affirmed.

25 Cal.2d 165

MAZZOTTA v. LOS ANGELES RY. CORPORATION et al.

L. A. 19013.

Supreme Court of California.

Nov. 10, 1944.

1. Appeal and error ⇨1015(1)

If evidence as a whole would be insufficient as a matter of law to support a verdict in favor of moving party, an order granting motion for new trial cannot be sustained.

2. Negligence ⇨136(10)

Where two directly contrary versions concerning happening of the accident were presented, jury had responsibility of determining which account was correct.

3. Appeal and error ⇨977(3)

The granting of a motion for a new trial rests so completely within discretion of trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears.

4. Appeal and error ⇨933(1)

Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict.

5. Appeal and error ⚩854(6)

An order granting new trial will be affirmed if it may be sustained on any ground although the reviewing court might have ruled differently in the first instance.

6. New trial ⚩39

A new trial may be granted on ground that the jury was erroneously instructed upon matters of law. Code Civ.Proc. § 657.

7. Trial ⚩296(8)

An instruction which required jury under certain stated circumstances to return a verdict for plaintiff included a formula that could be justified only if instruction contained all of the elements essential to a recovery and the absence of any one of necessary elements was not cured by fact that other instructions stated the omitted factors required to sustain the verdict directed.

8. Appeal and error ⚩978(1)

Much is committed to discretion of trial judge in determining a motion for new trial on ground of asserted error in instructions. Code Civ.Proc. § 657.

9. Appeal and error ⚩978(1)

Where testimony concerning happening of collision between bus and automobile was conflicting, granting automobile owner, after the return of verdict for bus passenger, a new trial for error in formula instruction which required a jury under certain stated circumstances to return a verdict for plaintiff without requiring a finding that automobile owner was negligent and that plaintiff was damaged as proximate consequence of misconduct was not an abuse of discretion. Code Civ. Proc. §§ 475, 657; Const. art. 6, § 4½.

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In Bank.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Jane Mazzotta against Los Angeles Railway Corporation and Samuel Finkelstein for injuries sustained in collision between a bus operated by the defendant Los Angeles Railway Corporation on which plaintiff was a passenger and an automobile of the individual defendant. From an order granting the individual defendant a new trial, following a verdict in favor of the plaintiff, the plaintiff appeals.

Affirmed.

Prior opinion, 145 P.2d 662.

Russell Hardy and Eugene E. Sax, both of Los Angeles, for appellant.

Parker & Stanbury, Harry D. Parker, and Vernon W. Hunt, all of Los Angeles, for respondent.

EDMONDS, Justice.

A jury awarded Jane Mazzotta damages for personal injuries sustained by her as the result of a collision between an automobile driven by Samuel Finkelstein and a motorbus operated by Los Angeles Railway Corporation. Both Finkelstein and the corporation moved for a new trial upon all of the statutory grounds. Each motion was granted, that of the corporation because of errors of law and also upon the ground of the insufficiency of the evidence to sustain the verdict. The ruling in favor of Finkelstein was based upon certain instructions which the court declared were erroneous, and the appeal is prosecuted solely from that order.

It appears that the accident occurred on a clear sunny morning as the bus was being driven upon a six-lane street. In the middle of the block, along the northerly curb, two spaces were marked off for diagonal parking. The bus, operated by a student driver in the presence of his instructor, was westbound in the second lane. Finkelstein was using the third and center lane, driving his automobile in the same direction. After passing the bus to the left, he proceeded a short distance and then turned to the right in front of the bus, traveling across the second lane and heading into one of the parking spaces.

Finkelstein testified that he last saw the bus by looking into his rear view mirror. His car was then at a point about 15 or 20 feet from the place where he intended to park. At that time the bus appeared to be traveling slowly and between 50 to 60 feet to the rear of his car. According to his version of the accident, the bus struck his car after he had parked and alighted from it.

All of the other evidence was directly to the contrary. Several witnesses testified that Finkelstein turned his automobile in front of the bus when it was but 15 or 20 feet away. As one witness put it, "* * * all of a sudden, he pulled this car directly around in front of the bus, and made an effort to park." Several persons testified that the automobile was in motion at the moment of the impact and had not yet reached the curb.

The controversy concerning the propriety of the order appealed from principally relates to an instruction upon which Finkelstein, in part, based his motion for a new trial. It reads: "If you find from the evidence that the defendant Sam Finkelstein could have avoided this accident by exercising ordinary care in using his senses of sight and hearing to discover the presence of the Los Angeles Railway bus and in preventing his automobile from colliding with the bus, then you must find for the plaintiff Jane Mazzotta and against the defendant Sam Finkelstein." The appellant contends that the giving of this instruction did not prejudice Finkelstein, but even if it be an incomplete statement of law, the ruling that it warrants a new trial was an abuse of discretion. Any error caused by the giving of this instruction, she asserts, was cured by other charges in which the jury was fully and fairly instructed upon every issue of the case. In any event, she adds, no possible prejudice could have resulted to Finkelstein because under the evidence and law a verdict in his favor could not stand. In support of the order, Finkelstein maintains that the court's direction to find for the plaintiff under the particular circumstances stated was an incomplete and prejudicial formula instruction, and because of it, there was no abuse of discretion in granting him a new trial.

[1, 2] If, in the present case, the evidence as a whole would be insufficient as a matter of law to support a verdict in favor of Finkelstein, the order appealed from cannot be sustained. Estate of Baird, 198 Cal. 490, 246 P. 324; Mercantile Trust Co. v. Sunset, etc., Co., 176 Cal. 461, 168 P. 1037; Hitchcock v. Rooney, 171 Cal. 285, 152 P. 913; Flood v. Petry, 165 Cal. 309, 132 P. 256, 46 L.R.A.,N.S., 861; Schlemmer v. Stokes, 47 Cal.App.2d 164, 117 P.2d 396; De La Falaise v. Gaumont-British Picture Corp., 39 Cal.App.2d 461, 103 P.2d 447; Henderson v. Braden, 35 Cal.App.2d 88, 94 P.2d 625; Wall v. Equitable Life Assur. Soc., 33 Cal.App.2d 112, 91 P.2d 145. But his testimony, if believed, furnishes sufficient evidence to support a finding that he exercised ordinary care at the time of the accident. If the jury had returned a verdict for him upon his testimony that at the last time he saw the bus he was but 15 feet from the parking space while the bus was 60 feet to his rear and traveling slowly, the determination could not be said to be unsupported by the evidence. Two directly contrary versions concerning the happening of the accident were presented to the jury and it had the responsibility of determining which account was correct. By its verdict the jury impliedly rejected Finkelstein's testimony but the record would substantially support a contrary conclusion.

[3-6] It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. Koyer v. McComber, 12 Cal.2d 175, 82 P.2d 941; Fennessey v. Pacific Gas & Elec. Co., 10 Cal.2d 538, 76 P.2d 104; Hall v. Desser, 8 Cal.2d 29, 63 P.2d 809; Sheets v. Southern Pac. Co., 212 Cal. 509, 299 P. 71; Abercrombie v. Thomsen, 59 Cal.App.2d 331, 138 P.2d 701; Hunt v. Pacific Elec. Ry. Co., 51 Cal.App.2d 11, 124 P.2d 89; Whitfield v. Debrincat, 18 Cal. App.2d 730, 64 P.2d 960; Bonner v. Los Angeles Examiner, 17 Cal.App.2d 458, 62 P.2d 427; Estate of Wood, 131 Cal.App. 465, 21 P.2d 626; Follett v. Brown, 118 Cal.App. 198, 5 P.2d 51; Malloway v. Hughes, 125 Cal.App. 573, 13 P.2d 1062. Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict (Abercrombie v. Thomsen, supra; Estate of Wood, supra; Weaver v. Shell Oil Co., 129 Cal.App. 232, 233, 18 P.2d 736) and the order will be affirmed if it may be sustained on any ground (Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 143 P.2d 929; Thompson v. California Construction Co., 148 Cal. 35, 82 P. 367; Campanella v. Campanella, 204 Cal. 515, 269 P. 433; Weaver v. Shell Oil Co., supra) although the reviewing court might have ruled differently in the first instance. Hall v. Desser, supra; Abercrombie v. Thomsen, supra; Whitfield v. Debrincat, supra. And since a new trial may be granted upon the ground that the jury was erroneously instructed upon matters of law (Code Civ.Proc. § 657; Brown v. George Pepperdine Foundation, supra; Sheets v. Southern Pac. Co., supra; Thompson v. California Construction Co., supra; Nieves v. Vigolino, 135 Cal.App. 763, 27 P.2d 916; Manufacturers' Finance Corp. v. Pacific W. Radio Inc., 130 Cal.App. 239, 19 P.2d 1013; Pope v. Wenisch, 109 Cal.App. 608,

293 P. 622), the question for decision is whether this wide discretion was abused in granting Finkelstein's motion.

[7] The instruction upon which Finkelstein substantially relies as justifying the action of the trial court required the jury, under certain stated circumstances, to return a verdict for Jane Mazzotta. It therefore includes a formula and may be justified only if it contains all of the elements essential to a recovery (Brown v. George Pepperdine Foundation, supra; Stroud v. Hansen, 48 Cal.App.2d 556, 120 P.2d 102; La Rue v. Powell, 5 Cal.App.2d 439, 42 P.2d 1063; Keller v. Pacific Tel. & Tel. Co., 2 Cal.App.2d 513, 38 P.2d 182; Wessling v. Southern Pac. Co., 116 Cal. App. 447, 3 P.2d 22; Pope v. Wenisch, supra; Sinan v. Atchison, etc., Ry. Co., 103 Cal.App. 703, 284 P. 1041), and the absence of any one of the necessary elements may not be compensated for or cured by the fact that other instructions state the omitted factors required to sustain the verdict directed. Douglas v. Southern Pac. Co., 203 Cal. 390, 264 P. 237, followed in La Rue v. Powell, supra, and Sinan v. Atchison, etc., Ry. Co., supra. Certainly, to return a verdict against Finkelstein, the jury was required to find that he was negligent and that Jane Mazzotta was damaged as a proximate consequence of his conduct. Presumably the jury followed the challenged instruction although it does not include either of these issues and only loosely and incompletely touches upon the law of negligence.

[8, 9] The appellant asserts that a new trial should not be granted upon the ground of misdirection of the jury where the error is harmless and a different result would not be probable had the error not occurred. This rule is based upon article VI, section 4½ of the California Constitution and section 475 of the Code of Civil Procedure which declare that technical but harmless error shall provide no basis for a determination which would result in a miscarriage of justice, and courts are thereby given a wide discretion when called upon in the first instance to relieve from error assertedly committed during the course of a trial. Accordingly, it has been held that although an instruction may not include all of the factors essential to a recovery by the plaintiff, its use does not constitute prejudicial error where, considered together in their entirety, the instructions fully and fairly charge the jury with the law applicable to the case. Wells v. Lloyd, 21 Cal. 2d 452, 132 P.2d 471; Westover v. City of Los Angeles, 20 Cal.2d 635, 128 P.2d 350; Miner v. Dabney-Johnson Oil Corp., 219 Cal. 580, 28 P.2d 23. But much is committed to the discretion of the trial judge in determining a motion for a new trial which is made upon the ground of asserted error in instructions. Thompson v. California Construction Co., supra. She was in a position to determine far more accurately than an appellate court the effect of a particular instruction upon the jury and in view of the conflicting testimony concerning the happening of the accident, her conclusion that Finkelstein was prejudiced by the charge complained of rests upon sound grounds. Certainly there is no showing whatever of any abuse of discretion.

The order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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25 Cal.2d 254

LUTHERAN HOSPITAL SOC. OF SOUTHERN CALIFORNIA v. LOS ANGELES COUNTY et al.

L. A. 19076.

Supreme Court of California.

Nov. 21, 1944.

1. Taxation 🔑191

The Legislature may enact reasonable regulations in determination of constitutional right of exemption from taxation.

2. Taxation 🔑242(1)

A hospital society incorporated primarily to maintain hospitals, etc., and to furnish courses of instruction in nursing, whose students at completion of courses of study received from school of nursing a certificate of nursing and from University of Southern California a Bachelor of Science degree, was not an "educational institution of collegiate grade" within constitutional provision exempting property of such an institution from taxation, and hence the school of nursing was not exempt from taxation. St.1939, p. 1280, § 203; Const. art. 13, § 1a.

See Words and Phrases, Permanent Edition, for all other definitions of "Educational Institution of Collegiate Grade".

3. Taxation ⚿193

Under constitutional provision exempting from taxation the property of any educational institution of collegiate grade, Legislature did not exceed its power in supplying a definition which would exclude a school of nursing conducted as an incident to hospital operations. St.1939, p. 1280, § 203; Const. art. 13, § 1a.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Robert H. Scott, Judge.

Action by the Lutheran Hospital Society of Southern California against the County of Los Angeles and others to recover taxes paid under protest. From a judgment for defendants, plaintiff appeals.

Affirmed.

Musick, Burrell & Pinney, Howard Burrell, Anson B. Jackson, Jr., Philip C. Jones, and Eugene M. Elson, all of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, Gordon Boller, Deputy Co. Counsel, Ray L. Chesebro, City Atty., and Louis Babior, Deputy City Atty., all of Los Angeles, for respondents.

SHENK, Justice.

The plaintiff sued to recover $685.01 paid under protest as taxes levied on its School of Nursing property for the period July 1, 1942, to June 30, 1943. It claimed exemption pursuant to article XIII, section 1a, of the state Constitution. Judgment was for the defendants and the plaintiff appealed.

The provision of the Constitution invoked by the plaintiff reads: "Any educational institution of collegiate grade, within the State of California, not conducted for profit, shall hold exempt from taxation its buildings and equipment, its grounds within which its buildings are located, not exceeding one hundred acres in area, its securities and income used exclusively for the purposes of education."

Section 203 of the Revenue and Taxation Code, St.1939, p. 1280, defines an educational institution of collegiate grade as "an institution incorporated as a college or seminary of learning under the laws of this State, which requires for regular admission the completion of a four-year high school course or its equivalent, and confers upon its graduates at least one academic or professional degree, based on a course of at least four years in liberal arts and sciences, or on a course of at least three years in professional studies, such as law, theology, education, medicine, dentistry, engineering, veterinary medicine, pharmacy, architecture, fine arts, commerce, or journalism."

The trial court found and concluded that the property involved was not held by an educational institution of collegiate grade as contemplated by the Constitution and the statute. The question is whether the finding and conclusion are supported by the record.

Lutheran Hospital Society of Southern California, also known and referred to as California Hospital, is incorporated under the laws of this state, and its properties are located in the county of Los Angeles. In connection with its hospital activities it owns the School of Nursing of the California Hospital, and conducts it in affiliation with the University of Southern California. Neither the hospital nor the school is conducted for profit. The School of Nursing, originally organized in 1888, was discontinued in 1933. It was reopened in 1941 because of a lack of nurses available for hospital service in Southern California. It is conducted in Larson Hall, a portion of the hospital properties located in the city of Los Angeles. Larson Hall contains four stories and a basement. Classes for student nurses are given in three of the rooms. Other rooms are assigned as offices, library, recreational, and dormitory for students and faculty. Students entered in the nursing courses are required to reside in the hall so as to be available for hospital service.

Application blanks for entry to the School of Nursing are obtained from the University of Southern California, filed with the School of Nursing, and the selection of applicants is made on the basis of personal and educational qualifications. Separate registration and tuition fees are paid to the university and to the School of

Nursing. The students do not pay for room or board while residing at Larson Hall. Room and board are considered as compensation for service to the hospital while students are in training. Occasionally for convenience certain of the university classes may be conducted at Larson Hall. Seventy-one aspirants comprised the student body at the time of trial of this action. At the successful completion of their courses of study and hospital training service the graduates receive from the School of Nursing a Certificate in Nursing, and from the University of Southern California a Bachelor of Science degree.

It is deemed unnecessary to consider the questions whether the plaintiff has waived the exemption for the period designated, whether nursing is a learned profession, and therefore college grade study, or what proportion, if any, of Larson Hall might come under such exemption, since it must be concluded that in any event the evidence otherwise supports the trial court's finding and conclusion that the plaintiff does not come within the constitutional exemption.

By the adoption of said section 1a of article XIII of the Constitution in 1914 an exemption of property held by "any educational institution of collegiate grade" and "used exclusively for the purposes of education" was provided for. The section did not define an educational institution of collegiate grade, but the Legislature supplied the omission by appropriate definition.

[1] Section 13 of the same article of the Constitution authorizes the Legislature to pass all laws necessary to carry out the provisions of that article and this court has recognized the propriety of reasonable regulations in the determination of a constitutional right of exemption from taxation. Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106. The Legislature has provided, as pointed out, that an educational institution to be exempt must be "incorporated as a college or seminary of learning" and "[confer] upon its graduates at least one academic or professional degree."

[2] By its amended articles of incorporation the plaintiff is incorporated primarily to "establish, maintain, conduct and operate hospitals, sanitaria, asylums, rest or retirement homes, maternity houses, dispensaries, clinics," etc., "for the care and treatment of the sick"; and "to the extent permitted by law to conduct, give and furnish courses of instruction in nursing * * * in connection with the operation of a hospital * * *, to confer degrees and to issue certificates and diplomas evidencing the completion of courses of instruction, and in connection with the foregoing to establish, own, maintain, conduct and operate nurses' homes, training schools, classrooms and quarters suitable for the furnishing of courses of instruction and the care and maintenance of students." It thus appears that the plaintiff is incorporated as a hospital and not as a college or seminary of learning. It does not in fact confer a degree. The degree of Bachelor of Science is conferred by the University of Southern California and not by the hospital corporation. We therefore have an incorporated institution of collegiate grade, the university, conferring the academic degree, while the property sought to be exempted is owned and held by an institution incorporated as a hospital, and not as a college or seminary of learning; nor does it confer a degree as required by law.

The law on the subject as incorporated in the Constitution and statute is reasonably clear and would seem to need no interpretation. See Ross v. City of Long Beach, 24 Cal.2d ——, 148 P.2d 649. In Pasadena University v. Los Angeles County, 190 Cal. 786, 789, 214 P. 868, 869, this court, reading the language in its natural and ordinary sense, held that "the Constitution, exemption is granted to an institution of collegiate grade as a whole and not otherwise." See Estate of Pence, 117 Cal. App. 323, 329, 4 P.2d 202; vol. 7 Words and Phrases, Perm.Ed., p. 627. The definition of an "educational institution of collegiate grade" as provided by the legislative enactment is in harmony with the constitutional exemption as declared in the Pasadena University case. It does not unduly limit or extend the exemption as applied to an "educational institution."

[3] It may not therefore be said that the Legislature has exceeded its power in supplying a definition which would exclude a school of nursing when, as here, it is conducted as an incident to hospital operations. In Massachusetts General Hospital v. United States, 1 Cir., 112 F. 670, 671, 50 C.C.A. 417, it was pointed out that if it had been intended to include in the exemption any institutions other than those designated, the intention could readily have been disclosed. Under our Constitution, as under the Massachusetts provision, the words "educational institution," used in the ordinary and

commonly accepted sense, do not include a general hospital which has, as an incident to its main purpose and usefulness, an educational feature. Furthermore, it is apparent that in the ordinary acceptation of the term, a hospital is not considered as an "educational institution of collegiate grade" or as a "college or seminary of learning." In this field of legislation the Legislature may well have concluded that the training of women as nurses is mainly in connection with and for the benefit of the hospital (see article 2, ch. 6, div. II of the Business and Professions Code, as added by St.1937, p. 1377, and that the property used for such purposes is entitled only to the classification accorded general hospital property devoted to nonprofit or charitable uses. The record indicates that upon application to the Board of Equalization and a presentation of facts showing its use exclusively for charitable and nonprofit purposes, the plaintiff received a 50 per cent reduction in the assessed valuation of all of its property including Larson Hall. Total exemption of the property of such institutions was rejected by the electors of the state in November, 1930, when it was proposed to add section 1⅝ to article XIII of the Constitution to accomplish that purpose. However, at the November, 1944, election, proposed section 1c of article XIII was added, making it permissive for the Legislature to exempt all or a portion of the properties of nonprofit hospital corporations. That section is, of course, prospective only.

The plaintiff invokes language approved by this court in Mitchell v. Whittier College, 205 Cal. 744, at pages 747, 748, 272 P. 748, to the effect that "college" means growth and must conform to the changing conditions of each generation and the requirements of the times which it serves. However, that language bears on the question whether the study of nursing is college grade work and does not alone resolve the problem whether the plaintiff as an "institution" qualifies under the constitutional exemption. There is nothing in the history or policy of exemptions from taxation granted to colleges, seminaries of learning, public schools, and the like, which would justify a departure from this court's application of the law in the case of Pasadena University v. Los Angeles County, supra.

It necessarily follows that the trial court should be sustained in its finding and conclusion that the plaintiff was not at the time the tax here involved was imposed an educational institution within the meaning of the Constitution and the statute.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

25 Cal.2d 216

PEOPLE v. NAGLE.

PEOPLE v. EYRE et al.

Cr. 4557, 4559.

Supreme Court of California.

Nov. 17, 1944.

1. Criminal law 🔑238

The evidence before a committing magistrate at a preliminary hearing need not be such as would require a conviction in order to hold accused to answer. Pen. Code, §§ 872, 995, 1487, subd. 7.

2. Criminal law 🔑240

Habeas corpus 🔑21

"Sufficient cause" for commitment by magistrate under statute providing that defendant must be held where it appears that there is "sufficient cause to believe defendant guilty", means no more than "reasonable or probable cause" as specified in the statute relating to discharge on habeas corpus, which means such a state of facts as would lead a man of ordinary prudence to believe, and conscientiously entertain a strong suspicion of, accused's guilt, and which may exist notwithstanding there is some room for doubt. Pen.Code, §§ 872, 995, 1487, subd. 7.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable or Probable Cause" and "Sufficient Cause".

3. Criminal law 🔑238

Evidence at preliminary examination was sufficient to justify magistrate's commitment of defendants accused of murder. Pen.Code, §§ 872, 995.

4. Criminal law 🔑409

Where defendant's statement included incriminating facts that defendant fired fatal shot, necessity for determining voluntary character of statement did not depend on whether it constituted a confession.

5. Criminal law 🔑520(1)

Aside from any constitutional violation, circumstances surrounding inducement or promised gratuity may be such as to render confession equally untrustworthy as if inducement related to punishment.

6. Criminal law 🔑519(8)

Where alleged treatment of holding defendant accused of murder incommunicado three days following his arrest until time defendant made confession was not unusual, and defendant had no cause to believe his treatment would be better if he confessed, confession was not inadmissible on ground it was involuntary.

7. Criminal law 🔑531(3)

Evidence supported finding that confession was freely and voluntarily given and not induced by defendant's being held incommunicado or promise of reward.

8. Criminal law 🔑519(1)

A voluntary confession was admissible against defendant regardless whether defendant made confession upon hope of being privileged to see a codefendant or in an effort to free codefendants.

9. Criminal law 🔑808½

In prosecution for murder where court instructed that prosecution was required to show an intent to rob deceased, court correctly instructed upon bearing defendant's intoxication might have upon existence of intent, to constitute a crime, by instructing in words of statute relating to intoxication. Pen.Code, § 22.

10. Criminal law 🔑829(6)

Refusing a cumulative instruction which amounted to merely a direction to apply law as theretofore enunciated to defendant's intoxicated condition was not error, since jury understand they were to apply law as enunciated. Pen.Code, § 22.

In Bank.

Appeal from Superior Court, Alameda County; Edward J. Tyrrell, Judge.

Djory Nagle, Lucille Eyre, and others were convicted of murder, and they appeal.

Affirmed.

Willard W. Shea, Public Defender, and Leo A. Sullivan, both of Oakland, for appellants.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendants, Djory Nagle, Sally Mixon and Lucille Eyre, were found guilty by a jury of the murder of John Lucia, a taxicab driver, whose death occurred as a result of bullet wounds suffered from a .32 automatic pistol owned by defendant Nagle and used by him in dispossessing Lucia of his taxicab. Sentence of death was imposed upon Nagle, while his codefendants were given life imprisonment. All three defendants have appealed from the judgments and from orders denying new trials. In addition to the automatic appeal from the judgment and sentence of death, counsel for appellant Nagle has diligently perfected and prosecuted an appeal on behalf of his client. The case has been ably briefed on behalf of defendants Nagle and Mixon, but no brief has been filed in support of the appeal of Lucille Eyre, however, we have examined the record for error on her behalf along with her codefendants.

The facts, as material to this appeal, are that the three defendants at the time of the occurrence of the events herein concerned and for a short time prior thereto, had been residing at the home of defendant Lucille Eyre, an acquaintance of Sally Mixon, in San Francisco. Nagle and Eyre had for some time been discussing the carrying out of a holdup of a beer parlor in Oakland known as Sam's Place. Upon receiving and accepting on October 10, 1943, an invitation from Lucille's mother, a resident of Oakland, to pay her a visit the following day, the defendants decided to carry out the contemplated robbery of Sam's Place on the same trip. They planned to make a visit to Sam's Place, "casing it," or looking it over early in the day and then carry out the robbery later. Nagle was the owner of a .32 caliber automatic revolver. Defendants had no automobile, but Sally was to borrow one from a friend in Oakland, as to which idea she was apparently somewhat recalcitrant.

All of the defendants were habitual consumers of alcoholic beverages. According to the evidence, before starting out on the morning of October 11, 1943, they consumed a quantity of liquor. Shortly after leaving the house they stopped at a bar known as the "Can Do," where Nagle drank gin, Sally, whiskey and beer, and Lucille, some form of liquor. They then procured a taxicab, which however because of regulations was unable to take them to Oakland, but took them to the Ferry Building, where decedent Lucia was engaged to transport them to Oakland. Before leaving, however, another bar was visited and liquor consumed. They then were transported by Lucia to Sam's Place in Oakland, where they indulged in drinks while "casing" the place. While there, the idea originated (in whose mind does not appear) that Lucia's car, a large sedan, would be good to use in perpetrating the robbery. It was agreed that Nagle should oust Lucia from the car in the neighborhood of Hayward. In consonance with this plan, upon resumption of travel, and after Lucia had been given $20 by Nagle for taxi fare, Sally requested that Lucia drive them to Hayward, stating she had a relative there. Upon reaching the outskirts of Hayward, Nagle, who was sitting in the front seat with Lucia, ousted the latter from the car. The evidence is conflicting as to just how this took place, but Lucia, who was unarmed, was shot twice in the body and a third time, while lying on the ground, in the forehead. He was left to die or dead alongside the road and defendants drove off toward Oakland in his automobile. During the melee with Lucia, Nagle got a considerable quantity of blood on his clothing, so in order to have at hand an alibi in case of need, he directed Sally to purchase some razor blades, and while at another bar in Oakland, cut himself on the left hand, quickly broke a beer glass against the bar, feigned cutting his hand, was taken by taxi to the emergency hospital where stitches were taken. He there gave the name of George Powell. The razor blade used was retrieved the next day from the toilet pipes in the women's rest room at the last-mentioned beer parlor. A bartender testified that Lucille went to the rest room right after Nagle cut his hand. Lucia's car had been abandoned upon reaching Oakland and the foregoing incidents necessitated the putting in abeyance of the plan to rob Sam's Place. After leaving the hospital defendants proceeded to the home of the mother of Lucille, where Nagle and Sally were arrested early the next morning at the instance of Lucille's mother, Lucille by this time having become semi-hysterical as a result of the lurid events of the preceding day. Later that same day, she also was taken into custody. Three days afterwards, Nagle and Sally made a joint statement to the district attorney's office which included, among others, some of the foregoing details.

Three grounds are raised by appellants for reversal of the judgment: (1) That the court erred in denying appellants' motion made under section 995 of the Penal Code to set aside the information on the ground of the insufficiency of the evidence adduced at the preliminary examination to connect appellants with the death of John Lucia. (2) The joint statement of Djory Nagle and Sally Mixon was not freely and voluntarily given on the part of Djory Nagle and should not have been introduced into evidence. (3) The court erred in refusing to give defendants' proposed jury instruction in regard to intoxication.

The evidence adduced at the preliminary examination was clearly sufficient to establish that a public offiense had been committed, and there was reasonable or probable cause for appellants' commitment.

At the preliminary hearing the cause of the death of Lucia was established by Dr. Gertrude Moore, who performed an autopsy on his body. She testified that his death was due to multiple bullet wounds. The prosecution then proceeded to assiduously trace the movements of defendants throughout the day of October 11, 1943. One Kief, a taxicab driver, testified to his engagement by defendants and the driving of them to the Ferry Building. They wanted him to drive them to Oakland, but he could not do so because of regulations. Thomas Mooney, a service station operator, acquainted with deceased, testified as to the presence of defendants with deceased when the latter drove into Mooney's station between 1 and 2 p. m. Sam Matheson, proprietor of an Oakland cafe, was then produced and identified defendants as being in his cafe, together with a man answering the description of Lucia, at about 3 p. m. on the same afternoon, and he testified that the four of them left together. They then placed upon the stand one Alvina Olivas, who testified that on the afternoon of October 11, 1943, she was picking walnuts near Hayward, in close proximity to where the body of Lucia was later found; that a big dark car came along and stopped about 300 feet from her; that a man fell out, and another man got out of the car and pulled him over to the side of the road and left him there; that the car in driving away passed her, and that there were two women in the car, one woman wore a green coat and had reddish hair. The latter statement of the witness was descriptive of the defendant Mixon and the coat she was wearing. Lillian Brill, working in her husband's liquor store at about 4 p. m., saw the defendants arrive in Oakland, hitting the curb as they drove up. She saw a blonde woman get out of the car wearing a coat like the one introduced into evidence as worn by defendant Eyre. In addition to the foregoing testimony, a .32 caliber bullet or projectile and shell case found near the body of Lucia and another bullet taken out of the back of the front cushion of Lucia's automobile were produced together with a .32 caliber automatic revolver taken from the handbag of defendant Mixon at the time of her arrest. The revolver was shown to have contained six cartridges, identical as to type and make, with the projectiles and shell case first mentioned. Decedent's car was shown to have been located in Oakland a few blocks from the place of defendants' arrest, and keys were produced accompanied by testimony that they fitted the locks on the car and had been found underneath a seat of the police car in which defendants Nagle and Mixon were taken to the police station after their arrest.

Defendants produced no evidence at the preliminary hearing.

[1-3] It must be remembered that the evidence before a committing magistrate at a preliminary examination need not be such as would require a conviction. Section 872 of the Penal Code provides that the defendant must be held to answer if "it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof." Section 1487(7) of the Penal Code provides that a party is entitled to discharge upon habeas corpus proceedings where he has "been committed on a criminal charge without reasonable or probable cause"; "sufficient cause," therefore, means no more than that. People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; Clough v. Strakosch, 9 Cir., 109 F.2d 330; In re Martinez, 36 Cal.App.2d 687, 98 P.2d 528. "Reasonable or probable cause" means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. "Reasonable or probable cause" may exist although there may be some room for doubt. In re McCarty, 140 Cal.App. 473, 474, 35 P.2d 568; Ex parte Heacock, 8 Cal.App. 420, 97 P. 77; In re Mesquita, 139 Cal.App. 91, 33 P.2d 459; Ex parte Vice, 5 Cal.App. 153, 89 P. 983. The committing magistrate, with the foregoing evidence before him had no alternative other than to order the defendants held for trial.

There was no error in receiving the joint statement of Djory Nagle and Sally Mixon.

It is appellant Nagle's contention that the joint statement given by himself and Sally Mixon to the district attorney's office, three days after their arrest, which included as a part thereof details of the robbery of Lucia's automobile and the shooting of Lucia by Nagle, was over objection improperly admitted into evidence, because it was not freely and voluntarily given on his part, but was compelled by his being held incommunicado three days, and more particularly, induced by a promise on the part of the jailers or others in authority, that "If I had something to say I would be permitted to see Miss Mixon; otherwise no." On the witness stand, he claimed to have been so far intoxicated that he could not recall the events surrounding the shooting and the removal of Lucia from his automobile.

[4] The necessity for determining the voluntary character of the statement does not depend upon whether or not it constitutes a confession of guilt. It included an important incriminating fact, that defendant Nagle fired the fatal shots. People v. Gonzales, 24 Cal.2d 870, 151 P.2d 251; People v. Quan Gim Gow, 23 Cal.App. 507, 512, 138 P. 918.

[5] At the outset the attorney general contends that any such inducement or promise of reward as claimed by appellant to have been made, assuming it was made, is not such a form of coercion or promise of reward as to require the exclusion of the confession. It has been held in some juris-

dictions that a collateral benefit or boon, not relating to any phase of immunity, is insufficient to render a confession induced thereby inadmissible as involuntary. State v. Woo Dak San, 35 N.M. 105, 290 P. 322; Roesel v. State, 62 N.J.L. 216, 41 A. 408; Com. v. Knapp, 9 Pick., Mass., 496, 20 Am. Dec. 491; State v. Tatro, 50 Vt. 483; (promise to unchain defendant and allow him to associate with other prisoners); Rex v. Lloyd, 6 C. & P. 393 (promise to permit defendant to see his wife who was confined in a separate cell). See 22 C.J.S., Criminal Law, § 825, p. 1444; 16 C.J., Criminal Law, § 1490. However, aside from any constitutional violation, the circumstances surrounding the inducement or promised gratuity might be such as to render the confession equally untrustworthy, as if the inducement related to punishment. People v. Mellus, 134 Cal.App. 219, 25 P.2d 237; Shields v. People, 132 Ill.App. 109; Com. v. Knapp, supra. We do not find it necessary, however, to pass upon the sufficiency of the alleged inducement as a matter of law, for the evidence clearly shows that the statement was freely and voluntarily given and free from any improper influence. A foundation for introduction of the statement was laid by the testimony of Christine Allen, a stenographer in the office of the district attorney, who was present and transcribed the whole conversation that took place between defendants Nagle, Mixon and the interviewing assistant district attorney, Laurence Dayton. She testified that at the time of the conversation no promises were made to either of said defendants to induce them to make a statement, but that it was freely and voluntarily given. This fact was also acknowledged by defendant Nagle in the statement, at which time he said to disregard all former statements made by him. In response to the admonition by Mr. Dayton that "I want you to understand that all statements you now make you are making of your own free will, without any promise by anyone," Nagle replied, "Yes, I figure this: That is, if I make a statement now it's a confession and I know that is usually taken into consideration. I don't expect too much myself but there's always the possibility of a break for them." Nagle's testimony at the trial given upon voir dire, that the statement was induced by a promise to be accorded the privilege of seeing Miss Mixon was later contradicted by himself upon direct examination in chief, when he explained it away as having been made "in order to let Miss Mixon out." Assistant District Attorney Laurence Dayton, called to the stand as a witness on behalf of defendant Nagle, denied sending word to him that he could talk to his codefendant Mixon if he would make a statement. The following colloquy appearing in the concluding portion of the statement is indicative that Nagle, after having concluded same, had some hope that he would then be awarded the privilege of seeing his codefendant, which he then requested, but clearly shows that he was not acting in reliance upon any promise theretofore given:

"'(Nagle) I told you you should disregard everything I have told you before. I only hope you will take Sally into consideration; the girls, and especially Sally and go easy on her. I don't care especially about Lucille.

"Q. (Dayton) That's about the story. A. I believe that is about it. Will you make it possible for me to see Sally once or twice a week?

"Q. That is of course something that the Sheriff's office will have to arrange. A. But I suppose now, if you would suggest it, he might consider it, don't you think?

"Q All right. That's about all now.'"

[6, 7] As to Nagle's claim of being held incommunicado three days ensuing his arrest—up until the time of the giving of the statement, which is not relied upon as material, separate and apart from the inducement heretofore considered,—Nagle testified that he was held in a cell separate from other prisoners; but also that he was called out on various occasions, and that he did see and talk with Sally Mixon during that period. No showing was made that this treatment was unusual in respect to one in his position, or that he had cause to believe his treatment would be bettered if he confessed. What has heretofore been said in regard to the alleged inducement offered applies equally upon the matter of the statement being affected by his treatment. The trial judge preliminarily admitted the statement and then submitted to the jury under proper instructions the question of its voluntariness, and their finding is amply supported by the circumstances before them.

[8] If the statement was made by defendant Nagle, upon the hope of being accorded the privilege of seeing Sally Mixon, or in an effort to free her and Lucille Eyre, yet it being a statement in the nature of a confession, voluntarily given, it could be used as evidence against him. People v. Luis, 158 Cal. 185, 110 P. 580; People v. Smalling, 94 Cal. 112, 29 P. 421; Reeder v. State, 182 Ark. 1093, 34 S.W.2d 451.

The jury was correctly instructed upon the issue of intoxication.

[9, 10] It is contended by defendants Nagle and Mixon that the court erred in refusing to give the following portion of a requested instruction to the jury: "If you find from the evidence that the defendant Nagle was so intoxicated on the afternoon of October 11, 1943, as to be incapable of forming an intent to rob John Lucia, then you will find the defendant Nagle not guilty of the crime of murder of the first degree." The jury was correctly instructed upon the bearing intoxication might have upon the existence of intent, to constitute a crime, by the giving of an instruction in the words of section 22 of the Penal Code, to wit: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." They were also instructed that it was incumbent upon the prosecution to show, "an intent to perpetrate the crime of robbery of John Lucia."

The portion of the instruction refused is cumulative and amounts at most to merely a direction to apply the law, as theretofore enunciated to defendants' situation, something the jury could not help from understanding they were to do anyway. There was no error in the refusal to so instruct. People v. Casagranda, 43 Cal.App.2d 818, 822, 111 P.2d 672; People v. Gaytan, 38 Cal.App.2d 83, 100 P.2d 496.

The judgments and the orders denying a new trial are and each of them is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concur.

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25 Cal.2d 237

DONAHOO v. KRESS HOUSE MOVING CORPORATION et al.

L. A. 19068.

Supreme Court of California.

Nov. 21, 1944.

1. Landlord and tenant ⚿164(3)
Master and servant ⚿304

A landlord, undertaking to make repairs on demised premises, is liable for injuries to tenant or any person whose use of premises under hiring is within parties' contemplation as result of landlord's or his servants' negligence in making repairs.

2. Landlord and tenant ⚿119(2)

A month to month tenant's holding over, with landlord's consent, while negotiating for reduction of rent because of change in condition of leased premises, after failure to pay month's rent on due date, did not change tenant's status to that of "tenant at sufferance". Civ.Code, § 1946.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant at Sufferance".

3. Negligence ⚿32(1, 2)

House moving contractors, permitting lot owner's tenant and her mother, living in house on lot, to remain on premises during removal of such house and another house thereon to rear of lot, accepted such occupants as "invitees" and owed them duty to exercise ordinary reasonable care to provide reasonably safe passageway for ingress and egress to and from house and guard openings or excavations made by contractors on such premises.

See Words and Phrases, Permanent Edition, for all other definitions of "Invitee".

4. Negligence ⚿63

The fact that house moving contractors' dirt filling of holes, left by pulling of timbers installed as anchors on lot after removal of houses from front to rear thereof, sunk because of heavy rains, did not relieve contractors from liability for injuries to occupant of one of such houses as result of fall into one of holes.

5. Negligence ⚿136(26)

A woman injured by fall into hole, left by house moving contractors on lot from front to rear of which they had moved house occupied by her, was not, as matter of law, guilty of contributory negligence, barring her recovery of damages from contractors, in taking path, over which her daughter and a friend had made frequent trips safely between house and place on lot to which injured woman went from house to meet such friend just before accident.

6. Negligence ⚷32(1)

An invitation or permission to enter upon land need not be expressed but may be implied from such circumstances as the conduct of the possessor, the arrangement of the premises, or local custom.

7. Negligence ⚷36

Permission given by house movers to tenant to occupy during the construction one of the houses being moved back on a lot, and tenant's necessity to traverse the premises in going to and from the street, placed upon house movers the duty of providing a reasonably safe passageway to serve tenant's necessity.

SCHAUER and EDMONDS, JJ., dissenting.

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In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by Lettie Donahoo against the Kress House Moving Corporation and another for personal injuries caused by a fall into a hole dug by defendant near a house occupied by plaintiff during defendant's operation in moving such house and another house on the same lot to the rear thereof. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 147 P.2d 637.

Frank W. Woodhead, of Los Angeles, for appellants.

Irving E. Read, of Los Angeles, for respondent.

PER CURIAM.

After hearing granted and oral argument the following portions of the opinion of the District Court of Appeal, Second District, Division Three, 147 P.2d 637, prepared by Presiding Justice Desmond, with some additional comment, constitute the opinion on which the decision in this case is based:

"This is an appeal from a judgment entered in favor of the plaintiff, Lettie Donahoo, against Kress House Moving Corporation and its vice-president, Edwin O. Egnew, in an action tried before a court without a jury.

"The locale of the accident resulting in the injuries for which judgment was awarded was the rear of a lot on the south side of Hollywood Boulevard a short distance east of Gower Street in the city of Los Angeles. This lot belonged to a man named Mark Hansen and was of sufficient depth to warrant the moving of two houses located thereon to the rear of the premises, thereby making available as a used car lot the front of the premises. Hansen, on February 1, 1941, entered into a written contract with defendant corporation to move the buildings, which were respectively occupied by his tenants, Dr. Taylor and Miss Juanita Donahoo, an artist, whose 77-year-old mother, the respondent here, lived with her and kept house for her. The Donahoo house, smaller than the Taylor house, was moved first and placed upon a concrete foundation which had been prepared for it at the extreme rear of the property. The contract between the owner and the Kress House Moving Corporation contained as one of its provisions, the following: '(d) Uninterrupted Possession: To furnish and provide to the contractor at all reasonable times during the progress of the work whenever required in the performance of this contract by the contractor, an exclusive and uninterrupted possession of all the building or buildings and properties herein referred to, and to hold the contractor free and harmless at all times from any interference with such possession and occupation, as may be necessary to carry out the obligations of the contractor herein, and to hold the contractor free and harmless from all claims of third parties which may arise by reason of the doing by the contractor in a proper manner of the work herein agreed by him to be performed.' The occupants of the Donahoo house were permitted by the defendant corporation to continue their occupancy of the house during the moving operations.

"According to the defendant Egnew, who was in active charge of the work, his organization started moving the Taylor house on the 11th day of February, 1941, the Donahoo house having been lowered in the morning of that day upon its permanent foundation. Miss Donahoo testified that before the Taylor house was moved she saw the employees of the defendant corporation dig a ditch 'near the northwest corner of our house, as it is now located.' This ditch she described as being approximately seven or eight feet long and between three and four feet deep, located in an area immediately adjacent to the northwest corner of the Donahoo house. The court found that 'this hole ran from east to west, and was approximately a foot north of the front of the Donahoo house.' Miss Donahoo also testified that the workmen put some beams in the hole and a metal upright or stake to which a chain and cable were attached. Other testimony showed that the hole, timbers, and metal stake formed what was known as an 'anchor' in house moving operations, and the timbers, being buried in the ground, were known as 'deadmen.' A new foundation was also constructed for the Taylor house but the work of placing it permanently upon that foundation was interrupted by winter rains and for approximately a fortnight after February 18, 1941, it rested on heavy timbers immediately above the concrete foundation.

"As the work progressed after February 1st, the front of the premises became littered with all kinds of equipment and machinery used in house moving and in concrete construction. Because of the great inconvenience involved in making her way out to Hollywood Boulevard by going to the north, Miss Donahoo resorted to a short cut, by which she obtained an exit to a paved driveway a few feet to the southwest of the northwest corner of her house. At that point two boards had been removed from a fence abutting on the paved driveway, by which easy access was had to Gower Street. Because of the muddy condition of the lot, the trip from the front of the Donahoo house to the paved driveway was made over small boards approximately one and a half feet long by six inches wide, laid end to end and bordering at one point upon the hole, above described, which, according to the findings of the court, the defendants 'neglected and failed to cover up or place a guard over or around the hole * * * so that it would be reasonably safe for plaintiff and her daughter to either walk over or around the same and out to the passageway in question.' The evidence does not disclose who laid the small boards in position but it appears clearly that Juanita Donahoo and a Miss Young, who was a close friend of her mother, frequently used the path formed by these boards. Mrs. Donahoo, however, had no occasion to use the path or to go to the driveway since she remained inside the Donahoo house during all the moving operations from February 1st to February 22d, the night when she suffered her injuries, with the exception of a single instance when she 'went out to get the mail, toward Hollywood.' On the evening of February 22d, she was expecting Miss Young to call upon her and undertook to light the way to and from the driveway by putting on the lights in two westerly bedrooms and the front porch. There were no back stairs available, the defendants having removed them when moving the house and not having replaced them. Mrs. Donahoo decided that she would make her way to the fence corner, greet her friend and return with her to the house. She had no knowledge whatever of the hole having been dug but, undoubtedly, was familiar with the fact that her daughter and Miss Young had made use of the short cut above described. On the night in question she went from the house to the paved driveway about 7 o'clock and, meeting Miss Young at that point, turned about and preceded her toward the Donahoo house. She described her trip going from the house, as follows: 'I walked—stepping on these small boards, I came to a white board, a little board painted white, and I stepped on that, and then up on a beam, and then over onto another beam, and then to a sort of a cement coating, and then down on the cement—on cement paving.' On the trip back, toward the house, 'I stepped on the first beam with my right foot, after passing over the coping, and leaving the paving, I stepped on the beam—the first beam, with my right foot, and then over on the left beam with my left, and then down on this little white board with my right foot, which slipped into the hole or trench or whatever it was. I didn't see it before I slipped into it, or I never saw it afterwards; I never saw the hole.' She also testified that the force of the fall 'sent my body over the beam south, and the beam hit my knee, the sharp edge of the beam hit my knee, and I couldn't move.' While the night was described as 'dark' by certain of the witnesses, Mrs. Donahoo testified that she saw the beams and the little white board, saying, 'I stepped down on that little white board, because I could see that plainly.' Miss Young also testified that while she could not remember about the 'moon' she could see very well. * * *

"As a result of this accident Mrs. Donahoo was confined to her bed for a period of eight or nine weeks with her leg in a cast, then got about by means of crutches and a cane for a period of approximately a year after the date of her fall.

"Appellants make no complaint with reference to the amount of the award made by the court, but contend that the evidence is insufficient as a matter of law to support the judgment; that it does not justify the findings of fact and conclusions of law made by the court, and that the plaintiff was guilty of contributory negligence as a matter of law. It is also claimed that the negligence, if any, of the defendants was not the proximate cause of the injuries sustained by the plaintiff:

"As to the findings it may be said that many of the details covered in the foregoing recital appeared therein, and to us they furnish adequate support for the conclusions reached by the court, as follows: (1) That the defendants had uninterrupted possession of the property at the time of the accident and that the plaintiff was, both prior to and at the time of her accident, an invitee of the defendants. (2) That it was the duty of the defendants to provide a reasonably safe passageway on the said property for the plaintiff to walk upon and use as a means of ingress and egress to and from the house; that it was also the duty of the defendants to exercise reasonable care in guarding any openings or excavations it made on said property so that plaintiff and other invitees would not, in the exercise of reasonable care, fall into the same. (3) That the defendants dug the hole in question and failed to guard the same or provide a reasonably safe passage over or around the same and that by reason thereof were careless and negligent; that their carelessness and negligence was the sole proximate cause of the plaintiff's accident and injuries. (4) That the plaintiff was in the exercise of reasonable care and caution immediately preceding and at the time of the accident and there was no negligence on her part proximately contributing thereto. (5) That the plaintiff was entitled to recover the sum of $2,496.50 from the defendants Kress House Moving Corporation, a corporation, and Edwin O. Egnew.

"With the exception of the amount estimated by the court as a just award for the injuries suffered by Mrs. Donahoo, the appellant contends that all the foregoing conclusions are unwarranted under the testimony submitted. * * *

[1-3] "Miss Donahoo was the tenant of Hansen, the owner of the property, before and during all the moving operations. As such, she was an invitee and so was her mother, a member of her household and acting as her housekeeper. As stated in 36 C.J., p. 217 (Landlord & Tenant), the rule reads, 'Where the landlord undertakes to make repairs upon the demised premises, he is liable for injuries resulting from the negligence of himself or his servants in making such repairs. The liability of a landlord in such cases is not limited to the tenant personally, but includes all persons who, within the contemplation of the parties, were to use the premises under the hiring.' See, also, 32 Am.Jur., section 665, p. 529 (Landlord & Tenant), which states, '* * * It is the well-settled general rule that the duties and liabilities of a landlord to persons on the leased premises by the consent of the tenant are the same as those owed to the tenant himself. For this purpose they stand in his shoes. This rule applies to the tenant's wife or child.' Since the defendants permitted Miss and Mrs. Donahoo to remain on the premises their status did not change; they remained invitees. Appellants argue that since Donahoo was negotiating during the month of February for a reduction of rent because of the change in the condition of the premises which she occupied, she became a tenant at sufferance merely because her rent was not paid promptly on February 1st, the day when it was due. We do not think this reasoning is sound for Miss Donahoo stayed on with the consent of her landlord and, since she rented on a month to month basis, her holding over did not change her status to that of a tenant at sufferance. 'In the case of a prior tenancy from month to month, a tenant, on the election of the landlord so to treat him, becomes or remains a tenant from month to month.' (32 Am.Jur., sec. 941, p. 793; see sec. 1946, Civ.Code.) Under this rule Miss Donahoo was still owed the same degree of care that was due her before the negotiation for the reduced rent began. The same, of course, is true of her mother. When the defendants permitted these two women to remain upon the premises, they accepted them as invitees to whom they owed ordinary and reasonable care since they continued as tenants, and the defendants, by the terms of the moving contract with

Hansen, were given complete possession and control of the buildings and the property involved in the moving operations.

"Appellants contend that the court erred in concluding that it was the duty of the defendants to provide a reasonably safe passageway on the Hansen lot for the plaintiff to use in going to and coming from her house, but under the circumstances of this case it clearly appears that some provision of this sort should have been made. The defendant Egnew testified that, while the moving operations were going on, the area between the Donahoo house and Hollywood Boulevard was 'about like a pig pen in winter.' Notwithstanding that, and with full knowledge that women were entering and leaving the house, neither he nor anyone by his order, according to his testimony, laid any boards or planks over the short distance, approximately 15 or 20 feet, from the front of the Donahoo house to the paved driveway leading to Gower Street, while the work was going on in the front part of the Hansen lot, nor did they provide means of entry or exit elsewhere on the premises. A witness, George Gray, describing the condition north of the Donahoo house, stated, 'it was strewn with brush and with timbers, with sand, with concrete, concrete mixers, and everything that a person would use in moving and building foundations'; also that when the Donahoo house was in its old location a cement sidewalk led from the front of their house around on the east side of the Taylor house, to the front of the Taylor house, and on to the walk, but that prior to February 22, 1941, 'The biggest part of it had been broken up by the trucks and then moved out completely.' Plaintiff's Exhibit 4 vividly depicts the condition of the area between the Donahoo house and Hollywood Boulevard. We find the appellants, in their opening brief, mentioning that 'there were concrete mixers, sand, cement, concrete forms and other paraphernalia connected wtih construction operations upon the premises. The cement contractor had dug trenches for the purpose of laying the foundations for both houses; the plumbing contractor had laid pipes on the ground in the vicinity of both houses; trees and shrubbery were uprooted all over the premises and timbers which were essential to the house moving operations and the construction work necessarily were lying on the ground surrounding both houses.' Instead of providing a reasonably safe means of ingress and egress the defendants, according to the finding of the court, dug the hole, which we have heretofore described, at the northwest corner of the Donahoo house and immediately adjacent to it. Having complete control of the property, they stood in the same position as a landlord and, in our opinion, violated the rule stated in 15 Cal.Jur., p. 741, 'Where a landlord retains or has control of a portion of the leased premises, the responsibility rests with him to see that no injury results to those having rights there because of the way in which that portion is occupied or used.' See Davis v. Pacific Power Co., 1895, 107 Cal. 563, 40 P. 950, 48 Am.St.Rep. 156; Mendelsohn v. Van Herick, 1933, 133 Cal.App. 612, 24 P.2d 878, where the court said, p. 615, 'It is true as defendant contends, that 'an invitation to use property on which work is being done extends to the property in its then condition, and invitees using the property assume the risk of such condition' (45 C.J., p. 837); but obviously such rule does not do away with the legal duty imposed upon the owner to use ordinary care to keep the premises in a reasonably safe condition for those he has invited to come upon them.' In speaking of liability for injuries, we find the following in Restatement, Torts, vol. II, section 384: 'Persons Creating Artificial Conditions on Land on Behalf of Possessor For Bodily Harm Caused Thereby While The Work Remains In Their Charge. One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the structure or other conditions.' The 'other condition' which proved dangerous to Mrs. Donahoo consisted of the open hole dug by the defendants, left unguarded and, according to Miss Donahoo, never completely filled. Under the circumstances of the case this condition might well be called a trap created by the negligence of the defendants. * * *"

The evidence "furnished ample grounds for the court's conclusion that it was also the duty of the defendants 'to exercise reasonable care in guarding any openings or excavations it made on said property so that plaintiff and other invitees would not in the exercise of reasonable care fall into the same.' In the case of Hall v. Barber Door Co., 1933, 218 Cal. 412, 419, 23 P.2d 279, 281, it is stated" : "It cannot be doubted that an independent contractor is responsible to an occupant of a building rightfully on the premises at the request or consent of the owner for any wrongful acts that may be committed by himself or his employees while the stipulated work is in progress and resulting in injuries to such occupant. The ground upon which this liability is based is the implied duty which the law casts upon the independent contractor, as the person in charge and control of the work, to see that the rights of other persons, rightfully on the premises, are not injuriously affected by the performance of the work. Charlock v. Freel, 125 N.Y. 357, 26 N.E. 262. See, also [38 A.L.R. 403], Pettyjohn & Sons v. Basham, 126 Va. 72, 100 S.E. 813, 38 A.L.R. [391], where the cases are exhaustively collected and commented upon. Upon both principle and authority, it is clear that an independent contractor, who by his own negligence creates dangerous conditions during the progress of the work, should be held responsible for an injury occasioned by those conditions to one rightfully on the premises, and should be held liable for damage directly atttributable to the failure to perform this duty. (Citing cases.)" In that case, as in this, the defendant independent contractor contended that as to it the plaintiff was a mere licensee. The court said at page 420 of 218 Cal., at page 282 of 23 P.2d, "For reasons already stated, we do not think this is so, but, even if it were, the judgment of nonsuit would have to be reversed. As already pointed out, defendant installed the door and knew that the set screws had not been countersunk. Under such circumstances, the jury could have found that defendant knew, or should have known, that persons rightfully on the premises were likely to use that door; that defendant knew or should have known that it would be dangerous to use the door under those circumstances. We think the jury could have inferred that, as left by defendant, there was an implied invitation to use the door. The jury could also have found that, as left by defendant, the door was a dangerous instrumentality within the meaning of that doctrine as recently enunciated by this court in Dahms v. General Elevator Co., supra [214 Cal. 733, 7 P.2d 1013], and that, as constructed and left by defendant, it was in legal effect a trap of the existence of which it was defendant's duty to warn even licensees."

"In view of all the foregoing, it might well be argued that even if Mrs. Donahoo is considered a licensee, the appellants failed in the duty which they owed her.

[4] "Adverting to the argument by the appellants that any fill made at the points where anchors were installed on the Hansen property had sunk by reason of heavy rains and therefore the defendants should not be held liable, we cannot accept this as a sound principle. In the case of Ames v. Gannon, 1909, 77 N.J.L. 385, 72 A. 27, 38 A.L.R. 418, the syllabus states the rule: 'A person who excavates a trench in a public highway and places therein a sewer for property owners, under a private contract with them, is bound to restore the street to a safe condition, and this duty is not answered by simply replacing the excavated earth and leaving the street without further examination or attention, for he is charged with the knowledge that earth in a newly filled trench is likely to settle after a heavy rainfall, which imposes on him a duty to ascertain whether under such circumstances that condition exists, and, if it does, to make the necessary repairs.'

"The objection of the appellants to the conclusion of the court that defendants' carelessness and negligence 'was the sole proximate cause' of the plaintiff's accident and injuries, we believe, is answered by the rule just quoted, for if the fill had been maintained on a level with the surrounding surface there would have been no hole for Mrs. Donahoo to fall into.

[5] "The appellants rely strongly upon their affirmative defense of contributory negligence and argue that the adverse conclusion reached by the trial judge upon that question cannot be supported for the reason that the conditions show contributory negligence upon the plaintiff's part as a matter of law. We believe, however, that the trial judge was entitled to treat it as a question of fact to be decided by him. If one considers the actions of Mrs. Donahoo, aware as she was that her daughter and her friend, Miss Young, over a period of two weeks or more, had made frequent trips to and from her house to the fence corner where the boards had been ripped off, can it be said that she was contributorily negligent in taking a path which she knew existed and which, until then, had

proven safe? Undoubtedly, this was one of the questions which the court had in mind when considering the subject of contributory negligence. Even if the lights, which Mrs. Donahoo turned on before making the trip, did not illuminate all the area traversed, the court would still be entitled to consider, as bearing upon the question of contributory negligence, the fact that she was able, nevertheless, without any apparent difficulty, to go to the fence corner where she met Miss Young before turning back toward her house. These conditions, in our opinion, sufficiently answer the contentions of appellants that the respondent was guilty of contributory negligence as a matter of law, and, at the same time, furnish a substantial basis for the court's decision in favor of the respondent upon the question of contributory negligence as one of fact, a decision which, so far as we are concerned, is conclusive. (Hanson v. Cordoza, 1930, 106 Cal.App. 500, 502, 290 P. 62.)"

[6, 7] Our conclusion is in harmony with the case of Oettinger v. Stewart, 24 Cal.2d 133, 148 P.2d 19, where the defendant negligently fell down the steps of her own premises and injured the plaintiff, a business invitee, and this court reversed a judgment entered on the verdict for the defendant which appeared to be the product of erroneous instructions regarding the duty of the defendant to the plaintiff. Here it seems to be the contention of the defendants that because the plaintiff could not be said to have had any business relations with the defendants, she must necessarily be considered a mere licensee or a trespasser. The result contended for does not follow. The plaintiff remained in the occupancy of the premises by the permission of the defendants while they had possession thereof for the purposes indicated. In the course of that occupancy, in going to and from the house to the street, the plaintiff was compelled to cross the premises at some point, and the defendants must have been aware of the necessity for a reasonably safe passageway for that purpose. In the Oettinger case it was said at page 136 of 24 Cal.2d, at page 21 of 148 P.2d: "An invitation or permission to enter upon land need not be express but may be implied from such circumstances as the conduct of the possessor, the arrangement of the premises, or local custom." In the present case the permission of the defendants for plaintiff's occupancy during the construction, and the plaintiff's necessity to traverse the premises in going to and from the street placed upon the defendants the duty of providing a reasonably safe passageway to serve the plaintiff's necessity.

Powers v. Raymond, 197 Cal. 126, 239 P. 1069, relied upon by the defendants, is not controlling here. It was there held that the plaintiff was contributorily negligent in choosing a dark unused path when a safe and lighted way was afforded by the defendant.

Nor is our conclusion inconsistent with the decision in King v. Griffith Co., 65 Cal. App.2d 114, 150 P.2d 8, cited by the defendants on oral argument. In that case the decision recognized the plaintiff as an invitee in relation to the defendant construction company which was in control of the premises. It was determined that the plaintiff, who was injured while attempting to cross a ditch during daylight, was contributorily negligent in not observing the ditch which was as obvious to him as to those who had crossed it safely immediately in front of him and which he himself had crossed on previous occasions. Cf. Locke v. Red River Lumber Co., 65 Cal. App.2d 322, 150 P.2d 506.

The judgment is affirmed.

SCHAUER, Justice.

I dissent. The findings of the trial court do not, in my opinion, support the conclusion "That it was the duty of * * * defendants to provide a reasonably safe passageway on said property for plaintiff to walk upon and use as a means of ingress and egress. * * *" The trial court found "that the plaintiff and her daughter occupied the Donahoo house with the knowledge and implied consent of the defendants" and that "defendants knew at all times prior to and at the time of the accident that it was necessary for plaintiff and her daughter to have means of ingress and egress to and from their place of abode and that by reason of debris, boards and timbers and moving equipment which were piled up in front of the new location of the Donahoo home and because of rainy weather and muddy conditions that had been created thereby, that * * * their only * * * means of ingress and egress to and from their house was by the use of the front entrance and through a portion of the yard * * *; that the defendants * * * failed to provide a reasonably safe passageway from the front entrance of the Donahoo house. * * *"

Defendants are house movers. By their contract with Hansen they agreed to move houses and so far as the evidence shows they carried on the moving operations in an ordinary and reasonable manner which necessarily involved the littering of the premises with materials and the digging of holes. The majority opinion now holds that "When the defendants permitted these two women [plaintiff and her daughter] to remain upon the premises, they accepted them as invitees," and that "Having complete control of the property, they [defendants] stood in the same position as a landlord" and assumed the same duty of furnishing a safe passageway to these tenants as a landlord who maintains common hallways and entrances in an apartment house.

There appears no basis for the imposition on the defendants of an affirmative duty to construct and maintain a means of ingress and egress for the plaintiff. The contract with Hansen did not give rise to such a duty. So far as appears, by that contract defendants simply agreed to move houses; the "possession" which was agreed to be furnished them was possession for the sole purpose of performance of the contract by the moving of the houses in the usual manner.

Neither does it appear that the "implied consent of the defendants," with which, as found by the trial court, plaintiff occupied the house, coupled with the knowledge of the defendants "that it was necessary for plaintiff * * * to have means of ingress and egress," imposed upon the defendants the duty of providing a passageway. If defendants could consent to the occupation of the house by plaintiff it would seem that they could have refused such consent. But according to the holding of the majority opinion the defendants had no such simple choice of permitting or refusing to permit plaintiff to occupy the house during the moving operations; since they did not object, their "implied consent," the majority hold, became an invitation to plaintiff, not merely to occupy and go to and from the house, but also to walk about the premises in the dark in the assurance that defendants had provided a safe pathway. The defendants did nothing to give plaintiff any such assurance. They did not lay out any temporary walk, nor were they requested to do so by the tenants of the Donahoo house. The only "path" consisted of small boards which had apparently been haphazardly thrown about. Defendants received no benefit from the occupancy of the premises by plaintiff and her daughter during the moving operations. Defendants' consent was purely a matter of convenience to such occupants. Could defendants not consent that the occupants merely remain at their own option and risk and subject to whatever conditions might be created in the course of the moving operations? By what right can this court impose any further obligation upon defendants? Are we to presume not merely a bare consent to occupancy but also an uncompensated covenant to depart from usual business practices for the benefit of the recipients of defendants' bounty? What is the measure of defendants' responsibility under the majority holding? Must they from hour to hour as the house slides back on the lot keep it in contact with a paved and rail-guarded walk? I perceive no established or just basis in law for answers to those questions which will support the majority holding. It has heretofore been the law that a licensee, whether business visitor or gratuitous licensee, "must accept or reject the possessor's consent to enter the land under the conditions which are known to him or which he could discover by the use of his senses" (II Rest., Torts, § 341, Comment d) and that "The licensee is not entitled to enter the land of another except in so far as he is privileged to do so by the possessor's consent. Therefore, the mere fact that the possessor has consented to his entry gives him no right to expect that the possessor will change the method in which he conducts his activity so as to secure the licensee's safety. If he knows of the nature of the activities conducted upon the land and the manner in which they are conducted, he has all that he is entitled to expect, that is an opportunity for an intelligent choice as to whether or not the advantage to be gained by coming on the land is sufficient to justify him in incurring the risks incident thereto." (Id., Comment a.)

"One who on behalf of the possessor of land * * * creates any * * * condition thereon is subject to the same liability, and enjoys the same immunity from liability, as though he were the possessor of the land, for bodily harm caused to others within and without the land, while the work is in his charge, by the dangerous character of the * * * condition." (II

Rest., Torts, § 384; Hall v. Barber Door Co., 1933, 218 Cal. 412, 419, 23 P.2d 279.) The conditions here necessarily created by the defendants in the performance of their contract with Hansen were dangerous to one walking about in the mud and dark. But the defendants in creating such conditions were not negligent toward the plaintiff, who had elected to live in the midst of them. "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein." (II Rest., Torts, § 340; Shanley v. American Olive Co., 1921, 185 Cal. 552, 555, 197 P. 793; Blodgett v. B. H. Dyas Co., 1935, 4 Cal.2d 511, 512, 50 P.2d 801.) The moving of the two houses and the resultant conditions created by defendants involved a risk which should have been known to plaintiff because the risk was "necessarily inherent in the nature of the activity carried on" (II Rest., Torts, § 340, Comment c) and it was obvious to the senses.

The plaintiff, who had elected to occupy the house during the moving operations, was not entitled to expect that the land would remain in its normal condition and that her way of ingress and egress would remain substantially unobstructed. She testified not only that she did not know of the existence of the particular hole into which she fell, but that she had never even looked out from the front porch over the area where the accident occurred. But she had been living in the house during all the moving operations, which had continued for about three weeks before the accident, and it is inherently improbable and unbelievable that she was unaware that the yard was torn up and littered with equipment. Furthermore, she testified that she turned the house lights on in order to illuminate the area to some extent and the accident happened as she was endeavoring to return to the house after once traversing the yard.

Plaintiff derived her privilege to remain on the land from the implied consent of the defendants, and the proposition stated in II Restatement, Torts, section 340, Comment e, applies: The licensee, whether business visitor (invitee) or gratuitous licensee, is "entitled to nothing more than knowledge of the actual conditions, which he will encounter if he avails himself of the possessor's consent. If he knows the actual conditions, he has an opportunity to exercise an intelligent choice as to whether the advantage to be gained from his entry is sufficient to justify him in incurring the risk which he knows is inseparable from it." (See, also, Mautino v. Sutter Hospital Ass'n, 1931, 211 Cal. 556, 561, 296 P. 76; Watwood v. Fosdick, 1931, 212 Cal. 84, 85, 297 P. 881.) And in the exercise of an "intelligent choice" he must use his senses in perceiving that which is obvious. (II Rest., Torts, § 341, Comment d, quoted supra.)

The findings of fact do not support the conclusion that defendants "neglected to perform their duty * * * [to exercise reasonable care] in the matter of guarding" the hole into which plaintiff fell. The following language from Webber v. Bank of Tracy, 1924, 66 Cal.App. 29, 36, 225 P. 41, 44, applies: "No man is held by law to a higher degree of care than the fair average of his profession, business, or trade, and the standard of due care is the conduct of the average prudent man. * * * Juries must necessarily determine the responsibility of individual conduct, but they cannot be allowed to set a standard which shall, in effect, dictate the customs or control the business of the community." It should not be expected that premises on which houses are being moved will be in a condition comparable to premises on which no such operations are proceeding. The area near the Donahoo house "was strewn with * * * everything that a person would use in moving and building foundations." It is common knowledge that the construction of foundations and the connecting of utilities ordinarily entail the digging of holes. There were brush and pieces of rope over which plaintiff might have tripped and beams against which she might have fallen (including two beams on which plaintiff stepped just before she stepped down on the board which slipped into the hole), and all these obstructions, like the hole, were unguarded, but were in themselves most obvious warnings of danger. There is no more basis for holding that defendants, in order to escape liability, should have fenced the hole necessarily made by them in the performance of their work, than there is for holding that they should have cleaned up the entire premises when they temporarily suspended work because the heavy rains forced them so to do.

The majority opinion states that the unguarded hole "might well be called a trap created by the negligence of the defendants." The hole was no more a trap than were the other obstructions to safe travel above mentioned. Defendants did not lay out the rough path of boards which led past the hole; they did not in any way invite or encourage plaintiff to walk near the hole. They did not negligently create an appearance of safety; in the lawful exercise of their calling they created conditions which presented an appearance of danger and which constituted a warning to plaintiff.

As stated in Mautino v. Sutter Hospital Ass'n, 1931, supra, 211 Cal. 556, 561, 296 P. 76, 78, "Even if the plaintiff were free from contributory negligence, 'not every accident that occurs gives rise to a cause of action upon which the party injured may recover damages from some one. Thousands of accidents occur every day for which no one is liable in damages * * *.' " The plaintiff here voluntarily assumed the risk and lost. Her misfortune is regrettable but having assumed the risk she should bear the loss.

The judgment should be reversed.

EDMONDS, J., concurred.

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25 Cal.2d 209

GRANELL v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 19130.

Supreme Court of California.

Nov. 17, 1944.

1. Workmen's compensation 🔑428

Under the Workmen's Compensation Act, dependents, extent of dependency, and rate of compensation to be applied, must be determined as of date of injury rather than date of employee's death. St.1937, pp. 268, 269, 284, 285, §§ 3501, 3502, 3600, 4700, 4701, 4703, 4704; Const. art. 20, § 21.

2. Workmen's compensation 🔑408

The sections providing for payment of compensation accrued upon employee's death, authorizing a death benefit, and providing for its apportionment, presuppose a previous adjudication of dependency, and are concerned solely with question of distribution of a benefit after it has been concluded that persons were dependents. St.1937, pp. 280, 284, 285, §§ 4550, 4700, 4701, 4703, 4704.

3. Workmen's compensation 🔑428

Provision that Industrial Accident Commission may set apart or reassign a death benefit to one subsequent in right "or not otherwise entitled thereto" does not authorize commission to disregard other sections providing for ascertaining dependency as of time of employee's injury. St.1937, pp. 268, 269, 285, §§ 3501, 3502, 4704.

4. Workmen's compensation 🔑408

Sections providing who should be presumed to be dependent upon an employee at time of his injury, and for determining in other cases who are dependents at time of injury, do not apply only to procedure. St.1937, pp. 268, 269, §§ 3501, 3502.

5. Workmen's compensation 🔑434

One becoming employee's wife after his injury and dependent upon him at time of his death is not a "dependent" entitled to a death benefit, under the Workmen's Compensation Act. St.1937, pp. 268, 269, 280, 284, 285, §§ 3501, 3502, 3600, 4550, 4700, 4701, 4703, 4704; Const. art. 20, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Dependent".

6. Workmen's compensation 🔑434

Where employee married after he was injured in lifting and died during operation for herniation of an intervertebral disc, wife was not entitled to a death benefit under Workmen's Compensation Act on ground that a new injury occurred after the marriage, since original injury from lifting was required to be the proximate cause of death to warrant recovery of any death benefit. St.1937, pp. 268, 269, 284, 285, §§ 3501, 3502, 3600, 4700, 4701, 4703, 4704; Const. art. 20, § 21.

In Bank.

Proceeding under the Workmen's Compensation Act by Marguerite Granell to review an award of the Industrial Accident Commission denying petitioner's claim to a death benefit for the death of Jonas D.

Granell, petitioner's husband, injured while employed by Loew's Incorporated.

Order denying death benefit affirmed.

Hiram T. Kellogg, of Los Angeles, for petitioner.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, and J. L. Kearney, of Los Angeles, for respondents.

CARTER, Justice.

Decedent, Jonas D. Granell, sustained injuries arising out of and occurring in the course of his employment by respondent, Loew's Incorporated, on September 25, 1941. He married the applicant on January 17, 1942, and died as a result of those injuries on August 1, 1943. From the time of the marriage to the death of Granell, applicant and decedent lived together as husband and wife and she was wholly dependent upon him for support.

The Industrial Accident Commission denied applicant's claim to a death benefit on the ground that she was not decedent's wife at the time of his injury. The sole question presented on this review is whether a widow who married an employee between the time of the occurrence of a compensable injury and death resulting therefrom is entitled to a death benefit under the workmen's compensation laws.

The Constitution of California provides for the creation of a complete system of workmen's compensation which expressly includes compensation to dependents of an employee for the latter's death. Cal.Const., art. XX, § 21. Such a system has found its way by statutory enactment into the Labor Code. Lab.Code, div. IV, V. Liability is imposed upon the employer for the death of an employee when an injury occurring in the course of employment proximately causes death and the conditions of compensation exist. Labor Code, § 3600, St.1937, p. 269.

Particularly with respect to dependents, section 3501 reads:

"The following shall be conclusively *presumed to be wholly* dependent for support upon a deceased employee: (a) A wife upon a husband with whom she was living *at the time of his injury,* or for whose support such husband was legally liable *at the time of his injury.* (b) A child under the age of eighteen years or over that age but physically or mentally incapacitated from earning, upon the parent with whom he is living at the time of the injury of the parent or for whose maintenance the parent was legally liable at the time of injury, there being no surviving dependent parent." (Italics added.) The following section states:

"In *all other cases,* questions of entire or partial dependency and questions as to *who are dependents* and the extent of their dependency shall be *determined in accordance with the facts as they exist at the time of the injury of the employee.*" (Italics added.) Labor Code, § 3502. It is upon those provisions that respondents base their claim that applicant is not entitled to an award; that the presumption of entire dependency cannot apply because it is limited to a wife who was living with the employee at the time of the injury to him, Labor Code, § 3501(a); that in all other cases no presumption exists, and questions of who are dependents must be determined by the facts existing at the time of injury to the employee. That construction is borne out by the history of workmen's compensation laws in this state. The act of 1911 provided that a wife shall be presumed to be dependent upon her husband, and questions "as to who constitute dependents" shall be determined as of the date of the *death* of the employee. Stats.1911, p. 796, § 9(4). The 1913 act contained substantially the same provisions, except there was added to the clause regarding the presumption of a wife being dependent on her husband the words "with whom she was living at the *time of his death.*" See Stats.1913, pp. 279, 289, § 19; Garcia v. Industrial Acc. Comm., 171 Cal. 57, 151 P. 741. The 1917 act contained similar provisions with regard to the wife and children, but provided that in all other cases the question of who is a dependent shall be determined by the facts existing *at the time of the injury.* See Stats.1917, p. 831, 844, § 14; London G. & A. Co. v. Industrial Acc. Comm., 181 Cal. 460, 184 P. 864. However, in 1919, the Legislature amended the law to specify the date of the injury rather than death as the time at which the then existing facts were controlling in all cases, Stats.1919, p. 910, 917, § 14, and it has remained substantially the same to the present time.

[1] It has been stated generally in construing the statute that the question of the condition of the dependency as being entire or partial and the extent thereof together with the rate to be applied must

be determined as of the date of the injury. Hartford A. & I. Co. v. Industrial Acc. Comm., 197 Cal. 17, 239 P. 330; Great W. P. Co. v. Industrial Acc. Comm., 196 Cal. 593, 238 P. 662; Spreckels S. Co. v. Industrial Acc. Comm., 186 Cal. 256, 199 P. 8; Great W. Power Co. v. Industrial Acc. Comm., 191 Cal. 724, 218 P. 1009; Market St. Ry. Co. v. Industrial Acc. Comm., 193 Cal. 178, 224 P. 95; Landsrath v. Industrial Acc. Comm., 77 Cal.App. 509, 247 P. 227. The statute as it now reads requires that the issue as to what persons are dependents must be decided on the facts existing at the date of the injury.

It would seem to follow therefore that the determination of who occupies the status of dependents and thus are entitled to the death benefit must be ascertained from the facts existing at the time of the injury which results in the employee's death, rather than those existing at the time of the death. There is no presumption that applicant was wholly dependent on Granell because at the time of the injury she was not married to him. There is nothing in the record which indicates that there were other circumstances making her a dependent within the meaning of the statute at the time of the injury.

Applicant asserts however, that there are other provisions of the statute which are controlling and compel a different result. Labor Code, section 4700, provides that even though the employee dies after the injury, compensation which has theretofore accrued and is unpaid shall be paid to the employee's dependents or to his estate or heirs if there are no dependents. Section 4701 reads:

"Where an injury causes death, either with or without disability, the employer shall be liable, in addition to any other benefits provided by this division, for: (a) Reasonable expenses of the employee's burial, not exceeding [one hundred fifty dollars] $150. (b) A death benefit, to be allowed *to the dependents* when the employee *leaves any person dependent upon him for support.*" (Italics added.) Section 4703 states:

"Subject to the provisions of section 4704, *this section shall determine the right* to a death benefit.

"If there is any person wholly dependent for support upon a deceased employee, such person shall receive the entire death benefit, and any person partially dependent shall receive no part thereof.

"If there is more than one person wholly dependent for support upon a deceased employee, the death benefit shall be divided equally among them.

"If there is more than one person partially dependent for support upon a deceased employee, and no person wholly dependent for support, the amount allowed as a death benefit shall be divided among the persons so partially dependent in proportion to the relative extent of their dependency." (Italics added.) Section 4704 authorizes the commission to set apart or reassign the death benefit to several dependents in accordance with their needs and "may order payment to a dependent subsequent in right, or not otherwise entitled thereto, upon good cause being shown therefor."

[2, 3] Manifestly, those provisions are concerned solely with the question of the *distribution* of the death benefit *once it has been concluded* that *a certain person or persons are dependents.* It presupposes a previous adjudication of the latter issue. Section 4701 merely authorizes a death benefit to dependents. It does not purport to define the term. Section 4703 provides how the benefit award is to be apportioned after the identity of the dependents has been ascertained. Section 4704 places large discretion in the commission with regard to the apportionment of the death benefit. The phrase therein to the effect that it may set apart or reassign the death benefit to one subsequent in right "or not otherwise entitled thereto" cannot be construed as authorizing the commission to disregard the statutory provision for ascertaining dependency. It probably refers to an apportionment to a partial dependent when there are persons wholly dependent and who would not be entitled to an allowance under section 4703 standing alone. The foregoing views find support in section 4550, which reads:

"Where *liability for compensation exists* under this division, such *compensation shall be furnished or paid by the employer and shall be as provided in this chapter.*" (Italics added.) The chapter referred to is chapter 2, the same chapter in which we find sections 4701–4704, relied upon by applicant. By the wording of section 4550 the liability for compensation must exist, that is, there must be a liability to persons who are dependents before the chapter applies.

[4] It cannot be said that, as contended by applicant, sections 3501 and 3502 apply

only to procedure. The former section specifies the cases in which a conclusive presumption of dependency exists. Manifestly, applicant cannot have the benefit thereof because she was not married to the employee at the time of the injury. The latter section concerns more than procedure. It expressly limits the *time* at which the facts must be considered to determine *whether or not there are any dependents.* That time is the date of the injury and none other. To construe it otherwise would be to give no effect to the words "questions as to who are dependents" and "the facts as they exist at the time of the injury to the employee."

Applicant relies on Crockett v. International R. Co., 176 App.Div. 45, 162 N.Y.S. 357; State Compensation Insurance Fund v. Hartman, 99 Colo. 324, 64 P.2d 122; McBride v. Industrial Commission, 97 Colo. 166, 49 P.2d 386; Rosell v. State Industrial Acc. Comm., 164 Or. 173, 95 P.2d 726; McKay v. Department of Labor and Industries, 180 Wash. 191, 39 P.2d 997, 98 A.L.R. 990, as supporting her construction of our statute. To those citations may be added Austin Co. v. Brown, 121 Ohio St. 271, 167 N.E. 874, Reagh v. Texas Indemnity Ins. Co., 123 Tex. 57, 67 S.W.2d 233. In all of those cases the statute either provided that there was a conclusive presumption of dependency of a wife upon her husband unless it is shown that she was living apart from him at the date of his injury or *death,* or with whom she was living at the *time of death,* or declared that the circumstances at time of death were controlling, or the statute allowed the benefit to the "surviving wife" regardless of actual dependency, or no limitations were stated. Particularly in the McBride case, reliance was placed on a section which provided that dependency would depend on whether the person was actually being supported by decedent at the time of death. The Hartman case merely followed the McBride case.

[5] On the other hand in construing statutes similar to ours, it has been uniformly held that one who becomes the wife of an injured employee after the time of the injury is not a dependent entitled to a death benefit. See Dahlquist v. Nevada Industrial Commission, 46 Nev. 107, 206 P. 197, 207 P. 1104; Magma Copper Co. v. Naglich, 60 Ariz. 43, 131 P.2d 357; Kuetbach v. Industrial Comm., 166 Wis. 378, 165 N.W. 302, L.R.A.1918F, 476; Atkinson v. Atkinson, 47 Ga.App. 345, 170 S.E. 527; Gleason's Case, 269 Mass. 583, 169 N.E. 409; State Compensation Ins. Fund v. Hartman, 99 Colo. 324, 64 P.2d 122, 2 N.C.C.A.,N.S., 311; McKay v. Department of Labor and Industries, 181 Wash. 191, 39 P.2d 997, 98 A.L.R. 993; Temescal Rock Co. v. Industrial Acc. Comm., 180 Cal. 637, 182 P. 447, 13 A.L.R. 686; Martilla v. Quincy Min. Co., 221 Mich. 525, 191 N.W. 193, 30 A.L.R. 1253; Sarich v. Industrial Comm., 64 Utah 17, 227 P. 1039, 35 A.L.R. 1066; McGarry v. Industrial Comm., 64 Utah 592, 232 P. 1090, 39 A.L.R. 313; Log Mountain Coal Co. v. Head, 219 Ky. 799, 294 S.W. 470, 53 A.L.R. 218; Janesville Sand & Gravel Co. v. Industrial Comm., 197 Wis. 421, 222 N.W. 317, 62 A.L.R. 160; Utah Fuel Co. v. Industrial Comm., 80 Utah 301, 15 P.2d 297, 86 A.L.R. 865; Schurler v. Industrial Comm., 86 Utah 284, 43 P.2d 696, 100 A.L.R. 1090.

[6] Finally, applicant contends that because of the peculiar circumstances of the case a new injury occurred after the marriage. The injury in the first instance occurred when decedent lifted a heavy object at which time he felt something snap in his back. He worked off and on thereafter suffering from the injury more or less continually and was examined and treated by various doctors. Finally, after his marriage, he was operated upon pursuant to the advice of an independent medical examiner for herniation of an intervertebral disc. He died during the operation. Assuming that a new injury would fix the time at which the then existing facts must be examined to determine the identity of the dependents, it still remains that his original injury from lifting must have been the proximate cause of the death. Otherwise no death benefit would be recoverable regardless of the existence of dependents. Hence, the time of injury was the date of the lifting. We express no opinion on the question of what date is the time of an injury in a latent and progressive occupational disease (see Marsh v. Industrial Acc. Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563) in regard to the ascertainment of the identity of dependents. If the Marsh case be followed in deciding what is meant by time of injury (there the statute of limitation was being considered), that is, that injury and compensable disability are the same, then we must conclude that here the time of injury was before the marriage inasmuch

as decedent had a compensable disability and received compensation therefor.

Applicant cites McKay v. Department of Labor and Industries, supra; Thorpe v. Department of Labor and Industries, 145 Wash. 498, 261 P. 85; and Rosell v. State Industrial Acc. Comm., supra. Those cases do not discuss the meaning of the phrase "time of injury" or support applicant's contention, except insofar as they are claimed to generally allow the widow of a marriage after the accident to recover. But as we have seen the statutes considered in those cases were quite different. The Thorpe case was concerned solely with the law applicable to that case, and for a death benefit, it applied the law existing at the date of injury rather than at the date of death at which latter time the law gave a larger death benefit.

For the foregoing reasons the order denying a death benefit to applicant is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

67 Cal.App.2d 166

PEOPLE v. COX.

Cr. 629.

District Court of Appeal, Fourth District, California.

Dec. 1, 1944.

1. Criminal law ⇨1144(13)

On appeal from conviction evidence must be viewed in light most favorable to the people.

2. Homicide ⇨269

In murder prosecution, whether there was a deliberate intention on part of accused to unlawfully take the life of deceased was for jury. Pen.Code, § 188.

3. Homicide ⇨12

Malice is "express" when there is manifested a deliberate intention to take the life of a fellow creature. Pen.Code, § 188.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Malice".

4. Homicide ⇨254

Evidence sustained conviction of murder in the second degree.

5. Criminal law ⇨53

Unconsciousness produced by voluntary intoxication does not render a defendant incapable of committing a crime. Pen.Code, § 26, subd. 5.

6. Homicide ⇨142(1)

That accused charged with murder entered only a plea of not guilty did not preclude accused from offering evidence on question of his unconscious condition at time of homicide because of blow inflicted by deceased. Pen.Code, § 26, subd. 5.

7. Criminal law ⇨772(6)

Where there is evidence of existence of that state of mind wherein individual's conscious mind has ceased to operate and his actions are controlled by the subconscious or subjective mind, it is error to refuse instructions as to legal effect of such unconsciousness.

8. Homicide ⇨142(1)

In murder prosecution wherein accused claimed unconsciousness at time of homicide from a blow on the head inflicted by deceased, and wherein accused produced a specialist in psychiatry and neurology who testified that he had made a mental and physical examination of accused, exclusion of further testimony by the specialist bearing on the subject of amnesia was error, although insanity was not pleaded. Pen.Code, § 26, subd. 5.

9. Homicide ⇨293

In murder prosecution wherein accused who did not plead insanity claimed unconsciousness from a blow on the head inflicted by deceased, which blow created traumatic amnesia, and that while in such unconscious condition accused committed an act without being conscious thereof, refusal of instructions based on statute that a person is incapable of committing a crime when he is not conscious thereof was error. Pen.Code, § 26, subd. 5.

10. Homicide ⇨109

The acts which a defendant may do and justify under plea of self-defense depend primarily upon his own conduct and secondly upon conduct of deceased.

11. Homicide ⚷300(12)

In murder prosecution, an instruction on self-defense involving question as to who was the aggressor was erroneous for failure to take into consideration all the evidence and surrounding circumstances, for omitting several elements pertaining to the law of self-defense and accused's claim of traumatic amnesia, and for ignoring question whether the act in discharging revolver was intentional.

12. Criminal law ⚷1186(4)

In murder prosecution error in refusing instructions based on statute that a person is incapable of committing a crime when he is not conscious thereof, which instructions were predicated on testimony that accused was unconscious at time of homicide from a blow on the head inflicted by deceased, was prejudicial. Pen.Code, § 26, subd. 5; Const. art. 6, § 4½.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Raymond L. Cox was convicted of murder and of assault with a deadly weapon, and he appeals.

Reversed and new trial ordered.

See also 151 P.2d 269.

Swing & Swing, of San Bernardino, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted of the murder of Charles C. Clauson under count 1 of the information and his sentence fixed as second degree murder, and of assault with a deadly weapon on one Lee Clauson under count 2 thereof. The deceased, Charles C. Clauson, was a barber and had been acquainted with the defendant who operated a bar and cafe in San Bernardino for many years. Lee Clauson, 30 years of age, was a son of deceased. On the evening of March 4, 1944, at about 11:45 o'clock, after returning from some wrestling matches, the Clausons and Jack Houser went to defendant's place of business, which was closed. They knocked on the door and defendant opened it. Charles asked if they could buy a drink. After some discussion, defendant let the men into the cafe and seated them in the rear room. A bar with several stalls occupied the space near the east wall. Three or four booths occupied the space near the west wall. Defendant poured four drinks for the guests. Tom Basham, who was in the barroom when the men entered, joined them. A Mrs. Koke, who worked there as a waitress, was near the bar. Defendant, as well as the guests, had had several drinks during that evening. After the round of drinks had been consumed, defendant asked who was going to pay for them. Some discussion ensued as to the amount due and who was to pay it. The testimony relating to subsequent events leading up to the homicide is somewhat conflicting.

Houser testified generally that when the defendant asked them for $2.40 for the drinks he offered to give a check for the amount; that deceased said: "I will take care of it"; that Lee said he would pay for their drinks but for nobody else's; that defendant took a swing at Lee and hit him in the face with his fist; that Lee then hit defendant with his fist and that they both fell to the floor with Lee on top; that he (Houser) walked out of the back room to the front end of the bar where he and Basham stood; that Lee came out of the back room and said to him: "Let's go"; that Mrs. Koke opened the door for them; that after they got outside Basham came running out and grabbed Lee; that Lee said to Basham: "Get back in there or I will knock your ——— ——— head off"; that while he was walking east on Third Street several feet from the entrance to the cafe, he heard three shots fired; that he later went back and found Lee lying on the sidewalk about 8 feet from the front door near the curb; that the deceased was lying on the sidewalk about 4 feet from the building; that he did not see the defendant.

Lee Clauson was unable to appear as a witness at the trial due to his physical injuries. His testimony given at the preliminary examination was, by stipulation, read into the evidence. He there testified in effect that defendant invited them into the cafe and said: "Have one on me"; that when defendant asked for the money for the drinks he told him that he wasn't going to be invited into a place to have a drink on the house and then have to pay for everybody's drink; that Charles offered to pay tomorrow; that defendant got mad and took a swing at Charles and missed him; that he (Lee) stepped up to separate them and defendant hit him; that he hit defendant two or three times and they fell to the floor and a scuffle ensued; that he reached in and took out a bottle of whiskey from one of the cases around the room and threatened to hit defendant; that he did not hit him but he thought he heard a bottle break; that he got up, took the bottle with him, and walked out the front door with Basham following him; that he there waited for his father; that as Basham approached him Basham assumed a fighting position and he threatened Basham with the bottle unless he stepped back into the cafe; that his father stepped out about that time; that the door opened again and defendant appeared with a gun; that as he looked toward the door he saw flashes from the gun and he was hit; that he heard five or six shots fired and saw his father go down; that after defendant stopped shooting, the door closed.

Basham testified that Lee said he wouldn't pay anything for the drinks and shoved defendant back into the corner among some boxes; that Lee grabbed two whiskey bottles; that Lee had defendant down on the floor hitting him over the head with a bottle; that he left and went into another room for 7 or 8 minutes and later ran out of the front door and nearly ran into the Clausons who were on the sidewalk; that Lee threatened him with the bottle; that he ran back into the cafe and shortly thereafter heard 2 or 3 shots fired and that he didn't see any broken glass there but did see the Clausons lying on the sidewalk.

Mrs. Koke testified that she heard blows being struck and she ran to the storeroom and saw defendant on the floor with his head against some cases; that Lee was on top of him; that she said to Lee: "You are killing him"; that Charles was standing there watching him and he got a bottle out of the case and held it over his son's head and said: "Quit hitting him you ——— or I will murder you"; that Lee got up and went to the front door; that the others followed; that a few minutes later Charles came out; that defendant was just a step behind him; that defendant staggered up and fell against the door-jamb; that she heard someone say: "Get back in there you ——— ———"; that she heard a blow, the breaking of glass, and then some shots; that it all followed so closely together that there was no noticeable time intervening; that after defendant fired the shots he went over to the front end of the bar and leaned against it; that he was unsteady on his feet; that she put her arms around his body and helped him back to the storeroom where he stood while she got some water and washed the blood from his face and removed his bloodstained shirt; that defendant secured a dustpan and said: "Let's clean up and go home."

Defendant testified that when he suggested that the price of the drinks was $2.40 Lee said "Don't give him a ——— ——— cent"; that deceased said: "All I got to do is to say one word, we start fighting, we never lose, somebody gets hurt and hurt bad"; that deceased hit him in the mouth and knocked out his upper plate; that Lee hit him in the temple and grabbed a bottle and knocked him down with it; that blood began to run from his nose and face; that he asked Lee not to hit him any more; that right then another bottle broke over his head; that that was the last he remembered for some time; that when he "came to" he was lying on the floor and when he started to get up he saw deceased standing about four feet from him with a bottle in his hand reaching into a coke case near-by; that when he got up deceased had gone to the main bar; that he followed him and told him to put the bottles down and get out; that deceased turned and threw the large bottle at him and hit him in the stomach; that he figured he had to have his gun for protection; that he went and got his revolver which was kept on the shelf in the kitchen at the rear of the cafe; that he returned to the bar and that deceased was still standing there sideways with two coke bottles in his hands looking back towards the kitchen; that deceased walked toward the front door looking over his shoulder and watching him; that he followed him; that when deceased went out the front door he was right behind him; that he (defendant) "kind of stood up against the side of the door and leaned against it"; that deceased was standing about four feet out in front; that he heard someone say: "Get your head back in there, you ——— ——— or I will knock it off"; that he stuck his head out to see who it was and deceased instantly hit him with one of the coke bottles; that he was struck in the head and this was the last he remembered until he came to in the county hospital; that he did not recall discharging the revolver and didn't remember what he did with it afterwards.

A photograph of defendant in evidence clearly shows a serious head injury had been inflicted. Medical testimony was introduced showing that defendant had four cuts on his forehead, evidence of bleeding from the right ear, and superficial bruises on his abdomen; that it seemed as though defendant had a brain injury and an opinion was expressed that defendant had a loss of memory or traumatic amnesia caused by a blow on the head, and that defendant, at the time of trial, was still suffering therefrom. Without relating it in detail, there was other testimony of police officers as to the conduct of defendant at the time the arrest was made which might support a conclusion that defendant was or that he was not suffering from traumatic amnesia at the time. We will consider this matter at another time.

Since defendant questions the sufficiency of the evidence to support the verdict, we shall discuss this subject before answering the other legal points presented.

[1-4] It is argued that the evidence fails to show malice, either express or implied. Viewing the evidence in a light most favorable to the people, the jury was justified in believing that there was a deliberate intention on the part of the defendant to unlawfully take the life of the deceased. Malice is express when there is manifested a deliberate intention to take the life of a fellow creature. People v. Greig, 14 Cal.2d 548, 561, 95 P.2d 936; Penal Code, § 188. Viewing the evidence in a light most favorable to the prosecution, there is no question that it would support a conviction of murder in the second degree. People v. Reese, 65 Cal.App.2d 329, 150 P.2d 571.

[5-7] Defendant offered a group of instructions, which included not only the theory of self-defense but other defensive theories, which proffered instructions were refused by the trial court. Two of these bore upon the right to an instruction or instructions based upon section 26, subdivision 5 of the Penal Code, which is to the effect that a person is incapable of committing a crime when he is not conscious thereof. It has been repeatedly held in this state that unconsciousness produced by voluntary intoxication does not render a defendant incapable of committing a crime. People v. Taylor, 31 Cal.App.2d 723, 88 P.2d 942; People v. Sameniego, 118 Cal.App. 165, 4 P.2d 809, 5 P.2d 653. The people argued throughout the trial that in view of the fact that defendant entered only a plea of not guilty of the offenses charged in the information that the defendant was therefore conclusively presumed to have been sane at the time of their commission and that he was therefore precluded from offering evidence on the question of his unconscious condition at the time, and that the court's refusal to give any instruction on that subject was justifiable. We are convinced that this is where the trial court fell into error. Counsel for defendant does not now, nor did he during the trial, contend that defendant was insane. In fact, he stated that he was sane but suffering from amnesia. It is likewise not contended here that defendant was unconscious from voluntary intoxication but was unconscious from a blow on the head inflicted by his assailant, which blow created traumatic amnesia or automatism, and that while in such unconscious condition he committed an act without being conscious thereof.

In People v. Freeman, 61 Cal.App.2d 110, 142 P.2d 435, on a charge of violating sec. 500 of the Vehicle Code, St.1941, p. 1414 (negligent homicide), where there was a conflict in the evidence as to whether the driver of the car was under the influence of intoxicating liquor at the time of the accident, or whether his condition was the result of an attack of epilepsy, the court, in discussing the issues there involved, held that it was not incumbent on defendant to plead insanity in order to prove his unconsciousness at the time of the accident. The Attorney General in that case contended that in order for the defendant to prove his unconsciousness at the time of the accident it was incumbent upon him to plead insanity. It was there directly stated that such is not the law, citing cases. It was also held that the jury should have been instructed in direct and clear language that defendant should be found not guilty if the collision occurred while he was not conscious of his acts because of an attack of epilepsy. It must be said here as it was said in People v. Sameniego, supra, 118 Cal.App. at page 173, 4 P.2d at page 812: "Where there is evidence of the existence of that state of the mind wherein the individual's conscious mind has ceased to operate and his actions are controlled by the subconscious or subjective mind, it would be error to refuse instructions as to the legal effect of such unconsciousness. This leads to the query as to whether any such evidence exists in this case."

In addition to defendant's testimony that he did not remember anything after he was struck on the head at the door just before the shots were fired and the evidence already set forth, several police officers testified that when defendant was taken to the police station and while talking, he, the defendant, fell off of the chair unconscious; that a doctor examined him and sent him to the hospital; that he was suffering from a head injury and remained unconscious for some time; that there was nothing about the way he walked that indicated that he was intoxicated. There was ample evidence to support defendant's claimed defense under section 26, subdivision 5 of the Penal Code.

[8] In this connection, defendant produced a specialist in psychiatry and neurology who was on the staff at the county hospital and attended defendant from March 4th until the time of trial. He testified that he examined defendant thoroughly at the jail, observed the wound over his right forehead and that there were several wounds on the left forehead; that defendant complained of pain in his abdomen; that he "appeared rather sheepish and sluggish in action"; and that he then and subsequently made a mental and physical examination of him.

The trial court sustained all objections to further proposed questions by counsel for the defendant bearing on this subject of amnesia on the mistaken theory that that issue could only be raised where the defendant had entered a plea of not guilty by reason of insanity. An offer of proof was made that the witness would testify that from the time the blow was inflicted on defendant's head, in his opinion, defendant was suffering from traumatic amnesia and had no recollection of what acts he did during that period. Under the cases cited, the court's refusal to accept such evidence was clearly error.

[9] Thereafter, the trial court refused defendant's instructions bearing upon this claimed defense. Defendant was entitled to a proper instruction based upon section 26, subdivision 5 of the Penal Code and the court's refusal to instruct thereon was prejudicial error. People v. Freeman, supra.

[10-12] Defendant next complains of certain instructions offered by the people and given by the court on the law of self-defense. People's instruction No. 10, involving the question as to who was the aggressor, reads in part as follows: "If the jury believe * * * that the defendant * * * at the time and place alleged in the information, was assailed by Charles C. Clauson and Lee Clauson, in the first instance"; that the Clausons "in good faith withdrew from the combat and left the scene of the encounter; * * * that the defendant, after the withdrawal of the said" Clausons "from combat, if you believe they did so withdraw, pursued the said Charles C. Clauson and the said Lee Clauson with a loaded pistol in his hand, then and in that event you are instructed that the defendant became the aggressor; and if the jury should further believe * * * that the defendant while so pursuing the said" Clausons "shot off and discharged said pistol at and towards the said" Clausons "and thereby killed the said Charles C. Clauson and wounded the said Lee Clauson, then you will find the defendant guilty as charged * * *."

The instruction in itself is not complete. It does not take into consideration all of the evidence and surrounding circumstances here involved in defining who the aggressor was. It omits several elements pertaining to the law of self-defense and the claim of traumatic amnesia. It also ignores the question whether the act in discharging the revolver was or was not intentional. The acts which a defendant may do and justify under the plea of self-defense depend primarily upon his own conduct, and secondly upon the conduct of the deceased. There is really no fixed rule applicable to every case, although there are certain well-established principles of law which may be defined as a guide for the determination of the deportment of the parties and the actions of men for the guidance of the jury. People v. Hubbard, 64 Cal.App. 27, 220 P. 315; People v. Freeman, supra. Defendant was entitled to a full and proper instruction on the subject. Having inadequately and erroneously defined an aggressor under all the circumstances of this case in instruction No. 10, the other instructions using the word "aggressor" may have likewise conveyed to the jury an erroneous impression or statement of the law. The attorney general, on appeal, has fairly stated that the failure to give the instruction based on section 26, subdivision 5, was error, but contends that under section 4½, article VI of the Constitution, the judgment should not be reversed. We are fully convinced that the errors complained of were prejudicial and of such a character that a new trial should be ordered. People v. Reese, supra.

Many other errors are urged. Inasmuch as the judgment and order must be reversed and a new trial ordered for reasons expressed, we will not discuss other claimed errors or the objections made to the many other instructions given and refused. No doubt proper instructions on the issues presented will be given on a new trial.

Judgment and order reversed and a new trial ordered.

BARNARD, P. J., and MARKS, J., concur.

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67 Cal.App.2d 151

HOERTKORN et al. v. SULLIVAN et al.

Civ. 12769.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1944.

Hearing Denied Jan. 29, 1945.

1. Municipal corporations ⇨185(11)

Police commission had no power to rehear or to vacate an order discharging certain policemen on charges of misconduct in the absence of city charter provision conferring such power.

2. Municipal corporations ⇨58

San Francisco charter provision conferring upon police commission power of "management" of police department does not conflict with special provisions defining the powers of the commission in relation to the discipline of the members of the police force and does not carry the power to revoke or to reinstate.

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Mandamus action by Thomas L. Hoertkorn and others against Jeremiah F. Sullivan, Jr. and John Leslie Howell, as members of the Police Commission of the City and County of San Francisco, to require defendants to consider on the merits the petition of plaintiffs to review the cases in which plaintiffs were charged with misconduct and to reinstate each plaintiff to his former rank and position. A demurrer to the petition was sustained and, from the judgment dismissing the proceedings, plaintiffs appeal.

Affirmed.

Joseph A. Brown, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Walter A. Dold, Chief Deputy, both of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiffs were formerly members of the San Francisco police department and were removed therefrom in 1936 after trial on charges of misconduct before the local police commission. In November, 1943, they filed a petition with the police commission asking that body to review the case and reinstate each to his former rank and position. The commission determined that it was beyond its jurisdiction to hear the matter on the ground that there was no law authorizing it to rehear the former proceedings, or to reinstate petitioners. Plaintiffs then filed a writ of mandate praying that an order be directed to the police commission requiring it to consider their petitions on the merits. Defendants' demurrer was sustained and judgment dismissing the proceedings followed.

On their appeal from the judgment appellants contend that the commission had jurisdiction to revoke the prior orders of discharge, and to reinstate plaintiffs to their former positions and rank under the general provisions of section 35 of the San Francisco charter. The defendants answer that such power does not exist unless expressly conferred in the charter. They also argue that judgments on prior writs affirming the orders of discharge are res judicata. We will confine our discussion to the question of the power of defendants to rehear or to vacate an existing order of discharge.

[1] The case is controlled by the rule of decision found in Heap v. City of Los Angeles, 6 Cal.2d 405, 57 P.2d 1323; Proud

v. McGregor, 9 Cal.2d 178, 70 P.2d 194; and Cook v. Civil Service Commission, 160 Cal. 598, 117 P. 662. In the former an order was made by the Civil Service Commission of the City of Los Angeles rescinding a former order discharging petitioner from his position in the municipal civil service. In a proceeding in mandamus to enforce the second order the Supreme Court affirmed the judgment of the superior court holding that petitioner had no cause of action. In its opinion the Supreme Court said that the only question presented was whether the commission could vacate its order of discharge and reinstate the petitioner. In holding that this could not be done without express authority in the municipal charter the Supreme Court said (page 407 of 6 Cal.2d, page 1324 of 57 P.2d): "The jurisdiction of the commission is a special and limited one. Petersen v. Civil Service Board, 67 Cal.App. 70, 227 P. 238. The required procedure was followed, and the question of appellant's discharge was determined by the commission when it adopted the first resolution. Its action sustaining his discharge was 'final and conclusive.' Krohn v. Board of Water & Power Commissioners, 95 Cal. App. 289, 296, 272 P. 757. It had no jurisdiction to retry the question and make a different finding at a later time. The charter gives no such grant of power, and it may not be implied. 'A civil service commission has no inherent power after entering a final order dismissing an officer from the service to entertain a motion for new trial or rehearing and review and set aside its prior order.' 43 Cor.Jur. 682. See, also, Cook v. Civil Service Commission, 160 Cal. 598, 600, 117 P. 662."

The same rule was followed in Proud v. McGregor, supra. In that case the petitioners had been dismissed for cause by the Santa Barbara police commission after hearing held. Later the commission purported to reinstate them to their former positions. In holding that this could not be done the Supreme Court relied upon the ruling in the Heap case and said that the commission was without power to vacate its order of dismissal or to reinstate the petitioners.

In Cook v. Civil Service Commission, supra, the question presented was the right of the commission to set aside a list of eligible appointees which had been duly adopted in accordance with the provisions of the San Francisco charter. The court said (page 600 of 160 Cal., page 663 of 117 P.): "There was no grant of power directly given by the charter, or necessarily implied from the prerogatives conferred, which enabled the commission properly to set aside its own action after it had declared a list of eligibles, except in the single instance cited above. It follows that the board acted beyond its authority in taking the action which was the basis of the order of dismissal by the district court of appeal."

In commenting upon the reasonableness of the rule which forbids a vacation of a valid order of discharge the Supreme Court in the Heap case said (page 407 of 6 Cal. 2d, page 1324 of 57 P.2d): "But the rule stated above, that a civil service commission has no such power in the absence of express authorization, is sound and practical. If the power were admitted what procedure would govern its exercise? Within what time would it have to be exercised; how many times could it be exercised? Could a subsequent commission reopen and reconsider an order of a prior commission? And if the commission could reconsider an order sustaining a discharge, could it reconsider an order having the opposite effect, thus retroactively holding a person unfit for his position? These and many other possible questions which might be raised demonstrate how unsafe and impracticable would be the view that a commission might upset its final orders at its pleasure, without limitations of time, or methods of procedure."

Following the rule that express legislative authority is necessary before an administrative agency may review or revoke its order of dismissal are Pacheco v. Clark, 44 Cal.App.2d 147, 153, 112 P.2d 67; Olive Proration, etc., Comm. v. Agricultural Prorate Comm., 17 Cal.2d 204, 209, 109 P.2d 918.

[2] Appellants seek to escape the force of this rule by reference to section 35 of the San Francisco charter which confers upon the police commission authority of "management" of the police department. This is but a general section which creates the commission and states its purposes. It does not in any respect conflict with the special provisions of section 155 defining the powers of the commission in relation to the discipline of the members of the police force and prescribing the pro-

cedure of trial, and punishment upon conviction of a specified offense. Since this power to punish after hearing does not carry the express power to revoke or to reinstate, such power does not exist.

The judgment is affirmed.

SPENCE and STURTEVANT, JJ., concur.

66 Cal.App.2d 947

BESSINGER v. GROTZ.

Civ. 14621.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

Hearing Denied Jan. 18, 1945.

1. Mortgages 🔑599(1)

Persons purchasing realty from purchaser thereof at mortgage foreclosure sale were "tenants" within statute extending redemption period until five days after purchaser gives redemptioner sworn statement of amount of rents received from tenants in possession during such period. Code Civ. Proc. § 707.

See Words and Phrases, Permanent Edition, for all other definitions of "Tenant".

2. Mortgages 🔑599(1)

The word "tenant" in statute extending mortgage foreclosure redemption period until five days after purchaser gives redemptioner sworn statement of amount of rent received from tenant in possession of mortgaged realty is not used in specific sense as referring to relation of landlord and tenant, but in generic sense as indicating one holding possession of land by any kind of title. Code Civ.Proc. § 707.

3. Mortgages 🔑554

A sheriff's or commissioners' deed issued and delivered to mortgage foreclosure purchaser before expiration of redemption period as extended because of judgment creditor's failure to deliver to judgment debtor verified statement of amount of rents received from tenants in possession of mortgaged realty, was void. Code Civ.Proc. § 707.

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Frederick H. Bessinger against Myrtle A. Grotz to compel an accounting for rents and profits received by defendant during the period for redemption of realty from a mortgage foreclosure sale. Judgment for plaintiff, and defendant appeals.

Affirmed.

James R. Jaffray and Don Lake, both of Los Angeles, for appellant.

Robert N. Baker, of Santa Monica, and Bailie, Turner & Lake and Allen T. Lynch, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of plaintiff, after trial before the court without a jury, in an action pursuant to the provisions of Section 707 of the Code of Civil Procedure[1] to compel an accounting for rents and profits received during the redemption period by the judgment creditor, defendant appeals.

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[1] Section 707 of the Code of Civil Procedure read thus:

"Rents and profits. The purchaser from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, is entitled to receive, from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser, or his or their assigns, from the property thus sold preceding such redemption, the amounts of such rents and profits shall be a credit upon the redemption-money to be paid; and if the redemptioner of judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of the amounts of such rents and profits thus received, the period for redemption is extended five days after such sworn statement is given by such purchaser or his assigns, to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of one month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction, to compel an accounting and disclosure of such rents and profits, and until fifteen days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor."

The undisputed facts are:

On December 28, 1937, defendant purchased at a commissioner's sale, held pursuant to a decree of foreclosure, a parcel of real estate owned by plaintiff. On January 14, 1938, defendant entered into a contract whereby he agreed to sell and convey to persons then occupying the property the parcel of real estate which he had purchased. The purchase price was $2,898.14; $298.14 payable in cash, and the balance in monthly installments of $75, commencing on January 1, 1938. On November 16, 1938, plaintiff demanded in writing that defendant furnish him a verified written statement showing the amount he had received in rents and profits from the property which he had purchased at the foreclosure sale. This statement was never furnished and the present action was instituted pursuant to the provisions of Section 707 of the Code of Civil Procedure.

On December 30, 1938, a commissioner's deed to the property was delivered to defendant.

The trial resulted in a judgment that plaintiff had the right to redeem the property which had been sold by paying defendant $112.40. Defendant refused to accept the $112.40 tendered to him by plaintiff.

[1, 2] There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Were the purchasers of the foreclosed property from defendant "tenants" within the meaning of Section 707 of the Code of Civil Procedure, wherein it is provided that "if the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor, or his assigns, a written and verified statement of" the amount of rents and profits received from tenants in possession during the period of redemption, the period for redemption is extended until five days after such sworn statement is given by the purchaser or his assigns to the redemptioner or debtor?*

This question must be answered in the affirmative and is governed by this rule:

In an action to redeem from a purchaser of real property at a foreclosure sale, a vendee of such purchaser in possession during the period of redemption is a *tenant* within the meaning of the word as used in Section 707 of the Code of Civil Procedure. The word *tenant* as used in Section 707 is not used in the specific sense, as referring to the relation of landlord and tenant, but is employed in its generic sense, indicating one who holds possession of land by any kind of title. Citizens' Nat. Bank v. Western Loan & Building Co., 64 Mont. 40, 208 P. 893, 894; also Walker v. McCusker, 71 Cal. 594, 596 et seq., 12 P. 723; Harris v. Reynolds, 13 Cal. 514, 515, 517, 73 Am.Dec. 600.

Applying the foregoing rule to the facts in the instant case, the trial court properly held that the sums received by defendant from his vendee during the period of redemption constituted rents and profits received from a *tenant* in possession, and that therefore defendant should have furnished plaintiff with a verified statement of the amount of the same.

[3] Second: *Was the commissioner's deed delivered to defendant on December 30, 1938, void?*

This question must likewise be answered in the affirmative and is governed by the rule that a sheriff or commissioner's deed delivered before the period for redemption has expired is void. Perham v. Kuper, 61 Cal. 331, 332; Hall v. Yoell, 45 Cal. 584, 588; Moore v. Martin, 38 Cal. 428, 438; Gross v. Fowler, 21 Cal. 392, 396.

Since in the present case the judgment creditor did not deliver to the judgment debtor a verified statement as required by Section 707 of the Code of Civil Procedure, the period of redemption was extended until fifteen days beyond the final determination of the instant cause. The present action not having yet become final, the time for redemption has not expired and the commissioner's deed was prematurely issued to defendant and therefore void.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

66 Cal.App.2d 855

PEOPLE v. SWEENEY.

Cr. 3813.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1944.

1. Poisons ⚷9

Evidence was sufficient to sustain conviction for having unlawful possession of marijuana. St.1941, p. 2820, § 11160.

2. Poisons ⚷4

Neither intent nor knowledge is an element of offense of possessing marijuana. St.1941, p. 2820, § 11160; Pen.Code, § 20.

3. Criminal law ⚷21

It is only where, from language or effects of penal law, a purpose to require existence of intent can be discovered that intent need be shown. Pen.Code, § 20.

4. Poisons ⚷9

Defendant's contention that he had no knowledge of presence of narcotic cigarettes on windowsill outside window which opened inward to his room merely created, at most, a conflict with prima facie case made out by the prosecution showing that marijuana cigarettes were in defendant's possession, and the defense was for consideration of jury. St.1941, p. 2820, § 11160.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Joseph Sweeney was convicted for unlawfully having in his possession marijuana, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Bayard Rhone, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of violating section 11160 of the Health and Safety Code of California, St.1941, p. 2820, in that he did, on or about November 4, 1943, "willfully, unlawfully and feloniously" have in his possession "flowering tops and leaves of Indian Hemp (cannabis sativa)", commonly referred to as marijuana.

Following the entry of a plea of not guilty, the cause proceeded to trial before a jury, resulting in the defendant's conviction of the offense as charged. From such judgment of conviction, he prosecutes this appeal.

As grounds for a reversal appellant relies solely upon the contention that the evidence is insufficient to support the verdict. We therefore set forth an epitome of the testimony presented at the trial. From the record, it appears that on the evening of November 4, 1943, four Los Angeles city police officers went to an apartment house located at 4207 Naomi Street to make an investigation. An apartment on the second floor was occupied by the defendant. On the evening in question, he entered the apartment house between 6:30 and 7:15 o'clock, turned on the light, and shortly thereafter extinguished the light and left by the front door of the apartment house. When the light was extinguished the officers approached the entrance to the apartment house. They observed the defendant come out of the door thereof, walk down the steps onto the private walk and toward the street. One of the officers who was acquainted with the defendant for some two years started toward him, whereupon the latter turned around and started running back toward the apartment house but angled off to the left onto the lawn. The defendant then "took approximately two running steps toward the entrance and then veered to the left approximately two steps, * * * his left arm slightly raised in a throwing position". In this position the defendant hesitated and the officer "grabbed him around his right arm and his left, pinning them to his waist". The defendant attempted to break away from the officer, but was subdued. One of the officers, who was standing a short distance away, observed the defendant raise his arm in a "jerking motion" and saw an object leave the defendant's hand and go over the hedge onto the southernmost portion of the driveway and bounce onto the lawn approximately three feet from the sidewalk. The police officer immediately picked it up and went over to the other officers who were holding the defendant. The object in question was a piece of scrap iron with five marijuana cigarettes attached to it by a rubber band and was introduced in evidence at the trial. The officer who picked up the cigarettes took them over to where the defendant and other police officers were, saying, "I found some marijuana".

Thereupon the officers proceeded, with the defendant, into the apartment house. The officers requested defendant to open the door, but he refused, whereupon one of the officers took a key from the defendant and unlocked the front door.

The officers and the defendant then went to the latter's apartment, being accompanied by the landlord and landlady of the apartment house. The officers made a search of the defendant's room. No marijuana was found in the room itself, but on the windowsill outside of the French window which opened inward to the defendant's room they found a tobacco can containing 26 marijuana cigarettes. At that time, Mrs. Green, the landlady, addressed the defendant, saying, "J. C., I knew there was something wrong. These officers are right." She then proceeded to say that people coming up near the apartment house would whistle and then come up to the defendant's room. To these statements of Mrs. Green the defendant made no reply.

On the way to the police station, the defendant said to one of the officers, "Well, you were sure lucky tonight. I usually don't have anything on me. You must have some pretty good stool pigeons to tell you just where I keep my stuff. I had four guys approach me today, and I made them for stool pigeons right away. You will never get me for a sale." To which conversation, the officer replied: "You have been pretty lucky so far". And the defendant said "I have", to which the officer retorted, "You are a pretty wise guy aren't you?" and the defendant said "I guess I am". Subsequently, the officer had a conversation with the defendant in which he advised the latter that the police had the five cigarettes which the defendant had thrown away and also had the marijuana cigarettes that were found in the can on the windowsill of the defendant's room. To this the defendant answered, "That doesn't mean anything; you have some marijuana and you have me, you try to prove something."

Testifying in his own behalf, defendant stated that on the evening in question he was going to a baseball game, had returned to the apartment house to change his clothes and as he was leaving "four fellows grabbed me". He denied throwing any cigarettes up into the air or having any in his possession. He stated it was so dark he could not see anything and for that reason did not recognize his claimed assailants as policemen until after he had been handcuffed and gotten to his feet. He denied making the foregoing statements attributed to him by the officers.

[1] There would seem to be no question about the sufficiency of the evidence to establish possession by appellant of the marijuana cigarettes. Indeed, he does not urge upon this appeal that the evidence taken as a whole is insufficient in any regard except as stated in his brief that there is "no evidence presented wherein it could be inferred that the defendant had any knowledge of the contents of the cigarettes". A single authority only is cited by appellant in support of his position, and that is section 20 of the Penal Code, which provides that in every crime or public offense there must exist a union and joint operation of act and intent, or criminal negligence. Therefore, urges appellant, he having no knowledge of the contents of the cigarettes could have had no intent to violate the law.

[2, 3] Research by us indicates that whenever appellant's contention in the instant case has been previously advanced it has been determined adversely to him in every instance. Neither intent nor knowledge is an element of the offense herein charged. The mere possession, except as authorized by the provisions of the Health and Safety Code, is a violation of the act. The statute defining the offense charged against appellant does not declare that either intent or knowledge is an ingredient thereof. It provides that the mere possession of the narcotic named in the information shall subject the possessor to the penalties prescribed therein. It is only where, from the language or effects of the penal law, a purpose to require the existence of such intent can be discovered that such an intent need be shown. In the case of People v. O'Brien, 96 Cal. 171, 176, 31 P. 45, there is contained an exhaustive discussion of the law of criminal pleading applying to cases of the character of the one with which we are here concerned. That appellant's contention is devoid of merit is also established by the cases of People v. Le Baron, 92 Cal.App. 550, 557, 268 P. 651, 269 P. 476; People v. Randolph, 133 Cal.App. 192, 196, 23 P.2d 777; People v. Charley Quong, 5 Cal.App.2d 137, 139, 42 P.2d 386; People v. Terrazas, 42 Cal.App.2d 281, 282, 108 P.2d 680; and People v. Barton, 48 Cal.App.2d 565, 567, 119 P.2d 952.

[4] Furthermore, appellant's contention that he had no knowledge of the presence of the narcotic cigarettes on the window-sill outside the French window which opened inward to his room merely created, at most, a conflict with the prima facie case made out by the prosecution, including appellant's own statements and admissions, showing that the marijuana cigarettes were in his possession. This defense was for the consideration of the jury. People v. Randolph, supra.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur

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66 Cal.App.2d 920

KAUFFMAN'S ESTATE v. KAUFFMAN'S ESTATE.

MEYBERG v. KAUFFMAN.

Civ. 14360.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

Rehearing Denied Dec. 15, 1944.

Hearing Denied Jan. 18, 1945.

1. Executors and administrators 🔑506(3)

In proceeding to settle accounts of administrator with wills annexed of two decedents' estates, evidence was sufficient to sustain trial court's findings that outbreak of war resulted in sharp rise in wool prices, followed by leveling off and decline thereof, that pelts were purchased for packers during such period on understanding that prices would be adjusted according to market trends, that objector's husband so assured packers, that such adjustments were made, resulting in increased cost of pelts, and that end of year expenses, not appearing in interim statement, were also involved.

2. Executors and administrators 🔑506(3)

In proceedings to settle accounts of administrator with wills annexed of two decedents' estates, evidence was sufficient to sustain trial court's finding that all compensation paid for services rendered to certain company, as reflected by accounts, including compensation paid certain employee thereof, represented reasonable value of services actually rendered.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

In the matter of the estates of Clemence Kauffman, deceased, and Leon E. Kauffman, deceased. From orders settling certain accounts of the administrator with the wills annexed of such estates on the petition of Lazare M. Kauffman, Lorraine K. Meyberg, contestant, appeals.

Affirmed.

See, also, 147 P.2d 11.

Mitchel S. Meyberg and Leonard J. Meyberg, both of Los Angeles, for appellant.

O'Melveny & Myers and Pierce Works, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by contestants from orders settling the (1) first and second accounts in the estate of Clemence Kauffman, and (2) second and third accounts in the estate of Leon Kauffman, of the administrator with the will annexed of such estates.

[1] There are two questions presented for our determination which will be stated and answered hereunder seriatim:

First: *Was there substantial evidence to sustain the trial court's finding as follows:*

"The Court finds that with the outbreak of war on September 1, 1939, a sharp rise in wool prices resulted, following in about October with a leveling off and decline; that, as had been the custom as far back as during Leon E. Kauffman's lifetime, purchases of pelts were made for the packers during this period upon an understanding that adjustments in price would be made in accordance with market trends; that Leonard J. Meyberg, objector's husband, so assured the packers during the absence of proponent in Hawaii during this period; that such adjustments were later made, the result of which was to increase the cost of pelts in line with the rising prices of September, despite the falling prices in October and November. There were also involved end of year expenses which did not appear in the interim statement of September 30?"

This question must be answered in the affirmative and is conclusively demonstrated by taking the component parts of the finding and setting forth the evidence in support thereof thus:

Finding:

"The Court finds that with the outbreak of war on September 1, 1939, a sharp rise in wool prices resulted, followed in about October with a leveling off and decline;".

Evidence in support thereof:

Witness L. M. Kauffman testified:

"Q. Was there any rise or fall in the pricing market? A. Yes, there was in September 1939; war broke out and prices skyrocketed, both for wool and pelts.

"Q. Can you give us some idea now as to what the extent of that price rise was in September? A. I believe it was approximately 10 cents a pound.

"Q. All right. Now, what occasioned to change that situation as between September and November of 1939? A. Well, the anticipated rise in price for wool was short lived and prices shot up and declined rapidly and we had to sell the wool or ship the wool or bill the wool out for Leon, Inc. at lower prices after October then we did in October.

"Q. All of your products are sold to Leon, Inc., is that correct? A. That is correct, yes.

"Q. That is a corporation in which yourself on the one hand, and Mr. and Mrs. Meyberg on the other, each own 2500 shares of stock? A. Yes."

Finding:

"That, as had been the custom as far back as during Leon E. Kauffman's lifetime, purchases of pelts were made for (from?) the packers during this period upon an understanding that adjustments in price would be made in accordance with market trends;".

Evidence in support thereof:

Witness L. J. Meyberg testified:

"Q. You supervised the pricing of purchases from the packers during the fall of 1939 yourself? A. Yes.

"Q. Upon what did you base your pricing during the period the two boys were away? A. The basis of pricing that I used was the basis of the prices that were being obtained by Leon, Inc. in Boston at the time.

"Q. Do you mean by that—A. Differentials; in other words, if the price previous to that particular time was a dollar on top wools a pound, and the top wools were sold then for 90 cents, then it would be lowered. If it was raised to a dollar and ten cents it would be raised.

"Q. Well, let me see if I understand you, you would obtain information from Boston one way or another as to the prices at which the finished and scoured wool, let's say, was being sold by Leon, Inc.? A. That is correct.

"Q. That would have been wool that had been shipped east from L. Kauffman Company perhaps months before, is that correct? A. That is correct, that is right.

"Q. And then you would apply some kind of a slide rule to those prices derived on previously sold wool and tell the packers that that derived price was what you would pay for their pelts? A. That derived price, substantially, you are correct; in other words, if the price that we were selling the wool, if the price at which the wool was being sold in Boston on the various grades, they were divided into four general grades at that time, went up, then proportionately I would tell them that those were the prices that we were getting and that he would pay accordingly a raising price.

"The Court: If there was a 10 per cent rise in the price of wool on the Boston market, you gave a 10 per cent rise in the pelts? A. I didn't take a full 10 per cent rise.

"The Court: Pardon? A. A portion of that 10 per cent rise, so as to be on the safe side and I had known that L. Kauffman Company for many years prior had operated on somewhat the same arrangement and same policy with the packers, to recognize any adjustment that might be due them on the basis of the price that the wool would bring in Boston.

"Q. (By Mr. Works): That had been a practice of Mr. Leon E. Kauffman's during his lifetime, wasn't it? A. I had done the same.

"Q. Just a minute, please. If he had bought pelts at a certain price from the packer out here and then shipped them east, whether before or after the advent of Leon Inc. makes no difference, and then the price of the wool went up intermediate the time of the purchase and the time of the purchase and the time of the shipment to the east and the ultimate sale, it was common practice for him to make an adjustment to the packers out here in contemplation of the rise in price, isn't that true? A. Yes, and had been for—

"Q. But that is—A. Pardon me. let me answer my question. Have I or not?

"Mr. Works: I think you have answered it. A. The policy established by Mr. Leon Kauffman with regard to the pricings to the packer was on the basis of the assurance to the packer that he could pay him more over the period of a year for his pelts than he could get from any other source, not a question of bargaining from day to day as to what he would buy them from him at.

"Q. I understand that, but what I am asking you about is this, it was a common practice during Mr. Kauffman's lifetime to grant adjustments, or call them rebates, if you will, to the packers out here, according to how the price of the finished wool fluctuated in Boston, isn't that true? A. According to what he could sell for it, yes."

Finding:

"That Leonard J. Meyberg, objector's husband, so assured the packers during the absence of proponent in Hawaii during this period;".

Evidence in support thereof:

Witness L. J. Meyberg testified:

"Q. And you told these packers while these boys were away in Hawaii and if the prices continued to rise, the wool prices, due to war conditions or otherwise, that you would or the company would, rather, make an adjustment in price to these packers, is that correct? A. That is correct, if the value of the skins that we had purchased from them, if the market indicated that we had not fully paid them for them, that we would make an adjustment to them, that is correct, owing to the particular phase of the market at that time.

"Q. I suppose it is reasonable to assume that if the company doesn't maintain the good will of the packers it hasn't any business, isn't that correct? A. Yes."

Finding:

"That such adjustments were later made the result of which was to increase the cost of pelts in line with the rising prices of September, despite the falling prices in October and November."

Evidence in support thereof:

Witness L. J. Meyberg testified:

"Q. Do you know of your own knowledge that when Mr. Grossman returned that he gave them rebates, or rather, refunds, because you had given them too little for their pelts? A. Yes. The war had been declared, I believe, if I remember correctly, just shortly, the war between Germany and England, just shortly before these boys went away, and the market was quite strong and rather jumpy at the time and I had talked with some of the packers and had told them that we didn't know what that market was going to be and that we couldn't pay any great amount of rise, but that if after we obtained the purchases we found that the market warranted it that the business would adjust the prices with them for what purchases had been made; and the market did maintain rather strong and a number of them, in fact, most of them asked for an adjustment in that respect, and I went over it with them and a number of adjustments were made."

Finding:

"There were also involved end of year expenses which did not appear in the interim statement of September 30."

Evidence in support thereof:

Witness John K. Herr testified:

"A. Well, there is an item of supplies that is extremely large in the books for the month of November occasioned by the fact that supply bills at the end of each month are entered as an account payable at that time. They are not carried over and paid on the 10th of the following month, except the month of November, at the end of the fiscal year, when on November 30th all bills are paid and included in that month, which would make a two months' supply bill charged in the month of November, instead of one. There is a bonus—there was bonus paid on the year 1939, which was put in the salary expenses for the month of November.

"The Court: There is also a big difference in the inventory item on those two sheets? A. Yes, and there is a depreciation item of forty-seven hundred odd dollars—

"The Court: At the conclusion of the fiscal year. A. At the conclusion of the fiscal year.

"The Court: But one charged in the semi-monthly— A. It was not charged in any month except at the end of the year.

"The Court: All right."

[2] Second: *Was there substantial evidence to sustain the trial court's finding as follows:*

"The Court finds that all compensation and salaries paid for services rendered L. Kauffman Company as reflected by the accounts, including compensation and salary paid one Henry Grossman, represented the reasonable value of services actually rendered?"

This question must likewise be answered in the affirmative. The questioned finding is supported by the following testimony given by respondent:

"Q. Mr. Works: Now, there are a number of objections to wages and salaries paid to employees of L. Kauffman Company. Will you state whether or not to the best of your knowledge, information and belief the accounts on file and objected to in these proceedings correctly state the amount of wages and salaries earned and paid to employees of Kauffman Company? A. Yes, they did.

"Q. Bonuses are also reflected? A. They are, yes.

"Q. To the best of your knowledge, information and belief, were those bonuses given for services rendered to L. Kauffman & Company? A. Yes, they were.

"Q. Now directing your attention to Mr. Harry Grossman, what position does he occupy in L. Kauffman Company? A. He is my assistant.

"Q. Does he have any title? A. Well, he is assistant to me.

"Q. Assistant to you? A. That is right.

"Q. And has he always occupied that same position? A. For what period are you speaking?

"Q. Well, ever since your father died, let's take it. Over what period has he occupied that position, then, you tell me that better? A. Ever since he came to L. Kauffman Company, when he left Wolf-Bond he occupied that position.

"Q. And he occupies the same position now? A. Yes.

"Q. And that is the only position he has ever occupied since your father's death in L. Kauffman Company, is that correct or with the estate, or has he occupied some other position? A. Well, we don't go in much for titles at L. Kauffman Company, I don't know how to classify him; we are all interest in doing the work. Titles are unimportant.

"Q. Well, what is his business? Well, he is my assistant, you can call him whatever title you like, that is immaterial as far as I am concerned.

"Q. No, Mr. Kauffman, I am not making myself understood to you—I am asking you what position he holds. A. He is my assistant.

"Q. Has he been your assistant since he has been employed at L. Kauffman Company? A. Well, not prior to my father's death, no.

"Q. Since you have been at L. Kauffman? A. Yes, and from the time he came from Wolf-Bond Company, at the time of my father's death he was at the Wolf-Bond Company.

"Q. He was working at Wolf-Bond Company at the time of your father's death? A. Yes.

"Q. And subsequent to that he was employed at L. Kauffman Company, is that correct? A. Yes, but at Wolf-Bond Company he was working for my father, too, because we purchased all of Wolf-Bond Company merchandise."

In addition, Mr. Grossman testified thus:

"The Court: May I ask just what are your duties with the Kauffman Company? A. Well, I am an assistant to Mr. Lazare M. Kauffman and in his absence I run the business, which consists of contacting the packers, the various packing industries, purchasing their pelts, trading with the individual accounts, watching our costs, working out tests, individual tests on pelts, to see that we get the yield for which we pay; suggest policy at times work for the company on labor relations, and do everything that one having the responsibility of a plant would do in the absence of the owner; and when he is there we work very close together.

"The Court: Your position, then, might be said to be assistan to the manager, general manager? A. Yes, sir."

Since no error appears in the record, the orders appealed from are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

HILDEBRAND v. DELTA LUMBER & BOX CO. et al.

Civ. 7052.

District Court of Appeal, Third District, California.

Nov. 29, 1944.

Rehearing Denied Dec. 23, 1944.

Hearing Denied Jan. 25, 1945.

1. Dismissal and nonsuit 🔑29

The common law rule of "retraxit" is predicated on theory that a plaintiff who has been compensated for his injury by one of several joint tort-feasors is not entitled to second recovery of damages from other tort-feasors.

See Words and Phrases, Permanent Edition, for all other definitions of "Retraxit".

2. Dismissal and nonsuit 🔑42

Mere discontinuance of action as against one of several joint tort-feasors, without showing that satisfaction was given for such discontinuance, does not release other tort-feasors from liability to plaintiff under theory of retraxit.

3. Dismissal and nonsuit 🔑29

Plaintiff's dismissal of action for conversion of lumber as to one of several alleged joint tort-feasors did not amount to "retraxit" releasing other defendants from liability, in absence of showing that plaintiff received any consideration for dismissal.

4. Frauds, statute of 🔑95(1)

A lumber purchaser's payment to seller of sum based on inventory and estimate of amount of lumber available was sufficient to take sale contract out of statute of frauds as against contention that no property in lumber passed to purchaser until lumber was set aside and designated as that appropriated to purchaser. Civ.Code, §§ 1624a, 1724(1); Code Civ.Proc. § 1973a.

5. Appeal and error 🔑1054(1)

Admission of plaintiff's testimony, constituting conclusion in accordance with trial court's finding also supported by other substantial evidence, was not error.

6. Trover and conversion 🔑25

Parties taking and removing lumber in their debtor's possession, notwithstanding its owner's sale thereof to another, were guilty of conversion, whether they claimed as purchasers or creditors, where there was evidence that they knew of and urged such sale and no showing was made that they did anything to bring themselves within statute relating to remedies of creditors on matured claims. Civ.Code, §§ 3439.09, 3440.

7. Trover and conversion 🔑23

A creditor cannot satisfy his claim against debtor by unlawful seizure of debtor's property, so that taking of property without owner's authority or consent generally is neither warranted nor excused by fact that owner is indebted to taker.

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by Harry C. Hildebrand, as assignee for collection of the Hyman-Michaels Company, against the Delta Lumber & Box Company, W. E. Peters, and another for conversion of lumber. From a judgment for plaintiff against named defendants, they appeal.

Affirmed.

Gumpert & Mazzera and J. Calvert Snyder, all of Stockton, for appellants.

W. H. Brunner, of San Francisco, and Charles Kasch, of Ukiah, for respondent.

PEEK, Justice.

Plaintiff, as assignee for collection of the Hyman-Michaels Company, a corporation, brought this action against the Delta Lumber & Box Company, a corporation, W. E. Peters and Ray H. Oliver. The Delta Lumber & Box Company (hereinafter called the Delta Company) was family owned; the defendant Peters was its vice-president and manager and his wife was its president. The complaint alleged that Hyman-Michaels Company was the owner and entitled to the possession of certain described lumber located at a sawmill in Mendocino county; that between August 5, and 25, 1942, defendants entered the premises where the lumber was piled and wrongfully took and transported the lumber away and sold and converted it to their own use and benefit; that the reasonable market value of the converted lumber was $4,959.37, for which judgment was prayed against the defendants jointly and severally. Defendants answered denying said allegations and pleaded an estoppel as a separate defense. The case went to trial on May 3, 1943, and was submitted for decision on June 11, 1943. On July 16, the court by a minute entry ordered that plaintiff was entitled to judgment in the sum of $2,091.06 with interest from September 1, 1942. Thereafter counsel for the defendants filed a notice of motion to stay proceedings as to defendant Oliver by virtue of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix, § 501 et seq. The motion came on for hearing on August 6, and was opposed by plaintiff. On August 20, and before the court ruled on the motion to stay the proceedings, plaintiff filed a dismissal as to Oliver, which reads: "The above entitled action is hereby dismissed as to defendant Ray H. Oliver, and none other." The court on the same day ordered that the action against Oliver be dismissed and that plaintiff recover from the Delta Company and W. E. Peters the sum of $2,091.06, together with interest and costs. The findings of fact and conclusions of law, which were also filed on August 20, recite that the action was dismissed as to defendant Oliver; that Hyman-Michaels Company was the owner and entitled to the possession of 58,296 board feet of redwood lumber and 2,000 board feet of fir lumber; that during the period from August 5, 1942, to August 25, 1942, inclusive, defendants and each of them entered upon the premises where said lumber was piled and wrongfully took possession thereof and transported, sold and converted the same to their own use and benefit; that the reasonable market value of all the lumber so converted was $2,091.06; that plaintiff was not estopped; that it was not true that at the request of plaintiff the defendant Delta Company paid off certain obligations of Oliver in reliance upon representations made by plaintiff and Oliver that said lumber would be given as consideration for said advances; that the affirmative defense so pleaded by defendants is not sustained by the evidence. Judgment was entered for plaintiff and against the Delta Company and Peters, jointly and severally, for $2,091.06 with interest and costs. From the judgment so entered the defendants have appealed.

The first issue raised by defendants is that the dismissal filed as to the defendant Oliver amounted to a retraxit and operated as a release of the other defendants.

[1, 2] The common law rule of retraxit is predicated upon the theory that a complainant who has been compensated for his injury by one of the joint tort-feasors is not entitled to a second recovery from the others. Commercial Transfer, Inc., v. Daigh & Stewart, 1939, 33 Cal.App.2d 370, 91 P.2d 951. The mere discontinuance as to one of the several joint tort-feasors without a showing that satisfaction was given for such discontinuance does not operate to release the others. Westbay v. Gray, 1897, 116 Cal. 660, 48 P. 800; Shea v. City of San Bernardino, 1936, 7 Cal.2d 688, 62 P.2d 365; Commercial Transfer, Inc., v. Daigh & Stewart, supra; Key v. Caldwell, 1940, 39 Cal.App.2d 698, 104 P.2d 87.

[3] In the instant case no showing is made nor is it contended that plaintiff received consideration for the dismissal. There was no payment or agreement by Oliver to pay for the lumber converted nor was there any agreement or understanding between the parties or counsel that the dismissal was with prejudice nor was there any adjustment or agreement to adjust the merits of the controversy.

[4] Upon appeal it is now contended that the purported sale of the lumber to Hyman-Michaels Company was void under the Statute of Frauds; that if it could be said the evidence was sufficient to establish a contract of sale it only could be as to future and unascertained goods, and therefore until lumber was set aside and designated as the lumber appropriated to the Hyman-Michaels Company no property in the lumber passed to them. In support of such contention Sections 1724(1) and 1624a of the Civil Code, and Section 1973a of the Code of Civil Procedure are cited.

The record is such that we have encountered some difficulty in following testimony of the various witnesses. Suffice it to say, however, that there is substantial evidence that Hyman-Michaels Company paid Hildebrand $1,800 based upon an inventory and estimate of the amount of lumber then available. Such payment under the circumstances was sufficient to take the transaction out of the statute. See 1 Uniform Laws Ann. p. 48. The case relied upon by defendants in this regard, Stowe v. Fay Fruit Co., 90 Cal.App. 421, 265 P. 1042, was decided upon subdivision 4 of section 1624 of the Civil Code as it existed prior to the adoption of the Uniform Sales Act in 1931 (Stat.1931, Ch. 1070, p. 2234), which act amended said section by deleting the language of subdivision 4 that formed the basis for the decision in that case.

The record discloses further testimony by the wife of the defendant Oliver that before the conversion the defendants knew the lumber had been sold by Hildebrand to Hyman-Michaels Company, which testimony substantiated and confirmed the additional testimony by Hildebrand to the same effect.

[5] Defendants also allege that the trial court committed error in allowing Hildebrand to testify he "sold the lumber to Hyman-Michaels." We find no merit in this contention, as the record shows substantial evidence in addition to the attacked conclusion of Hildebrand to support the finding of the court.

[6] Although defendants by their answer alleged, and during the course of the trial claimed, they took the lumber by virtue of certain sums advanced to Oliver, it now is contended on appeal that the sale to Hyman-Michaels Company was void under Section 3440 of the Civil Code, in that there was no change of possession from Oliver; that he remained in possession of the lumber, and as the Delta Company was a creditor of his it could disregard the purported sale to the Hyman-Michaels Company. Regardless of whether or not defendants may thus shift their position, the evidence in any event is sufficient to refute such contention.

If the defendants claim as purchasers they could be protected only if purchasers in good faith for value. The record does not support such contention. There is evidence, although contradicted by the defendant Peters, that defendants not only had knowledge of the sale to Hyman-Michaels Company, but actually urged that the sale be made. Additional testimony in this regard was given by Mrs. Oliver that the defendants were determined to get the lumber before Hyman-Michaels Company started hauling it away.

[7] If defendants claim as creditors the record is likewise of no assistance to them. Nowhere is it shown that they have done anything to bring themselves within the provisions of section 3439.09 of the Civil Code relating to the remedies of creditors on matured claims, which was adopted in 1939 as a part of the Fraudulent Conveyances Act. Defendants argue, however, a creditor "has a right to deal with the property in any way he sees fit in order to protect his rights as such creditor." That the law does not sanction such method of satisfying alleged claims is well illustrated by the case of Travis Glass Co. v. Ibbetson, 186 Cal. 724, 729, 200 P. 595, 597. There a similar situation was presented, and the court said: "It is essential to the orderly administration of the law that a person be prevented from obtaining payment of a claim by the unlawful seizure of the property of his debtor, and, consequently, as a general rule the taking of property without authority or consent is neither warranted nor excused by the fact that the owner is indebted to the person taking the property. * * *"

In view of the evidence and the findings of the trial court we must conclude that the judgment should be affirmed.

Judgment affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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66 Cal.App.2d 889

PEOPLE v. LAY.

Cr. 3810.

District Court of Appeal, Second District, Division 3, California.

Nov. 21, 1944.

1. Rape ⚷14

The rule that to constitute rape there must have been the most vehement exercise of every physical means or faculty within female's power to resist penetration and a persistence in such resistance until offense is consummated does not apply in California. Pen. Code, § 261.

2. Rape ⚷51(4)

To sustain a conviction of rape under California rule, the evidence must authorize a conclusion either that prosecutrix resisted and her resistance was overcome by force or that she was prevented from resisting by threats of great and immediate bodily harm accompanied by apparent power of execution. Pen. Code, § 261.

3. Rape ⇐51(4)

In prosecution for rape, evidence that prosecutrix finally desisted in her calls for help and her struggle with defendant and submitted to intercourse did not prove consent. Pen. Code, § 261.

4. Rape ⇐14

Where defendant in his attempt to rape prosecutrix choked her every time she screamed, prosecutrix had right of free choice of what she might consider the lesser of two evils, and her choice of submission rather than possible strangulation did not show consent. Pen. Code, § 261.

5. Rape ⇐51(4)

Evidence authorized conviction of forcible rape as against defense of consent. Pen. Code, § 261.

◆

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Elmer Lay was convicted of forcible rape, and he appeals.

Affirmed.

James J. McCarthy, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., and Robert Wheeler, Deputy Dist. Atty., both of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Elmer Lay was convicted after a court trial of the crime of forcible rape. Upon his appeal he attacks the sufficiency of the evidence to support the finding of guilt.

Defendant Lay, a tailor and presser by trade, is 30 years of age, married and living with his wife. He was driven to a cafe in Culver City by a neighbor, one Bullerdick, at about 8 p. m., and spent some two hours there drinking beer. Bullerdick left the cafe in the meantime and did not return. The prosecutrix, 27 years of age, weighing 110 pounds, and married to a soldier who was overseas, entered the cafe at about 10 o'clock and had dinner. It was her intention to go window shopping until time to take a bus at 11:40 p. m. for the Hughes Aircraft plant where she was employed on the midnight shift as a key punch operator, punching time cards. Defendant engaged her in conversation in the cafe, offered to buy her a drink, which she refused, and left the cafe with her. He walked beside her for half a block and invited her to take a ride, which she declined. As they crossed an intersecting street defendant took hold of her arm, which alarmed her. She testified that as they proceeded defendant took hold of both of her arms and held them behind her. She saw a woman and two men leaving the cafe and called to them for help as defendant was shoving her along, but they paid no attention to her. Defendant was headed for the Bullerdick car which was parked at the curb with Bullerdick waiting in it. Prosecutrix testified that the front door of the car was open and that defendant lifted her from the ground and shoved her into the front seat which he entered after her. She saw a soldier and called to him: "Hey, soldier come here and help me. This fellow is bothering me." The soldier walked on. Bullerdick then drove around for 20 or 25 minutes. Defendant urged him to drive to some dark spot, which he did, and stopped the car, but changed his mind and drove on and back to the starting point. They then drove to a point on Main Street in Culver City and at about 11:30 p. m. parked in a well lighted block in the main part of town, three or four blocks from the police station. At defendant's request Bullerdick left the car to take a walk. He placed a cloth over the license plate of the car before departing. Questioned as to his purpose in this he answered, "I just accidentally dropped that thing over there; if there was going to be any trouble I would not be accused of any trouble of any kind." An act of intercourse was attempted by defendant in the front seat of the car, he then climbed over into the rear seat, prosecutrix either climbed or was pulled into the rear seat and an act of intercourse was in progress when it was interrupted by the appearance of a police officer. As to the foregoing facts there was no material conflict in the evidence. The conflicts in the testimony are the following: Defendant testified that prosecutrix accepted his invitation to take a ride, willingly entered the car, accepted his embraces and kisses, consented to the act of intercourse, helped him remove her clothing and climbed into the rear seat at his suggestion. He testified that she was friendly and agreeable at all times. However, he freely admitted that she called for help, as she testified, that he asked, "What in the hell are you hollering like that for?" and that she replied, "I don't know." And the officer testified that as they stood by the car defendant said, "one minute she is willing and the next minute she screams." He denied using any force upon prosecutrix or threatening her at any time. Prosecutrix testified that while they were driving around she took hold of Bullerdick's arm and asked him to let her out of the car; that defendant held her head with his hand over her eyes and ran his hands all over her person, that she resisted him and was frightened. She testified that defendant struck her in the face a couple of times and told her to keep quiet; that when Bullerdick left the car she screamed and defendant choked her; that he forced her down on the front seat and tried to remove her slacks; that she pushed him away; that he was alternately pulling at her clothing and choking her; that he choked her every time she screamed until she had just about given up screaming; that defendant pulled off her slacks and panties; that he pulled her into the rear seat and that she was badly frightened and felt confused and helpless.

The officer who appeared first on the scene had come to the station by motorcycle after a young boy had appeared at the scene and directed attention to the automobile. The officer first stopped some distance from the car, shut off his motor and listened. He then went on and parked close to the car where he encountered Bullerdick, who had returned from his stroll to the vicinity of the car. After a brief conversation, and hearing no noise from the car, the officer approached it and threw his flashlight upon the occupants of the rear seat. Prosecutrix called out for help, defendant emerged from the car, prosecutrix replaced her clothing and all parties were taken to the police station. In reply to an inquiry by the officer as to whether "it" was against her will, prosecutrix stated that it certainly was. At the station, according to the testimony of several officers, prosecutrix was found to have three livid marks upon one side of her throat and one upon the other side. Her slacks, which were introduced in evidence, were torn on one side. She required no medical attention. Bullerdick was jointly charged and convicted of rape. For his participation in the affair, as related, he received 30 days in jail and probation and did not appeal. His testimony while generally favorable to defendant did not relate to the occurrences in the car while it was parked.

[1, 2] Defendant's argument that the evidence failed to prove that prosecutrix resisted as vigorously as the law requires proceeds from the false premise that "there must be the most vehement exercise of every physical means or faculty within the female's power to resist penetration, and a persistence in such resistance until the offense is consummated." The statement is but part of a paragraph in 52 Corpus Juris 1019, quoted in full in People v. Cline, 1931, 117 Cal.App. 181, 3 P.2d 575, 576. It is not the language of the court or the law in this state. People v. Norrington, 1921, 55 Cal.App. 103, 202 P. 932. The question here is whether the court could reasonably have concluded from the evidence either that the prosecutrix resisted and her resistance was overcome by force or that she was prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution. Penal Code, § 261.

[3, 4] If the court had believed that prosecutrix finally desisted in her calls for help and her struggle with defendant and submitted to the act, this alone would not have proved consent. Submission induced by the fear specified in the Code is not consent. It is primarily for the woman who is attacked to decide to what extent, if at all, she can safely resist. Under such circumstances as the record here shows the law allows a woman a free choice of what she may consider the lesser of two evils and the prosecutrix had a right to choose between rape and possible strangulation.

[5] The trial court decided, as a question of fact, that the resistance offered by prosecutrix was in good faith and legally sufficient. If her testimony was believed no other conclusion would have been justified. That she was helpless in the hands of defendant is evident from the fact that she was a small, frail woman. The fact that there were livid marks upon her throat strongly corroborated her testimony that she had been choked. Defendant has offered no explanation of the marks and his counsel offers none, merely commenting, "how they got there, or when, I am not able to say." The trial court would have been justified in believing that prosecutrix was threatened with great and immediate bodily harm accompanied by apparent power of execution, if in doubt whether her

resistance had been overcome by actual force.

The judgment and order denying defendant's motion for new trial are affirmed.

PARKER WOOD, J., and FOX, Justice pro tem., concur.

66 Cal.App.2d 928

DOMJANOV et al. v. PACIFIC ELECTRIC RY. CO.

Civ. 14444.

District Court of Appeal, Second District. Division 2, California.

Nov. 22, 1944.

1. Railroads 🔑282(8)

In action for injuries sustained in a fall while crossing defendant's railroad tracks at night at a place other than where sidewalk had been provided, whether railroad was negligent in not providing a light or other source of warning of the dangerous condition of the right of way at the point where the accident occurred was for jury.

2. Trial 🔑296(4)

In action against railroad for injuries sustained in a fall at night on tracks at a point other than where a sidewalk had been provided, an instruction that where a person has two avenues of approach, only one of which is safe, and the dangerous one is selected by the party injured and the injury was due to the risk incident to the route selected, such party cannot recover, was not erroneous for failure to state that the danger was known or should have been known to the injured person, where other instructions covered the importance of plaintiff's knowledge of the danger.

3. Trial 🔑295(1)

Where the instructions read as a whole definitely and fairly instructed the jury upon the principles of law necessary for the determination of the case, it is not necessary that each instruction contain every applicable principle of law.

4. Railroads 🔑282(13)

Instruction that if plaintiff at the time she attempted to take the way she did in reaching the station knew that it was dangerous to attempt to pass over the tracks, or should have known that it was dangerous to attempt to reach the station in such manner, and that if there was another safe and convenient way provided which plaintiff knew about or should have known about, but that plaintiff attempted to pass over the dangerous route in preference to the safe one, plaintiff was negligent and could not recover, was proper.

5. Railroads 🔑282(13)

In action for injuries sustained in a fall on railroad track at night while on way to railroad station, court properly instructed that where alleged dangerous condition would be obvious to a person exercising ordinary care for his own concern in using premises, or where such condition was as well known to injured person as to the owner of the premises, there is no liability.

6. Trial 🔑260(8)

In action for injuries sustained in a fall while attempting to cross defendant's railroad track on way to station, refusing plaintiff's requested instruction relative to defendant's duty of providing safe accommodations for its passengers, and refusal to give instruction defining the word "station", was not error where other instructions fully covered the rules of law mentioned.

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Action by Perina Domjanov and John Domjanov against the Pacific Electric Railway Company to recover damages for personal injuries sustained by plaintiff Perina Donjanov in a fall while crossing defendant's railroad tracks. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Arthur C. Webb, of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, O. O. Collins, and Malcolm Archbold, all of Los Angeles, for respondent.

McCOMB, Justice.

From a judgment in favor of defendant after trial before a jury in an action to recover damages for personal injuries received by plaintiff, Perina Domjanov, when she fell while crossing the railroad tracks of defendant, plaintiffs appeal.

The evidence being viewed in the light most favorable to defendant (respondent), the essential facts are:

Defendant owns a double track railroad running north and south between Los Angeles and San Pedro, passing several towns or stopping places along its route, among which is Compton Station. Trains going to San Pedro use the westerly set of tracks, hereinafter referred to as the south tracks, while trains destined to Los Angeles use the easterly set of tracks, hereinafter referred to as the north tracks.

The station grounds at Compton occupy a parcel of land approximately 130 feet from east to west, approximately 105 feet from north to south, bounded on the west by the southbound tracks, on the south by Main Street, on the east by a street which is the easterly roadway of Wilmington Street, and on the north by the north side of the depot approximately 105 feet north of the north curbing of Main Street.

The station building is L-shaped. The base of the "L" is used as a passenger waiting room. The south side of the waiting room is 15 feet north of the north curb of Main Street, the east side of the waiting room is 25 feet west of the west curb of the east roadway of Wilmington Street, the west side of the waiting room is 28 feet east of the easterly rail of the south tracks, and the north side of the waiting room is 68 feet from the north edge of the paved station grounds.

The grounds surrounding the station are paved smooth and level with the grade of the sidewalk on the north side of Main Street, and this sidewalk is extended across both tracks to the west roadway of Wilmington Street by pavement laid flush with the tops of the rails and at the same grade as the rest of the station area.

Passengers may enter the waiting room from the east roadway of Wilmington Street at the easterly end of the waiting room, from Main Street at the south side of the waiting room, and from the station grounds at the west end of the waiting room. North of the north sidewalk line of Main Street there was not any paving of the four-feet strip between the east edge of the west roadway of Wilmington Street and the west rail of the south tracks. The ties and T-rails being fully exposed throughout its entire length.

On the night of the accident, hereinafter described, the only illumination in this area was furnished by the light coming from inside the station, and a street light on the west side of Wilmington Street about opposite the north end of the station building, all of which lights were dimmed.

On the evening of March 12, 1942, Mrs. Domjanov, one of the plaintiffs, alighted from her son-in-law's automobile on the west roadway on Wilmington Street, west of the railroad tracks at a point approximately 50 feet north of the macadam approach to the station located on the north side of Main Street. She crossed a portion of the north roadway of Wilmington Street to the unpaved portion of the right of way between the roadway and the west rail of the south tracks, and when attempting to step over the west rail into the unpaved space between the rails of the south tracks, she fell and received injuries.

Mrs. Domjanov admitted she knew:

1) The area between the rails and the pavement of Wilmington Street was unpaved.

2) That in crossing from Wilmington Street to go over the tracks it was rough north of the north side of Main Street, and also that the first rail was exposed to its full height above the ground.

3) The area between the southbound tracks was uneven north of Main Street, and that the tracks were built the same when she fell as they had been on previous occasions when she had crossed them, and

4) That if she crossed to the station at the sidewalk on the north side of Main Street it was smooth all the way across the tracks to the waiting room.

She also testified that several times before the accident she had crossed at the same place, and that it was so dark when she was crossing the tracks that she couldn't see where she was putting her feet and couldn't see where she was stepping.

Plaintiffs urge that the trial court committed prejudicial error in giving four instructions which will be quoted and discussed seriatim. These instructions are:

I

"You are instructed that if you find from the evidence that defendant knew or had reason to know that persons entered the station grounds by crossing the tracks in the manner plaintiff was doing at the time of her injury but that defendant had not extended any invitation to such persons or plaintiff to use that portion of the property in reaching the station grounds, you are instructed that under such circumstances plaintiff was known in law as a licensee, that is, one who goes upon premises of another by express or implied permission of the other but without invitation. Under such circumstances the rights and duties of the respective parties are as follows:

"When a licensee's presence on the premises of another is known to the owner of the property, or when the latter has good reason to expect the presence of a licensee, the owner of the property is bound to exercise ordinary care to avoid injuring the licensee by any overt act. By the expression 'overt act', as here used, is meant some active negligence as distinguished, for instance, from a mere passive omission to alter some condition on the premises existent when the licensee entered. As to all such conditions, and as to the activities regularly carried on about the premises she enters, a licensee assumes the risks incident thereto, and the owner of the property is under no duty to change them in the interests of the licensee's safety."

[1] Plaintiffs urge that as a matter of law defendant was negligent in not providing a light or other source of warning of the dangerous condition of defendant's right of way at the point where the accident occurred.

This objection is without merit. Plaintiffs asked and received an instruction relative to the extent of the invitation defendant had extended to its passengers. The determination of this question was purely a question of fact for the determination of the trier of fact. Bush v. Weed Lumber Co., 63 Cal.App. 426, 433, 218 P. 618.

II

[2, 3] "You are instructed that where a person has two avenues of approach, one safe and the other dangerous, and the dangerous one is selected by the party injured, then he cannot recover if the injury inflicted was due to the risk incident to the route selected. In such case a person assumes all risk of being injured."

Plaintiffs urge that the foregoing instruction was erroneously given because of the failure of the court to state that the danger was known or should have been known to the injured person.

This contention is likewise without merit.

Before giving the foregoing instruction the court instructed the jury thus:

"If in these instructions, any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions and as a whole, and to regard each in the light of all the others."

It is likewise settled law of this state that if the instructions, read as a whole, justly and fairly instruct the jury upon the principles of law necessary for the determination of the case, it is not necessary that each instruction contain every applicable principle of law. Westover v. City of Los Angeles, 20 Cal.2d 635, 637, 128 P.2d 350.

In other instructions the trial court properly instructed the jury relative to the importance of plaintiff's knowledge of the danger or of facts which would have indicated to her that a dangerous condition existed.

III

[4] "If you find from the evidence that plaintiff at the time she attempted to take the way she did in reaching the station knew that it was dangerous or unsafe to attempt to pass over the tracks, or knew, or in the exercise of ordinary care had reason to know, and should have known that it was imprudent or dangerous for her to pass over the tracks and reach the station in the manner she attempted, and if you further find that there was at hand another safe and convenient way provided by defendant, which plaintiff knew about, or in the exercise of ordinary care should have seen and could have easily and readily taken in going to the station, and that nevertheless she attempted to pass over the dangerous route in preference to the safe one, then I instruct you that plain-

tiff was negligent, and if you find that such negligence proximately contributed to cause the injury plaintiff received she cannot recover and you must find in favor of defendant."

The foregoing instruction contained a correct statement of the principles of law embodied therein. Mora v. Favilla, 186 Cal. 199, 204, et seq., 199 P. 17.

Mrs. Domjanov testified that she knew that the course she had selected was rough, uneven and dangerous, and that she could have reached the station by way of the north side of Main Street on pavement which was perfectly smooth and safe; hence, there is no merit in plaintiffs' contention that Mrs. Domjanov did not know the course she selected was dangerous.

IV

[5] "The true ground of liability in cases of this nature rests upon the owner's superior knowledge of the alleged dangerous condition over that of persons using the premises. Where such alleged dangerous condition would be obvious to a person exercising ordinary care for his own concern in using the premises, or where such condition is as well known to the injured person as to the owner of the premises, there is no liability."

The court did not err in giving the foregoing instruction. Such instruction contained a correct statement of principles of law. Shanley v. American Olive Co., 185 Cal. 552, 555, 197 P. 793; Crawford v. Pacific States Savings & Loan Co., 22 Cal. App.2d 448, 449, 71 P.2d 333.

[6] Plaintiffs also urge that the trial court erred in refusing to give the following instructions requested by them.

I

"When the defendant carrier undertook to establish on its own property a station and station grounds at a point in question it became charged with the duty of providing such accommodations as would afford safety and protection for its passengers in the use thereof."

II

"You are instructed that the word station would cover any place where trains usually and ordinarily stop, and the enclosure and adjoining area come within the meaning of a station."

It was not error for the court to refuse the foregoing instructions since the rules of law mentioned in the questioned instructions were fully covered in other instructions requested by plaintiffs and read to the jury by the trial judge.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

66 Cal.App.2d 884

In re CAMERON'S GUARDIANSHIP.
CAMERON v. WISSBECK.

Civ. 14620.

District Court of Appeal, Second District, Division 2, California.

Nov. 21, 1944.

Rehearing Denied Dec. 7, 1944.

Hearing Denied Jan. 18, 1945.

1. Guardian and ward 🔑8

The presence of a minor child in county gives court jurisdiction to appoint a guardian, though child is a resident of another state, but such jurisdiction is exercised only when necessary for the good of the child.

2. Guardian and ward 🔑13(1)

Trial court's discretion in determining when appointment of a local guardian for a nonresident minor is necessary should be exercised in accordance with established legal principles and not arbitrarily.

3. Divorce 🔑332

Decree with reference to custody of minor child, made by court of competent jurisdiction after hearing given to both parties, may be modified only upon a showing of change of circumstances arising after entry of original decree making a modification thereof advisable from the point of view of child's welfare, even though original decree was made in divorce action in court of another state.

4. Divorce 🔑332

Appointment of mother as guardian of minor son was improper as contravening doctrine of comity, in absence of showing of any change of circumstances warranting modification of decree of Colorado court granting father a divorce and awarding custody of son to him.

5. Divorce ⚷332

Comity requires that a judgment granting divorce and awarding custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in absence of showing of changed conditions affecting welfare of the child.

◆

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding in the matter of the petition of Sibble Cameron Wissbeck for appointment of herself as guardian of Harry Dale Cameron, a minor, opposed by Harry Cameron. From a judgment appointing petitioner guardian of the minor, Harry Cameron appeals.

Judgment reversed.

Leslie L. Heap, of Los Angeles, for appellant.

Arthur C. Miller and Lee A. Solomon, both of Los Angeles, for respondent.

W. J. WOOD, Justice.

This is an appeal by Harry Cameron from an order of the superior court whereby Sibble Cameron Wissbeck, his former wife, was appointed guardian of Harry Dale Cameron, the minor son of appellant and respondent. Appellant relies upon an order of a court of competent jurisdiction in the State of Colorado, by which the exclusive custody of the child was awarded to him in a divorce action. In the Colorado action an interlocutory decree of divorce was granted to appellant on January 7, 1938, against respondent on the ground of adultery and in both the interlocutory decree and in the final decree, which was entered on September 14, 1938, the sole care, custody and control of the minor child, then eighteen months of age, was awarded to appellant. At all times since the commencement of the divorce action the child has been living with the parents of appellant in Colorado and has been supported by appellant. It is conceded that the Colorado home is a proper one and that the child has been well cared for. It is not claimed that appellant is an unfit person to have the custody of the minor. On November 17, 1942, appellant entered the army of the United States and he now is and has been for some time stationed at San Pedro, California. On May 13, 1943, appellant married a second time and is now living with his wife in San Pedro. No question is raised as to the fitness of the second wife. It is the intention of appellant and his wife to reside in Colorado after his discharge from the army. Shortly after her divorce respondent remarried and is now living with her second husband about five miles from San Fernando in Los Angeles county. Respondent filed a petition with the Colorado court in January, 1943, asking for a change in the custody of the minor. That court refused to modify its previous order giving exclusive custody of the child to appellant but by an order dated May 13, 1943, permitted respondent to bring the child to California for a visit and required that he be returned to Denver, Colorado, by August 20, 1943. Respondent testified at the hearing in the present proceeding that she had said she would do her best to keep the child if she could "get him out here." In her petition to be appointed guardian, filed on August 4, 1943, and set for hearing for August 17, 1943, respondent alleged that appellant is unable to properly care for the child because of "his inclusion in the armed forces of the United States". Harry Dale Cameron has no estate in California but he has some war bonds in Colorado. On the advice of his attorney appellant signed a paper giving consent to the adoption of his son by his parents in the event of appellant's death while in the army.

The trial court found that "respondent retained said child contrary to said order" of the Colorado court. The court further found that appellant "is unable to properly care for said minor because of his induction into the armed forces of the United States. * * * that the welfare and future of said child require the appointment of said Sibble Cameron Wissbeck, mother of said child, as his guardian."

[1-3] The presence of a child in Los Angeles county gives the court jurisdiction to appoint a guardian notwithstanding he be a resident of the State of Colorado, but in such circumstances "the jurisdiction is never used except when necessary for the good of the child." De La Montanya v. De La Montanya, 112 Cal. 131, 133, 44 P. 354. The court is vested with discretion in determining when the appointment of a local guardian is necessary but this discretion should be exercised in accordance with established legal principles. It should

not be exercised arbitrarily or capriciously. It is thoroughly established that when a court of competent jurisdiction has made an order with reference to the custody of a child after a hearing given to both parties, the court will refuse a modification of its order unless it be shown that there is a change of circumstances which make a modification of the former order advisable from the point of view of the welfare of the child. The rule that a decree of custody may be modified only upon a showing of change of circumstances arising subsequent to the entry of the former decree is applicable when an attempt is made to modify the decree made in a divorce action in the court of a sister state. Foster v. Foster, 8 Cal.2d 719, 727, 68 P.2d 719, and cases there cited.

We find nothing whatever in the evidence received at the trial in the present proceeding which, measured by the rules above stated, justified the court in modifying the order of the Colorado court. It was established that the Colorado court had given thorough consideration to the problem of the custody of the minor child and was fully informed concerning the pertinent facts. The child was then a resident of Colorado and had been under his father's care and living in the home of his paternal grandparents since early infancy. The mother was and had been for several years a resident of Los Angeles county. The father had been in the army for a number of months before the Colorado court acted upon the mother's application for a change of custody. No change in these circumstances was shown at the Los Angeles hearing and no new circumstance has arisen since the hearing in Colorado which called for a change in the child's custody. It is suggested by respondent that appellant had seen his child in Los Angeles on only one occasion, when he was taken by respondent to appellant for a visit. But appellant gave a satisfactory answer to this contention when he testified that his permit to leave his station at San Pedro was of insufficient time to make the trip to respondent's home in the vicinity of San Fernando. Respondent mentions the fact that the trial judge had two conversations with the child in chambers and that the child told the judge that he wanted to remain with his mother. But it also appears that the child told the judge that he loved his father and his grandparents. The conversations of the judge with the child need not be given serious consideration, for it is evident that these conversations had little if anything to do with the order made by the court. In stating his views the judge said, "the particular reasoning of the court in this matter wasn't what the boy himself desired, because while that sometimes is persuasive and undoubtedly the court could consider it, but often times a boy of seven or eight years of age isn't in a position to exercise, really a sound discretion as to what is for his best interest. * * * But on the broad principle that this court has a very deep-rooted prejudice on this one proposition, I can't bring myself to the position of taking the child, where I have to make the choice. * * * And I wish I were a Solomon here and I could render a judgment that would give this boy to the father, the grandmother, and the mother, some way that they would all be satisfied. But it can't be done; the court must arbitrarily make one choice. I have very definite views that where the court finds he is in that position, that the natural mother is the person that is entitled to her offspring unless we have a very strong showing that she is not a good woman and that it will not be for the best interests of the child; and I don't think that showing has been made here."

[4, 5] It is apparent that the order, which in effect changes the custody of the child, was not made because of any change of circumstances after the order of the Colorado court was made, but because the views of the Los Angeles court differed from the views of the Colorado court on the subject of the custody of children. It contravenes the doctrine of comity between the states of the Union, which "requires that a judgment granting a divorce and awarding the custody of a minor child rendered by a court of one state shall be conclusive in the jurisdiction of the other states, in the absence of a showing of changed conditions affecting the welfare of the child." In re Wenman, 33 Cal.App. 592, 165 P. 1024, 1025.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; EDMONDS, CARTER, and SPENCE, JJ., dissenting.

67 Cal.App.2d 130

PEOPLE v. LOYD.

Cr. 561.

District Court of Appeal, Fourth District, California.

Nov. 30, 1944.

1. Rape ⚿52(1)

Evidence was sufficient to sustain conviction for statutory rape. Pen.Code, § 261, subd. 1.

2. Criminal law ⚿1115(1)

Where defendant, convicted of statutory rape, was acquitted on count charging rape with force, and defendant contended that evidence taken at preliminary examination was not sufficient to show evidence of rape by force and violence, claim that defendant was prejudiced before jury by being charged with such offense could not be considered where testimony taken at preliminary examination was not in the record. Pen.Code, § 261, subds. 1, 3.

3. Criminal law ⚿1170½(6)

In prosecution for statutory rape, where on cross-examination district attorney asked defendant if, at preliminary examination, while prosecutrix was testifying, defendant did not try to intimidate her by glaring at her but defendant answered that he did not and on objection by defendant's counsel, court ordered questions stricken and district attorney made no further mention of it, no prejudice resulted. Pen.Code, § 261, subd. 1.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Carmen Loyd was convicted of statutory rape, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged in an information with the crime of rape, in count one with rape by force under section 261, subdivision 3 of the Penal Code, and in count two with statutory rape under subdivision 1 thereof. The prosecutrix in each count, Airre Belflower, was of the age of 13 years. She testified that on the night of April 23, 1944, defendant, husband of her cousin, had and accomplished an act of sexual intercourse with her by force and violence and that she resisted.

The jury acquitted defendant on the first count and convicted him on the second and recommended that punishment be by imprisonment in the county jail. From this judgment of conviction defendant appealed, contending first that the evidence was not sufficient to support the verdict and judgment.

[1] We have read the entire record on appeal. Without relating the sordid details, suffice it to say, the prosecutrix's testimony, in itself, was sufficient to support the judgment and is fully corroborated by many other witnesses. Surely, counsel could not earnestly contend otherwise.

[2] It is next contended that the court erred in denying defendant's motion to dismiss the first count of the information upon defendant's arraignment on the ground that the defendant had not been legally committed on that count. It is argued that even though the jury acquitted the defendant on that count, the evidence taken at the preliminary examination was not sufficient to show any evidence of rape by force and violence and that the defendant was prejudiced before the jury by being charged in two counts instead of one. We see no merit to this argument. In the first place, the testimony taken at the preliminary examination is not before us and we have no means of determining the question presented even if it were necessary. In the absence of the transcript from the record on appeal, error cannot be assumed. The situation is quite similar to that in People v. Scott, 151 P.2d 517, where the Supreme Court held adversely to defendant's contention.

[3] It is next claimed that there was misconduct of the district attorney requiring a reversal. The misconduct is based on a question propounded to defendant on cross-examination by the district attorney. He was asked if, at the preliminary examination, while the prosecutrix was testifying, he did not "try to intimidate her by glaring at her". The defendant answered that he did not. Counsel for defendant then objected on the ground that it was not

proper cross-examination and assigned the question as misconduct. The trial court ordered the "question" stricken. In support of this argument, defendant quotes from People v. Wells, 100 Cal. 459, 34 P. 1078, at length. We see no merit to the argument. The court ordered the question stricken and the district attorney made no further mention of it. No prejudice resulted.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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66 Cal.App.2d 818

THOMAS v. THOMAS.

Civ. 14441.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1944.

1. Appeal and error ⟹837(1)

The appellate court can consider only documents used on hearing in court below in determination of matter appealed from.

2. Appeal and error ⟹837(1)

While it is not appellate court's responsibility to determine what papers were used on hearing in court below, appellate court is authorized to look through form to substance.

3. Divorce ⟹285

The superior court clerk's transcript on appeal from order directing husband to make payments for wife's support should not include all papers on file at date of hearing or any other date, but only those used on such hearing, the order itself, and notices specifically required by statute. Code Civ.Proc. § 953a.

4. Divorce ⟹285

On appeal from order directing husband to make payments for wife's support pursuant to property settlement agreement, "husband's questionnaire" and other papers, filed in court below after hearing and making of order, and such court's minute order, made after order appealed from, cannot be considered, though inadvertently certified by trial judge as papers used or considered on hearing and erroneously included in clerk's transcript. Code Civ. Proc. § 953a.

5. Divorce ⟹239

The superior court was not without jurisdiction to make order, directing husband to pay wife specified sum monthly for her support pursuant to property settlement agreement, after sustaining demurrer to her complaint in action to enforce such agreement, as filing of complaint which will withstand attack by demurrer is not condition precedent to making of such order, but only condition requisite to court's exercise of such discretion is that order be made when action for divorce is pending. Civ.Code, § 137.

6. Divorce ⟹92

In wife's action for divorce and enforcement of property settlement agreement, complaint was not insufficient to state cause of action because it contained no affirmative allegation that parties were husband and wife when action was filed, in view of allegations, required by statute for statistical purposes, as to dates of parties' marriage and separation. Code Civ.Proc. § 426a.

7. Divorce ⟹108

In wife's action for divorce and enforcement of property settlement agreement, statement by defendant's counsel, at hearing on order to show cause, that plaintiff was not then defendant's wife and that defendant had received a divorce from plaintiff in another state and was then living with his present wife, presented matter of defense, as to which burden of both pleading and proof was on defendant.

8. Divorce ⟹124

In wife's action for divorce and enforcement of property settlement agreement, statement by defendant's attorney at hearing that it was proved without dispute that defendant had obtained divorce from plaintiff in another state and that plaintiff was not defendant's wife when action was commenced constituted neither evidentiary nor legal proof of such facts.

9. Divorce ⟹286

On appeal from order directing husband to make payments for wife's support, pursuant to property settlement agreement sought to be enforced by her in divorce action, every presumption is in favor of validity of such order, made in exercise of trial court's discretion. Civ.Code, § 137.

10. Divorce ⚷211, 223

The amount of attorney's fees necessary to be paid by husband to procure proper presentation of wife's case in her action for divorce and enforcement of property settlement agreement, as well as amount of payments necessary for her support and maintenance pendente lite, is in trial court's sound discretion.

11. Divorce ⚷223

In wife's action for divorce and enforcement of property settlement agreement, trial court's order, continuing determination of amount of attorney's fees and costs to be paid wife by husband until time of trial, was not abuse of court's discretion to determine amount necessary to procure proper presentation of wife's case, where there was no showing that such award was unnecessary and wife's questionnaire, used at hearing, made sufficient showing to support order.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Freda J. Thomas against Roy T. Thomas for a divorce, enforcement of a property settlement agreement, and attorney's fees. From an order directing defendant to pay plaintiff attorney's fees, costs, and specified sum monthly for her support, defendant appeals.

Affirmed.

Michael Rudolph and Daly B. Robnett, both of Los Angeles, for appellant.

W. Blair Gibbens, of Santa Monica, for respondent.

WHITE, Justice.

Plaintiff instituted this action against defendant on July 20, 1943. By her complaint she asked for a dissolution of the "bonds of matrimony now existing between plaintiff and defendant; for the payment by defendant for plaintiff's support and maintenance of the sum of $130.00 per month pursuant to the property settlement agreement of the parties"; and for attorneys fees "pendente lite and at the time of trial". By the terms of the property settlement between them, the enforcement of which was also sought in plaintiff's complaint, the parties each transferred to the other certain community property and defendant husband agreed to pay plaintiff wife "for her support, care and maintenance, the sum of $130.00 monthly from and after October 5, 1941". When, on July 5, 1943, defendant husband refused to make further payments pursuant to the aforesaid agreement, the instant action was commenced.

After issuance of an order to show cause directed to said defendant, a hearing was had thereon October 1, 1943, following which proceedings the court made the following order: "That Roy T. Thomas pay to Freda J. Thomas the following sums at the times, for the purposes and in the manner specified: $——— on account of attorney's fees herein, payable continued to time of trial. For costs to suit herein, payable continued to time of trial. $130.00 per month for support of Freda J. Thomas, plaintiff payable: on the 1st day of each month, commencing: October 1, 1943, and to continue until further order of court."

From the record it appears that on September 9, 1943, defendant demurred to plaintiff's complaint on both general and special grounds. In support of his demurrer, defendant cited authorities that, as against a complaint in a divorce action upon the grounds of cruelty where the allegations of cruelty are pleaded in general terms, a demurrer for uncertainty is good. Sec. 426b, Code Civ.Proc. A further ground of demurrer urged was that plaintiff must allege performance by her of the terms of the contract she sought to enforce against defendant.

On September 24, 1943, when the demurrer came on for hearing, plaintiff's counsel appeared and, at his request and upon his motion, the demurrer of defendant to plaintiff's complaint was sustained with ten days allowed to amend such pleading.

From the above quoted order of October 1st, defendant prosecutes this appeal, and the same comes before us pursuant to the provisions of Section 953a of the Code of Civil Procedure. The Clerk's Transcript contains not only the complaint, the demurrer thereto and the documents which concern the order to show cause, the hearing thereon and the challenged order of October 1, 1943, but also copies of the amended complaint filed October 4; "Husband's Questionnaire" (a form used in the Superior Court of Los Angeles County in domestic relations proceedings); the demurrer to the amended complaint filed October 30; and the minute order overruling such demurrer made November 5 and entered November 10, 1943, all of which documents are certified by the trial judge as "the papers, and all of the papers, used or considered in the determination of the matter appealed from herein".

[1] In view of the fact that considerable of appellant's argument upon this appeal depends upon whether or not the "Husband's Questionnaire" was before the court, we feel impelled to say that it could not have been before the court because the record indicates it was not filed until October 16th, some two weeks after the order appealed from was made. While it is true appellant contends in his brief that "by reason of the fact that this case was pending in the Santa Monica Department of said court and it was required that all documents be filed in duplicate, and because of the fact that defendant's counsel had but one original of said affidavit with him at the time, it was necessary for him to reserve the filing thereof until a later date, but the said affidavit was presented and considered at the hearing of the order to show cause". However, respondent, in her brief, after calling attention to the fact that the "Husband's Questionnaire" was filed 16 days after the hearing, then states: "* * * the respondent does not have any recollection as to whether such Questionnaire was presented to the Court at the time of the hearing, although a copy was handed respondent a few minutes before the hearing. For the purpose of answering the appellant, the respondent will refer to the Husband's Questionnaire, but does not agree that such document was presented or considered by the Court." The situation thus presented shows the wisdom and efficacy of the rule which restricts us on appeal to a consideration only of those documents which were "used" in the determination of the matter appealed from.

[2, 3] While it is not the responsibility of an appellate court to determine what papers were used on the hearing in the court below (Spreckels v. Spreckels, 114 Cal. 60, 45 P. 1022), we are authorized to look through form to substance. The Clerk's Transcript on this appeal, as prescribed by law, should not include all papers on file at the date of the hearing, or at any other date, but only those "used" upon said hearing and the order and notices specifically required. It is unfair to respondent, as well as the court, to permit the presentation and consideration on appeal of papers not before the court below at the time of making the order appealed from. If this were allowable, the case on appeal might often have no resemblance to the one decided by the trial court. In re Moore, 78 Cal. 242, 20 P. 558.

[4] The certificate of the trial judge to the effect that said "Husband's Questionnaire" was "used or considered in the determination of the matter appealed from herein" is patently in error. The husband's questionnaire was not filed in the proceeding until 16 days after the making of the order here appealed from. The Reporter's Transcript shows that it was not offered or received in evidence, or even mentioned by counsel or court at the hearing where said order was made. Since, from the purported record on appeal before us, it appears that the trial court inadvertently certified as papers "used or considered" upon the hearing at which the order appealed from was made, not only said husband's questionnaire, but also several other papers filed in court after said hearing and its own minute order made some five weeks after the making of the order here appealed from, no consideration can be given by us to any of such papers so erroneously included in said Clerk's Transcript.

At the hearing that culminated in the order of October 1, 1943, which gives rise to this appeal, no oral testimony was presented. The record reflects that immediately after plaintiff was sworn as a witness in her own behalf and had stated her name, defendant's counsel interrupted to inform the court that this case "is a bit complicated and a brief statement of the issues would serve to acquaint the court with some of the facts we want to bring out by our witness". Thereupon plaintiff's counsel stated that there was but one issue involved and that was whether the defendant should pay the plaintiff money for her support pending the trial of the action, as well as court costs and attorneys' fees. Whereupon, defendant's counsel stated: "The plaintiff and the defendant were married a long time ago. The defendant secured a Nevada divorce in 1941, which my opponent no doubt will contest. So far he has not. Since that time, Mr. Thomas has married and at first, about the time of their divorce, secured in Nevada, a property settlement was entered into between Mrs. Thomas and Mr. Thomas upon which property settlement this proceeding is based. I call the Court's attention to the fact that an action for fraud, for cancellation, has been brought on that agreement. In the event that that agreement is set aside, then Mrs. Thomas will not be entitled to anything."

After the foregoing statement, plaintiff's counsel informed the court that "so far as we know, we have never been notified of any Nevada divorce. We are standing on a property settlement agreement which was made and by which this defendant has paid to the plaintiff for the last two years, $130.00 per month. It was only when he failed to pay, a few months ago, that this action was brought to enforce it."

Thereupon, the Court stated: "If there is no question here but what a property settlement agreement was entered into on November 18, 1941, providing for the payment of $130.00 per month, and there have been payments on that property settlement agreement, with the exception of two months, you need not take any more of my time, because I will rule that the $130.00 be paid instantly. I don't want to hear anything about any fraud or anything else." The above quoted order from which this appeal was taken was thereupon made.

[5] Appellant urges that the court, after sustaining a demurrer to the complaint and before the filing of the amended complaint, was without jurisdiction to make the order appealed from. Such is not the law. Section 137 of the Civil Code does not require as a condition precedent to the making of such an order that there shall be on file a complaint which will withstand attack by demurrer. The only condition requisite to the court's exercise of such discretion is that such order be made "when an action for divorce is pending". An action does not cease to be "pending" upon the sustaining of a demurrer to the complaint with leave to amend.

[6] Appellant further contends that the complaint failed to state a cause of action for divorce because it contained no affirmative allegation "that at the time of filing the action the parties were husband and wife"; and that consequently this was not an action for divorce and the court was without jurisdiction to make the order from which he has appealed.

We can not agree with appellant that the allegations of the complaint "for statistical purposes as required by Section 426a of the Code of Civil Procedure" that "plaintiff and defendant were married at Visalia, County of Tulare, State of California * * December 8, 1917" and "the date of separation was August 8, 1941" must be excluded when determining the sufficiency of the complaint.

[7] If, as stated by appellant's counsel at the hearing on order to show cause, respondent was not then the wife of appellant and that he (appellant) had "received a divorce * * * in Nevada in December, 1941", and was then living with his "present wife", that was a matter of defense as to which the burden of both pleading and proof was upon him. Bancroft v. Bancroft, 9 Cal.App.2d 464, 50 P.2d 465.

In Bancroft v. Bancroft, supra, the court affirmed an order such as the one here appealed from. There, the continued existence of the marriage sought to be dissolved was denied by defendant, testifying in his own behalf at the hearing on order to show cause and in his answer wherein he also set up his subsequent marriage to another. In that case, the court considered at length a number of cases where a former marriage had been presumed to have terminated prior to a subsequent marriage, but determined that the rule laid down in those cases (in each of which one of the parties to the first marriage was either dead or absent) did not apply in an action such as the one here involved, where both parties to the first marriage were before the court, and the Court further stated that defendant having failed to produce on the hearing satisfactory evidence of his alleged divorce from plaintiff, the trial court was justified in invoking against him the presumption "that a thing once proved to exist continues as long as is usual with things of that nature". C.C.P. 1963. In the case just cited, the Court, at page 470, of 9 Cal.App.2d, at page 468 of 50 P.2d, also stated:

"We are of the opinion that the proper rule on the question we are considering in this proceeding to obtain suit money is that applied in criminal cases in prosecutions for bigamy. In People v. Huntley, 93 Cal.App. 504, 269 P. 750, 751, it was thus announced: 'The question as to whether or not a first marriage no longer exists is one peculiarly within the knowledge of a defendant, and in such a case the burden is upon him to prove it. Commonwealth v. Boyer, 7 Allen [306], 89 Mass. 306. This burden is not an unreasonable one. People v. Velasquez, 70 Cal. App. 362, 233 P. 359. Then again, the marriage status having been proved * * the presumption is that the status as shown by the prosecution continued to exist. People v. Stokes, 71 Cal. 263, 12 P. 71.'"

The language quoted by appellant from Gunderson v. Gunderson, 4 Cal.App.2d 257, 261, 40 P.2d 956, (decided about 10 months before Bancroft v. Bancroft, supra), that the presumption of continued existence cannot take the place of an allegation of the continuance of a status is not controlling under the facts of the instant case. The Gunderson case was an appeal from a judgment, after a demurrer had been overruled and defendant had failed to answer. The action was to enforce a foreign divorce decree requiring defendant to make monthly payments for plaintiff's support as long as she did not remarry. The complaint set out the decree, but contained no allegation that she had not remarried. That fact was a prerequisite to her right of recovery, and it was a fact obviously peculiarly within her own knowledge. In that case, it would have been as unfair to have presumed the continuance of the unmarried status of plaintiff in the absence of allegations and proof by defendant of her remarriage, as it would be in the instant case to cast the burden upon plaintiff to allege and prove that defendant had not obtained a divorce from her in any of the 48 states or a foreign country.

Obviously, the case of Feickert v. Feickert, 98 N.J.Eq. 444, 131 A. 576, relied upon by appellant, is neither persuasive nor controlling herein. The factual situation is not analogous to the one confronting us. In the cited case, the Court was in possession of knowledge that the defendant had obtained a decree of divorce in the State of Nevada, while, in the instant case, no evidence was presented to the court that the defendant had obtained a divorce in a sister state, while plaintiff's attorney disclaimed, for her and himself, any knowledge or notification of "any Nevada decree".

[8] Appellant urges that "It was proved without dispute, that the defendant had obtained a divorce from plaintiff in the State of Nevada in December 1941, and that she was not the wife of defendant when this action was commenced". Statements to that effect were made at the hearing by defendant's attorney. But that is not proof, evidentiary or legal.

[9] Considering only the record properly before us on this appeal, it becomes apparent that, when making the order herein appealed from, there was no evidence of any kind before the court in opposition to the presumption of the continuing existence of the marriage sought to be dissolved. The trial judge did not "shut his eyes" to the fact (if it is a fact) that defendant had obtained a divorce in Nevada. Upon the showing before him, he merely decided that no dissolution of the marriage of plaintiff and defendant had been proved; that the marriage was still in existence; and that this was an action for divorce then pending; and exercised his discretion (Civ.Code 137) in making the order from which this appeal was taken. When reviewed, every presumption is in favor of the validity of such an order. Westphal v. Westphal, 122 Cal.App. 379, 10 P.2d 119; Helpling v. Helpling, 74 Cal. App. 431, 240 P. 1023; Howton v. Howton, 51 Cal.App.2d 323, 124 P.2d 837.

[10, 11] Appellant contends that the court had no jurisdiction to continue the matter of attorney's fees and costs of suit to the time of trial. As we read the order, the court did not delay its decision that defendant must pay such items, but merely continued until the time of trial the determination of the amount. This is a different situation from that shown by the facts in the cases cited by appellant (Loveren v. Loveren, 100 Cal. 493, 35 P. 87, and cases following that decision), wherein it was decided that payment of such items by the husband was not "necessary" to procure a proper presentation of the wife's case, no application for such relief having been made until after all services had been rendered. Here it is apparent that such services will be rendered by the wife's attorneys in reliance upon, not her credit, but the husband's—leaving the amount to be determined by the court when it will be in a better position to estimate the value of the services. There was no showing here that such an award was not necessary, and the wife's questionnaire, which was on file and "used" at the October 1st hearing, made sufficient showing to support the order. What is "necessary" for the purpose of securing a proper presentation of the wife's case, as well as for the purpose of her support and maintenance

pendente lite, is in the sound discretion of the trial court (Howton v. Howton, supra), and there is nothing in the record before us showing an abuse of such discretion.

The order appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

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67 Cal.App.2d 146

SECKEL v. ALLEN et al.

Civ. 12314.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1944.

Rehearing Denied Dec. 30, 1944.

Hearing Denied Jan. 29, 1945.

1. Brokers 🔑102

A corporate real estate agency and broker acting for agency, who were not parties to framing of listing of property for sale, were entitled to accept the listing as tendered by owner and were not liable to person purchasing the property in reliance thereon for alleged fraudulent misrepresentations in the listing.

2. Fraud 🔑30

Persons perpetrating fraud, by inclusion of false representations in written listing with real estate agency of property for sale which induced another to purchase property, would be liable in action based on fraud.

3. Fraud 🔑50

Fraud is never presumed.

4. Trial 🔑165

The rule that fraud is never presumed has no pertinency on motion for nonsuit in action based on claim of fraud, but, if defendants desired to make use of such rule, they should wait until submission of cause to jury and then have argued for and against presumptions.

5. Trial 🔑165

On defendants' motion for nonsuit, if evidence is fairly susceptible of one of several inferences, court must take view most favorable to plaintiff and disregard contradictory evidence, and plaintiff must be given benefit of every piece of evidence tending to sustain his averments and such evidence must be weighed in light most favorable to plaintiffs' claim.

6. Fraud 🔑64(3)

In action for fraud by purchaser who relied on written listing with broker containing recital that property had been leased and that lease was secured by cash deposit, where purchaser claimed that there was not in fact any deposit for security of rental but that entire leasehold claim was a fiction, evidence of fraud of vendor and alleged tenant was sufficient for jury. Code Civ.Proc. § 2055.

7. Brokers 🔑106

Purchaser, to make a case of fraud against broker for misrepresenting value of property, was bound to produce some evidence that when broker made alleged statement regarding value he did not know it to be true or did not have information which reasonably justified him in believing it to be true. Civ.Code, § 1572, subd. 1.

8. Brokers 🔑106

In purchaser's action for fraud, evidence that broker willfully or knowingly misrepresented value of property was insufficient to make case for jury against broker or his employer. Civ.Code, § 1572, subd. 1.

9. Appeal and error 🔑172(1)

Where action for deceit was not pleaded and request was not made to amend pleadings to conform to proof, issue regarding liability of defendants as in an action for deceit was not before trial court and would not be considered by appellate court. Civ.Code, §§ 1709–1711.

◆

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Action by Roderick Seckel against Lee W. Allen and W. A. Smith and others to recover damages for alleged fraud. From an adverse judgment, plaintiff appeals.

Judgment in favor of Lee W. Allen and W. A. Smith reversed, and affirmed as to all other defendants.

Prior opinion 148 P.2d 880.

Theodore M. Monell, of San Francisco, for appellant.

William E. Ferriter and James C. Purcell, both of San Francisco, for respondent Lee W. Allen.

Dudley F. Miller, of San Francisco, for respondent W. A. Smith.

Halsey & Leo, of San Francisco, for respondents J. F. McCormick, J. W. Wright & Co., and A. H. Wright.

STURTEVANT, Justice.

The plaintiff commenced an action against the defendants to recover damages for fraud imposed on the plaintiff in the sale to him of a lot and garage building located thereon. He named many defendants, L. W. Allen as the owner, Elsie M. Allen as his wife, W. A. Smith, as tenant, and several individuals as real estate agents. The defendants answered and the action was tried in the trial court before a jury. At the end of the plaintiff's case the trial court granted the motions for nonsuit made by the several defendants. The plaintiff consented to the granting of the motion of Elsie M. Allen but complains of the orders granting the other motions. He contends that the trial court erred in taking the case from the jury, and that on this appeal he is entitled to the benefit of all evidence that was substantial, including every inference reasonably to be drawn therefrom.

On the trial of the action the plaintiff, a man of about thirty years of age, took the stand and testified in his own behalf. Among other things he testified that the defendant McCormick represented the property as being of a value much in excess of $55,000. He also testified that McCormick represented to him that the property was leased to the defendant W. A. Smith and that there was a cash deposit of $4200 to secure the payment of the rent. The plaintiff testified that he believed the representations and acted thereon. Some of his witnesses were experts who testified the property was worth only $35,000. Other facts deemed material will be stated as we proceed.

Prior to April 1, 1940, Lee W. Allen and Elsie M. Allen, his wife, were the owners of the lot and concrete garage building located thereon, number 640 O'Farrell Street in San Francisco. On April 1, 1940, they leased the property to W. A. Smith for a term of ten years for a total rental of $81,000. The lease provided that $650 per month should be paid as rental for five years and $700 per month for the next five years. Shortly afterwards the owners employed J. W. Wright & Co., a corporation, to negotiate a sale of the property. Mr. Allen executed a written listing thereof which he signed and delivered. Among other things that listing had written on the face thereof: "Income: Leased to: W. A. Smith for ten years April 1, 1940 for total rental of $81,000. $650 per month for five years $700 per month for five years. Average rental $675 month $8100 year $4200 cash security up on lease." Prior to July 31, 1940, the plaintiff appeared at the office of J. W. Wright & Co. and there he met J. F. McCormick a real estate broker acting for said company. In his complaint he alleged that: "Plaintiff did inform the defendants above named that he had no experience in the real estate business in San Francisco, nor in the State of California, nor in the United States of America, and that his principal place of business had been in South Africa and in London, England, and that he was relying upon defendants above named to properly assist, and instruct, and guide him in the purchase of property suitable for garage purposes." He also alleged other averments necessary to plead a cause of action for fraud. 12 Cal.Jur. p. 806. On the trial he testified that when he applied to Mr. McCormick the latter produced the list above mentioned and said: "'Here is something I would like to buy myself; this is a wonderful thing.' Then he pointed out that the lease was secured by a cash deposit of $4200. He thought I could get the lot and building for $55,000 and that it was worth much more than $55,000." The plaintiff also testified that McCormick also told him the property had a wonderful return, paying 44½% on the investment of $16,800 and 12¾% on the total value of the property, and that it was worth much more than $55,000.

The plaintiff took the stand as a witness in his own behalf and was examined and cross-examined. Under section 2055, C.C.P., he called the defendant Lee W. Allen and the defendant W. A. Smith. Each was examined and cross-examined. There is no dispute in the testimony that the said list was exhibited to the plaintiff and the passage above quoted was specifically called to his attention by Mr. McCormick. Mr. Smith testified that he took from a strong box in his bureau $4200 and paid it to Mr. Allen as a deposit. The latter testified he received the cash and put it in a hollow brick for safe keeping. No other evidence of the payment was offered. The written lease was produced. On its face it recited the making of the deposit. It called for no interest to be paid thereon. The plaintiff stresses these facts and claims he should have been allowed to present them to the jury and ask it to hold and infer that both Mr. Allen and Mr. Smith were not telling the truth, and that there was not in fact any deposit for the security of the rental and that the entire leasehold claim was a fiction.

[1-6] J. W. Wright & Co. and J. F. McCormick, the broker, contend that they were not parties to the framing of the list and that they were entitled to accept it as tendered by their client, Mr. Allen. Restatement of the Law of Agency, sec. 348, p. 762; Graham v. Ellmore, 135 Cal. App. 129, 26 P.2d 696. That claim we think is sound so far as the real estate agents are concerned. However it is no reply so far as the owners and Mr. Smith are concerned. If, in fact, said recital contained in the list was a fiction and a fraud, those who perpetrated the fraud were liable in an action based on fraud. Hunter v. McKenzie, 197 Cal. 176, 185, 239 P. 1090; Cooper v. Kincaid, 151 Wash. 535, 276 P. 557, 558; Karst v. Seller, 45 Cal.App. 623, 626, 188 P. 298. The defendant L. W. Allen, and the defendant W. A. Smith, both cite authorities holding that fraud is never presumed. That, of course, is the law. However, the rule has no pertinency when a motion for a nonsuit in an action based on a claim of fraud is the question involved. If defendants would make use of the rule they should have waited until the cause was submitted to the jury and then have argued for and against presumptions. In other words it was for the trier of the facts, in this instance for the jury, to draw its own inferences and to apply such presumptions, when the whole case was submitted, as the trial court might direct by the instructions which would then have been given. Reviewing a judgment of nonsuit in Mitchell Camera Corp. v. Fox Film Corp., 8 Cal.2d 192, at page 197, 64 P.2d 946, at page 948, the court said: "Where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs. If contradictory evidence has been given, it must be disregarded. Estate of Arnold, 147 Cal. 583, 82 P. 252. The plaintiff must also be given the benefit of every piece of evidence which tends to sustain his averments and such evidence must be weighed in a light most favorable to plaintiffs' claim. Anderson v. Wickliffe, 178 Cal. 120, 172 P. 381." So in the instant case, the plaintiff was entitled to argue that an inference might properly be drawn in favor of or against L. W. Allen and W. A. Smith.

[7, 8] As to the claim that the value of the property was misrepresented, J. W. Wright & Co. and J. F. McCormick assert that the facts show no case was made against them. We think that is so. In pleading his case the plaintiff alleged that the defendants represented that the property "was reasonably worth greatly in excess of the sum of $55,000." Continuing the plaintiff also alleged "that the statements and representations made by defendants herein were and are and each of them was and is false * * * and each of them knew that the said statements were and are false." In other words, the plaintiff attempted to plead subdivision 1 of section 1572 of the Civil Code. To make a case the plaintiff was bound to produce some evidence that when J. F. McCormick made the alleged statement he did not know it to be true nor did he have any information which reasonably justified him in believing it to be true. Graham v. Ellmore, 135 Cal.App. 129, 132, 26 P.2d 696; Nash v. Rosesteel, 7 Cal.App. 504, 508, 94 P. 850; Nunemacher v. Western Motor, etc., Co., 82 Cal.App. 233, 239, 255 P. 266. But there is not a particle of evidence, direct or indirect, that J. F. McCormick wilfully or knowingly misrepresented the value of said property. On the other hand there was considerable evidence that he believed said representations to be true. It follows no case was made against him nor against J. W. Wright & Co., his employer.

[9] Something is said in the briefs touching the liability of the defendants as in an action for deceit. C.C. secs. 1709–1711. We need not pause to discuss that contention. An action for deceit was not pleaded, nor was a request made to amend to conform to the proof. Therefore that issue was not before the trial court. Williams v. Spazier, 134 Cal.App. 340, 347, 25 P.2d 851; Camm & Hedges Co. v. Bank of Covelo, 208 Cal. 246, 280 P. 962.

The judgment in favor of L. W. Allen and W. A. Smith is reversed but as to all other defendants it is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

66 Cal.App.2d 827

NAVARRO v. PAULLEY.

Civ. 14452.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1944.

1. Easements 🔑16

Where part of land owned by same person is sold, to survive severance, an implied easement must be reasonably necessary. Civ.Code, § 1104.

2. Appeal and error 🔑1010(1)

Whether an implied easement to maintain portion of a garage on an adjoining lot was reasonably necessary was a question of fact for trial court, a finding on which would not be disturbed on appeal where there was substantial evidence to support it. Civ.Code, § 1104.

3. Easements 🔑16

Where owner constructed garage for one lot partially on adjoining lot, which was not reasonably necessary for enjoyment of lot for which garage was constructed, and after plaintiff's predecessor in title purchased adjoining lot, defendant purchased lot for which garage was constructed, defendant was not entitled to an implied easement to maintain garage partially on plaintiff's lot. Civ.Code, § 1104.

Appeal from Superior Court, Los Angeles County; Jess E. Stephens, Judge.

Action by Micabla Navarro against Louise Paulley to quiet title. From a judgment quieting title in plaintiff, defendant appeals.

Judgment affirmed.

Louis F. Labarere and John A. Cronin, both of Los Angeles, for appellant.

Alfred E. Cate, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

The facts in this case are mostly undisputed, and mostly stipulated, and appear to be as follows: 40th Place, in the City of Los Angeles, runs east and west to Normandie Avenue. And, of course, Normandie Avenue runs north and south. On the northeast corner of the junction of these two streets is Lot 29 of West Park Tract, No. 2. Lot 28 in the same tract is immediately north of and adjoining Lot 29. These lots front 50 feet on Normandie Avenue and are 132.76 feet in depth.

In 1921 both lots were owned by one person, who erected two frame residences on Lot 29, one at the front and one at the rear of the lot, and also, at the rear of the lot, a garage. This garage extended over the boundary line of Lot 29, approximately 5 feet north into Lot 28. Later on, this same common owner built a fence running west from the northwest corner of the garage to a point 50 feet west from the rear of the lot. At this point the fence turned a right angle south 5 feet to the boundary line between the two lots. Thus it appears that there was a garage at the rear of Lot 29, the north 5 feet of it built upon Lot 28, and there was also a fence running west from the north line of the garage, located about 5 feet north of the common boundary line of the two lots. At a point 50 feet west from the rear of Lot 28 the fence jogged back to the boundary line.

In this respect the defendant testified:

"They gave me the key and told me to look it over. So I looked over the front house first, it was vacant, and then I went to the back and looked around, went through the garage and looked where the fence was to see just how far my property went over, and I thought it was pretty nice because the garage and the house was all fenced in already."

Some years after the houses and garage were built a successor in the title sold Lot 28 to the plaintiff in this case. The plaintiff was told by the real estate broker who negotiated the sale that she was to get a lot a full 50 feet wide and that the garage and fence from Lot 29 extended into the lot she was purchasing. Then, subsequently to the conveyance of Lot 28, Lot 29 was sold to the defendant.

Within a few days after the defendant went into possession of Lot 29, the plaintiff advised her that the fence and garage were over the boundary line, and upon plaintiff's property, but the defendant did nothing about it. The plaintiff then offered to execute a lease of the garage to the defendant, so that it would not be necessary to move it, but still the defendant did nothing. Thereupon the plaintiff tore down the encroaching fence, put a new fence on the boundary line between the two lots, and commenced this action to quiet title.

The trial court found that the plaintiff was the owner of all of Lot 28 and judgment followed quieting title in her.

Appellant claims an easement by implication for the maintenance of the garage and the fence on plaintiff's property. In support of this claim appellant asserts that the facts in this case bring it within the rule first enunciated in California in Cave v. Crafts, 53 Cal. 135, as follows: "When the owner of lands divides his property into two parts, granting away one of them, he is taken by implication to include in his grant all such easements in the remaining part as are necessary for the reasonable enjoyment of the part which he grants, in the form which it assumes at the time he transfers it."

This rule has been approved in many California cases. Quinlan v. Noble, 75 Cal. 250, 17 P. 69; Jersey Farm Co. v. Atlanta Realty Co., 164 Cal. 412, 129 P. 593; Cheda v. Bodkin, 173 Cal. 7, 158 P. 1035; Rosebrook v. Utz, 45 Cal.App.2d 726, 114 P.2d 715. It is codified in Civil Code, Section 1104. Discussion and citation of numerous cases may be found in 9 Cal.Jur., and supplements thereto; also in 9 McKinney's Digest, Easements, Secs. 15, 16, 17, and supplement thereto; and also in 13 Southern California Law Review, 525.

Inasmuch as an easement by implication takes real property or an interest therein from the record owner and vests it in another, there are certain indispensable conditions which must exist at the time of the conveyance from the common source of title before courts will enforce the implied grant. These conditions are set forth in Fischer v. Hendler, 49 Cal.App.2d 319, 121 P.2d 792. Among them is the requirement that the easement shall be reasonably necessary to the beneficial enjoyment of the land granted. And this is a question of fact for the trial court. Cave v. Crafts, 53 Cal. 135; Beem v. Reichman, 36 Cal. App. 258, 171 P. 972; Grimmesey v. Kirtlan, 93 Cal.App. 658, 270 P. 243; Fischer v. Hendler, supra; Rothschild v. Wolf, 20 Cal.2d 17, 123 P.2d 483; Slater v. Shell Oil Co., 39 Cal.App.2d 535, 103 P.2d 1043.

In the development of the law of easements in this country, for a time our courts held that an easement by implication might not pass unless it was strictly and absolutely necessary to the enjoyment of the tenement granted. 57 Am.Dec. 762. So, where a grantor having built two houses on adjacent lots, with a chimney between them resting wholly on one of the lots, conveyed the other lot, it was held that no easement to the chimney passed to prevent the grantor tearing it down, because it was not strictly necessary. Buss v. Dyer, 125 Mass. 287.

[1] But the better and now prevailing view is that in order to survive the severance the easement must be reasonably necessary. This is the rule in California. A statement of the law, with citation of authorities from the several states, may be found in 28 C.J.S., Easements, § 33, p. 692, as follows: "An easement corresponding to a use to which one part of the property has been subjected for the benefit of another part will not be implied on a severance of ownership unless the use is necessary for the enjoyment of the dominant tenement; mere convenience is insufficient. Some courts require that the use be strictly necessary; but the weight of authority sustains a rule less exacting than that of strict and indispensable necessity, namely, that the degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made. The test of necessity is whether the party claiming the right can, at reasonable cost, create a substitute on his own estate. It has been held that the rules as to ways of necessity should be applied."

[2, 3] In this case the trial court heard the testimony and considered the matter. In the performance of its duty the court determined against the defendant and appellant the essential fact of reasonable user at the time of the severance. With that determination this court can have nothing to do, if there be substantial evidence to support it. It is apparent that that part of plaintiff's lot enclosed by the fence was neither absolutely nor reasonably necessary to defendant's use of the lot conveyed to her. So far as the garage

is concerned, it may well be that the trial court drew the inference from the testimony that it could be moved from its location straddling the boundary line to a location entirely on defendant's property without any great hardship to the defendant. There is, therefore, substantial evidence to support the findings of fact, and the judgment.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

66 Cal.App.2d 956

PEOPLE v. RANKINS.

Cr. 3809.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

1. Criminal law ⚷768(1)

In prosecution for sex offenses, it is error for trial court not to give cautionary instruction to effect that such charges are easily made and difficult to disprove and that testimony of prosecuting witness should be examined with caution.

2. Criminal law ⚷1173(2)

Refusal to give a cautionary instruction is prejudicial error where testimony of prosecuting witness in prosecution for sex offense is uncorroborated, evidence is sharply conflicting, and appellate court cannot say that if instruction had been given the jury would have reached the same verdict.

3. Criminal law ⚷1173(2)

In prosecution for statutory rape and incest, failure to give a cautionary instruction constituted prejudicial error where there was a direct conflict between uncorroborated testimony of prosecuting witness and testimony of defendant.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Harry C. T. Rankins was convicted of statutory rape and incest, and he appeals.

Reversed and new trial ordered.

Robert W. Kenny and Frank Richards, both of San Francisco, for plaintiff.

Walter L. Gordon, Jr., of Los Angeles, for defendant.

McCOMB, Justice.

Defendant was convicted after trial by jury of (1) statutory rape and (2) incest. This appeal is from the judgments.

The prosecution (respondent) introduced evidence tending to prove the following facts: That at noon on or about February 28, 1943, defendant had sexual intercourse with the prosecuting witness, his daughter, who was 16 years of age. At the conclusion of the trial defendant requested the court to instruct the jury as follows:

1) "The charges of rape and incest are of a most serious nature and is such as may create a strong prejudice against the person charged. Such an accusation is said to be hard to prove and often harder to disprove or to defend against.

"It is the duty of every one of your jurors to exercise the utmost care and caution in examining the evidence and weighing the same in order that no injustice may be done to the Defendant on the one side, or the People of the State of California on the other. The case is of such a nature that there may be easily aroused either sympathy or prejudice.

"You should be very careful not to be moved by either sympathy or prejudice. You should consider all the evidence in a calm and judicial way, bearing in mind your oath taken at the beginning of this trial to return a verdict, according to the evidence."

2) "You are instructed to view the testimony of the prosecutrix with caution, especially when her testimony is uncorroborated since in this class of cases, the accused is almost defenseless and ample opportunity exists for the free play of malice and private vengeance."

Defendant relies for reversal of the judgments, among others, on the following proposition:

It was prejudicial error for the trial court not to give a "cautionary instruction" as requested by defendant.

This proposition is tenable and is governed by the following rules:

[1] 1) In prosecutions for sex offenses it is error for the trial court not to give a cautionary instruction to the effect that such charges are "easily made and difficult to disprove," and that "the testimony of the prosecuting witness should be examined with caution." People v. Putnam, 20 Cal.2d 885, 888, 889, 129 P.2d 367, 369; People v. Williams, 55 Cal.App.2d 696, 700, 131 P.2d 851.

[2] 2) The refusal to give a cautionary instruction is *prejudicial error* where as in the instant case the (a) testimony of the prosecuting witness is uncorroborated, (b) evidence is sharply conflicting, and (c) appellate court cannot say that if the instruction had been given the jury would have reached the same verdict. People v. Long, 63 Cal.App.2d 679, 147 P.2d 659; also People v. Dail, 22 Cal.2d 642, 650, 140 P.2d 828; People v. Silver, 16 Cal.2d 714, 723, 108 P.2d 4.

[3] Applying the foregoing rules to the facts of the instant case, we are of the opinion that the failure to give a "cautionary instruction" constituted prejudicial error. There is a direct conflict between the uncorroborated testimony of the prosecuting witness and the testimony of defendant. This conflict coupled with the conceded facts that:

1) The prosecuting witness testified that on the morning of February 28, 1943, defendant entered her bedroom and said, "Let's get some loving," to which remark she testified she said, "Well, I said plenty." The district attorney then asked her, "Now, did you just say now that, 'he said plenty' or 'I said plenty' or 'I feel funny' "? In answer to the latter question she said, "I said 'I feel funny' ";

2) The prosecuting witness testified that she had had sexual intercourse with the defendant since she was 11 years old but when questioned on several occasions regarding the matter she had denied ever having had intercourse with defendant;

3) Defendant had punished the prosecuting witness, previous to the time she complained of his act, because she had loaned some of his records to relatives;

4) The prosecutrix was tired of defendant punishing her for going out with boy friends;

5) Dr. Etta Grey's testimony after making a pelvic examination of the complaining witness that she found a ruptured and relaxed hymen, which rupture was not a recent one, and that the complaining witness was suffering from gonorrhea;

6) A pharmacist, Joseph M. Kallejian, testified that on February 28, 1943, defendant was employed at his drugstore from the hours of 9 a. m. until around 2 p. m. Clarence Lacefield and Jefferson Russell gave testimony to the same effect; and

7) Defendant's unequivocal denial that he ever had sexual intercourse with the complaining witness, and was not at home from eight in the morning until two in the afternoon on February 28, 1943; leads us to the opinion that it is probable that, had a proper cautionary instruction been given, the jury would have reached a different verdict.

This and other courts on previous occasions have called attention to the pronouncement of Lord Chief Justice Hale relative to the crime of rape which applies with equal force to the crime of incest.* It is as follows:

"It must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent; [and we should] be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over hastily carried to the conviction of the person accused thereof, by the confident testimony sometimes of malicious and false witnesses." (L. Hale P.C. 635, 636.)

For the foregoing reasons the judgments are and each is reversed and a new trial is ordered.

MOORE, P. J., and W. J. WOOD, J., concur.

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* People v. Benson, 1856, 6 Cal. 221, 223, 65 Am.Dec. 506; People v. Asavis, 1937, 22 Cal.App.2d 492, 497, 71 P.2d 307; People v. Huston, 1941, 45 Cal.App.2d 596, 597, 114 P.2d 607. See also People v. Lucas, 1940, 16 Cal.2d 178, 182, 105 P.2d 102, 130 A.L.R. 1485.

66 Cal.App.2d 874

PEOPLE v. CARLISLE.

Cr. 3825.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1944.

1. Criminal law ⚷1144(13)

On appeal from judgment of conviction, evidence must be viewed in light most favorable to the people.

2. Criminal law ⚷548

The credence to be given testimony of a witness whose evidence is presented at a trial in a superior court through medium of transcript of testimony taken at preliminary examination is governed by same rules that apply if the witness testifies personally in court.

3. Criminal law ⚷1160

Incompatibility and discrepancies in testimony, uncertainties of witness, and contradictions in evidence are solely for the jury in the first instance and for trial judge on motion for new trial, and such matters cannot be considered by the appellate court if there is substantial evidence to support jury's findings.

4. Infants ⚷20

Evidence sustained conviction of committing a lascivious act against a twelve-year-old girl. Pen.Code, § 288.

◆

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Kenneth Edward Carlisle was convicted of violating section 288 of the Penal Code, and he appeals.

Affirmed.

Robert Kenny, of San Francisco, for plaintiff and respondent.

Gladys Towles Root, of Los Angeles, for defendant and appellant.

McCOMB, Justice.

Defendant was convicted after trial by a jury of violating section 288 of the Penal Code. This appeal is from the judgment and order denying his motion for a new trial.

[1] The evidence being viewed in the light most favorable to the people (respondent), and in accordance with the rules set forth in People v. Pianezzi, 42 Cal.App.2d 265, 269, 108 P.2d 732, the essential facts are:

On November 12, 1943, shortly after eleven p. m., defendant got into the same bed where the complaining witness, a 12 year old girl, was sleeping. He then lifted her nightgown and fondled her private parts.

Testimony relative to the foregoing facts was presented to the trial court through the medium of a transcript of the testimony of the complaining witness taken at the preliminary examination, which by stipulation of counsel was read into evidence at the trial in the superior court.

Defendant relies for reversal of the judgment upon this proposition:

The evidence is so thoroughly discredited and so inherently improbable that it must be concluded that the verdict was the result of passion or prejudice.

This proposition is untenable and is governed by the following pertinent rules of law:

[2] 1) The credence to be given the testimony of a witness whose evidence is presented at a trial in a superior court through the medium of the transcript of the testimony taken at the preliminary examination is governed by the same rules that apply if the witness appears personally in court, is sworn and testifies. (People v. Leyshon, 108 Cal. 440, 445, 41 P. 480.)

[3] 2) Incompatibility and discrepancies in testimony, if any; the uncertainties of a witness in giving testimony, as well as contradictions in the evidence, are matters solely for the consideration of the trier of fact in the first instance and for the consideration of the trial judge on a motion for a new trial. Such matters cannot be considered by us if, as in the instant case, there is substantial evidence to support the findings of the jury. (People v. Pianezzi, supra.)

[4] Applying the foregoing rules to the facts of the present case, we find that the prosecuting witness gave direct evidence on her preliminary examination, which by stipulation was read in evidence at the trial in the superior court, to the

effect that defendant had committed an act prohibited by section 288 of the Penal Code. Further discussion of the sordid details would not serve any useful purpose.

For the foregoing reasons the judgment and order are and each is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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67 Cal.App.2d 107

PEOPLE v. ALEXANDER et al.

Cr. 2311.

District Court of Appeal, First District, Division 2, California.
Nov. 30, 1944.

1. Criminal law ⚷572

Evidence was sufficient to sustain conviction of three defendants for robbery of a filling station, as against claim of an alibi.

2. Robbery ⚷24(1, 3)

Evidence as to the identification of defendants and of the automobile which they allegedly used in the robbery of a filling station was not objectionable as being unreliable.

3. Criminal law ⚷1159(4)

Credibility of witnesses is a question for the jury, and an appellate court may not disturb its finding where there is any substantial evidence to support it.

4. Criminal law ⚷517(4)

In prosecution for robbery, testimony concerning the oral and written statements of one of the defendants admitting participation in crime was admissible where the corpus delicti had been established.

5. Criminal law ⚷563

Only slight or prima facie proof is necessary to establish the corpus delicti.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Billie Bruce Alexander, Walter Paul Collins and Wilson Joseph Robin were convicted of robbery in the first degree, and they appeal.

Affirmed.

Sol A. Abrams, of San Francisco, for appellants.

Walter L. Gordon, Jr., of Los Angeles, amicus curiae for appellant Alexander.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SPENCE, Justice.

Defendants Alexander, Collins and Robin were charged by information with robbery. They were tried by a jury and were found guilty of robbery in the first degree. They were sentenced to imprisonment in the state prison and they have appealed from the judgments of conviction.

At about 7 o'clock on the evening of February 10, 1944, a service station located in Port Chicago was robbed by two colored men who were armed with a gun. These men took about $164 in currency. Upon leaving the service station, they ran to a nearby automobile in which another colored man was sitting behind the wheel. The owner of the service station and an attendant identified the two men who held up the station as defendants Collins and Robin. Another witness identified defendant Alexander as the man who was sitting behind the wheel of the automobile which carried the men away from the scene of the crime. The three men were arrested later in the evening as they were crossing the San Francisco Bay Bridge in said automobile.

The automobile used by defendants was easily identified as it was a Lincoln Continental of the "flashy" type which carried two chrome horns on the front fenders and also carried Arizona license plates. This same car had entered the service station about two hours before the robbery and defendant Collins had then requested that the oil be checked. The attendant checked the oil but none was needed. On this visit to the station, defendant Collins had walked into the office where the owner was cashing pay checks for several workmen.

Upon the trial, defendants Collins and Robin took the stand and gave testimony which tended to establish an alibi. They admitted that the three defendants had driven from San Francisco to Port Chicago in defendant Collins' car on the afternoon of February 10, and that defendant Collins had visited the service station to check the oil. They claimed, however, that they had left Port Chicago at about 6 o'clock, being almost one hour before the robbery occurred. There was no corroboration of their alibi testimony.

Defendant Alexander did not testify on the trial. The sheriff, however, testified concerning an oral and also a written statement given by defendant Alexander following the arrest of defendants on the night of the robbery. In these statements defendant Alexander admitted that he accompanied defendants Collins and Robin on the trip to Port Chicago and that "we had a small gun." He also admitted waiting in the automobile a short distance from the service station at about 7 o'clock. He stated that when the other defendants returned they told him "they had held up the gas station." There was nothing in either the oral or written statement of defendant Alexander denying his previous knowledge that the other defendants intended to rob the service station. On the other hand, his statement showed that with full knowledge of the robbery, he continued to accompany the other defendants on their homeward journey.

[1-3] Defendants contend that the evidence was insufficient to sustain the conviction but it requires no citation of authority to show that this contention is wholly devoid of merit. Defendants' argument is based almost entirely upon the claim that the identification evidence was "unreliable", but a reading of the evidence as a whole shows that the jury was entitled to conclude that the identification evidence was entirely reliable. The question of the credibility of the witnesses was distinctly a question for the trier of the facts, and it is elemental that an appellate court may not disturb the finding of the jury where there is any substantial evidence to support it.

In reaching the conclusion that there was substantial evidence to support the conviction, we are not unmindful of the fact that the testimony concerning the oral and written statement of defendant Alexander was offered and admitted solely against said defendant. Eliminating those statements from consideration, we are still of the opinion that the remaining evidence was sufficient to sustain the conviction of all three defendants. There was an abundance of direct evidence concerning the commission of the crime by defendants Collins and Robin. As to defendant Alexander, this is not a case in which the evidence merely showed his presence at or near the scene of the crime as claimed by said defendant. Without resort to the statements of defendant Alexander, the jury was entitled to conclude from the remaining evidence that the three defendants had traveled together in defendant Collins' automobile for several hours before and after the crime; that they had carried in said automobile the gun used in the commission of the crime; that defendant Collins had visited the service station during the busy period about two hours before the commission of the crime for the purpose of inspecting the station; that the only purpose which defendants had in remaining in Port Chicago for two hours thereafter was to commit the crime shortly before the closing hour of the service station; that defendant Alexander had been seated behind the wheel of the automobile near the scene of the crime and while the crime was being committed for the purpose of having the automobile ready to make a speedy escape from the scene of the crime; and that the commission of the crime and the escape from the scene was the result of a prearranged plan on the part of all three defendants. Such were the reasonable inferences that the jury was entitled to draw from the remaining evidence.

[4, 5] The conclusions which we have reached are sufficient to dispose of defendant Alexander's further claim that the testimony concerning his oral and written statements was inadmissible as the corpus delicti had not been established. It is well settled that only "slight or prima facie proof" is necessary to establish the corpus delicti. People v. Harris, 40 Cal.App.2d 129, 104 P.2d 529, 530; People v. Wiezel, 39 Cal.App.2d 657, 104 P.2d 70; People v. Hudson, 139 Cal.App. 543, 34 P.2d 741. Having determined that the remaining evidence was not merely slight but that it was sufficient to sustain a conviction against defendant Alexander, it necessarily follows that the trial court did not err in admitting the above mentioned statements of said defendant.

The judgments of conviction are affirmed as to all defendants.

NOURSE, P. J., and STURTEVANT, J., concur.

66 Cal.App.2d 831

B. P. SCHULBERG PRODUCTIONS, Limited, v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 14526.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1944.

1. Appeal and error 🔑544(2)

On an appeal upon the judgment roll alone, District Court of Appeal can only determine whether judgment is supported by findings and whether upon findings made another and different judgment should have been entered or whether reversible error appears on face of record.

2. Statutes 🔑179

Adoption by Legislature of specific definitions of "employment" and "employer" in Unemployment Insurance Act indicated that Legislature did not intend to incorporate in such act common-law concept of master and servant or the definitions of employment, service, employee and wages as contained in the Labor Code and the Workmen's Compensation Act. St.1937, pp. 185, 265; Gen.Laws 1937, Act 8780d, §§ 6.5, 9(a).

3. Statutes 🔑179

Where meaning to be given to particular terms is prescribed by Legislature in enacting a statute, that meaning is binding upon the courts.

4. Statutes 🔑245

The Unemployment Insurance Act discloses legislative intent that application of act is to be broadly determined rather than by any narrow, technical, or even previously established legal definitions or descriptions. Gen.Laws 1937, Act 8780d, §§ 1, 6.5, 9(a).

5. Taxation 🔑59

Corporation which engaged motion picture artists under contracts and then sold their services to producing motion picture studios and which paid artists stipulated weekly amounts whether they were working at studios or not, which amount was only compensation artists received, was an "employer" of such artists and they were within "employment" of corporation within the meaning of Unemployment Insurance Act even while their services were being loaned to motion picture producing studios. Gen.Laws 1937, Act 8780d, §§ 1, 6.5, 9(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Employer" and "Employment".

◆

Appeal from Superior Court, Los Angeles County; John Gee Clark, Judge.

Mandamus by B. P. Schulberg Productions, Limited, against California Employment Commission and others to review a decision of the Commission holding certain motion picture artists to be in the employment of petitioner and that petitioner was not entitled to refund of contributions. From a judgment discharging the alternative writ of mandate and denying a peremptory writ, petitioner appeals.

Affirmed.

Lloyd G. Rainey and Paul C. Jones, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, and Doris H. Maier, Deputy Attys. Gen., for respondent.

WHITE, Justice.

This appeal comes before us on the judgment roll alone and was taken from a judgment discharging an alternative writ of mandate and denying a peremptory writ. By the writ in question, petitioner and appellant herein sought to review a decision of the California Employment Commission (predecessor of the California Employment Stabilization Commission), holding certain motion picture artists to be in the "employment" of petitioner and appellant and that the latter was therefore not entitled to refund of contributions it made for the year 1938 pursuant to the Unemployment Insurance Act. Chapter 352, p. 1226, Statutes 1935, as amended, Act 8780d, Deering's General Laws 1937.

For purposes of convenience, petitioner and appellant, B. P. Schulberg Productions, Ltd., will hereinafter be referred to as "appellant", while the defendants and respondents, California Employment Commission, will be designated as "respondent".

[1] As the present appeal is upon the judgment roll alone, this court is confined to the consideration of the question of whether the judgment is supported by the

findings, and whether upon the findings made another and different judgment should have been entered. Goldberg v. List, 11 Cal.2d 389, 79 P.2d 1087, 116 A.L.R. 900; Merron v. Title Guarantee & Trust Co., 45 Cal.App.2d 60, 113 P.2d 481. In other words, we are restricted to a consideration of whether reversible error appears upon the face of such record.

Reference to the judgment roll indicates that the facts, as disclosed therein, are not in dispute. Appellant's business was that of engaging artists under contract to it and then selling the services of such artists to producing motion picture studios. The artists who were under contract to appellant during the year 1937 and whose status is in question for the period of time during which their services were leased or loaned to other companies by appellant were Edward Arnold, LaVerne W. Brown and Leon Shamroy. Under the terms of their contracts with appellant, these artists were paid a stipulated wage per week regardless of whether or not they were actively performing services for appellant during such week or were loaned to other companies. Whenever the services of an artist under contract to appellant were loaned to another company, appellant received from such producing studio for whom the artist was working an agreed amount of money and the artist received nothing from such producing company for the services he was giving to it. At no time did the artists contract with the producing companies who borrowed their services from and paid appellant therefor. The only remuneration received by the artist was that paid him by appellant pursuant to the terms of its contract with such artist. All negotiations for the use of the services of the artist by the borrowing companies were carried on by appellant with such borrowing companies. Under its contract with the artists, appellant had the right to and did instruct the former when to start performing services for the borrowing companies and when such services should terminate. While performing services for a borrowing company, the artists were subject to the immediate control of the directors who were casting the picture for such borrowing company. It is conceded by appellant that during the times in which the artists were not loaned to other companies they were in the "employment" of appellant.

Therefore, the sole question presented is one of law and may be epitomized by saying that appellant was liable for the contributions it made for the year 1938 under the Unemployment Insurance Act only if the above mentioned artists were its employes during the various periods of the year 1937 when they rendered services to the various motion picture studios at the direction of appellant and pursuant to their contract with it. Otherwise, the fact would be that appellant had less than four individuals in its employ for some portion of a day in each of 20 different weeks during the calendar year 1937 and would not, therefore, meet the requirements of section 9(a) of the statute so as to qualify appellant as an "employer" under the Unemployment Insurance Act for the year 1938. If the aforesaid artists can be said to have been in the "employment" of appellant during the periods when they rendered services to other motion picture studios under the aforesaid agreements between appellant and such other borrowing companies, then the judgment appealed from must be affirmed. If, on the other hand, the decision of respondent commission that during such periods the artists were in the "employment" of appellant was unreasonable, arbitrary, or against the vested rights of appellant under the law, and therefore against the law itself, the judgment must be reversed.

The provisions of the California Unemployment Insurance Act which are pertinent and relevant to a determination of the question confronting us read, in part, as follows:

"'Employment,' subject to the other provisions of this act, means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied. * * *" Sec. 6.5.

"'Employer' means:

"(a) Any employing unit, which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks, whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment four or more individuals, irrespective of whether the same individuals are or were employed in each such day; provided, that prior to January 1, 1938, employer means any employing unit which for some portion of a day, but not necessarily simultaneously, in each of twenty different weeks whether or not such weeks are or were consecutive, has within the current calendar year or had within the preceding calendar year in employment eight or more individuals, irrespective of whether the same individuals are or were employed in each such day; * * *." Sec. 9.

The social policy of the state is declared in the California Unemployment Insurance Act adopted in 1935 and wherein after reciting the existence in California of a large number of unemployed people, it is declared that such a condition is detrimental to the interests of the people of the state as a whole, and that, "to meet in some measure the situation thus shown to be created by excessive unemployment, this act is designed to accumulate a reserve to assist in protecting the public against the social effects of unemployment which may be created in future years." In consonance with the express declaration of the social policy and to effectuate the same, the legislature, through the statute here in question, provided for the imposition of compulsory contributions upon workers and employers to establish a fund from which benefits could be paid to persons unemployed through no fault of their own.

[2-4] That the legislature did not intend to incorporate in this measure the common law concept of master and servant or the definitions of "employment", "service", "employee" and "wages" as contained in the Labor Code, St.1937, p. 185, and the Workmen's Compensation Act, St. 1937, p. 265, is evidenced by the fact that the statute itself contains definitions of the words "employment" and "employer", both of which definitions are hereinbefore set forth. When the meaning to be given to particular terms is prescribed by the legislature in enacting a statute, that meaning is binding upon the courts. In re Monrovia Evening Post, 199 Cal. 263, 270, 248 P. 1017; Rideaux v. Torgrimson, 12 Cal.2d 633, 637, 86 P.2d 826. We must not, therefore, use the words defined in the statute according to their rigid, precise or dictionary meanings, but rather as defined by the act itself, which evidences a legislative intent to give the words a broad and liberal description to the end that the far-reaching and evil effects of excessive unemployment may be eradicated. The broad language of the definitions contained in the statute leaves no doubt that the application of the act is to be broadly determined rather than by any narrow, technical, or even previously established legal definitions or descriptions.

[5] With the foregoing rules in mind, we proceed to a determination of what is meant by the terms "employment" and "employer" as used in the statute. The first of these terms is declared to mean "service, * * * performed for wages or under any contract of hire, written or oral, express or implied." That there was a contract of employment between the artists and appellant admits of no question; that the artists received their wages from appellant is equally and as firmly established. The artists received no salary whatever from the producing companies to whom the formers' services were loaned, but, whether or not the artists worked for appellant or were loaned to other companies, they did receive, in accordance with their contracts, a stipulated weekly wage from appellant. There was no contractual relation between the artists and the companies which borrowed their services from appellant. It was appellant who instructed the artists when they were to start performing services for the borrowing companies, where they were to perform such services, for whom they were to perform the services, and when these services were to terminate. The only contract of employment entered into by the artists was with appellant, and the conclusion seems inevitable that when performing services for the borrowing companies they were merely carrying out the terms and obligations of their contract of employment with appellant. Although the artists rendered services to the borrowing companies, the latter paid appellant and the amount of such payment was without the knowledge of, and of no concern to, the artists who were paid a weekly wage under their contract with appellant. In so far as control of the artists while working for the borrowing companies is concerned, the question for determination in the case at bar is not who had control of the particular employees at a given time, but in whose "employment" such individuals were. Since the artists' only contract of "employment" was with appellant, appellant fixed and paid their salaries, had the right to discharge them or direct them for whom and when to work, we are persuaded that, under the broad and general meaning ascribed by the legislature in the statute to the term "employment" and to kin-

dred and related terms and bearing in mind the evils which the statute was designed to cure, but one construction can be placed upon the facts reflected by the judgment roll in the instant case, and that is, as held by the trial court, that the artists around whose status this litigation centers were in the "employment" of appellant during the year 1937, by reason of which appellant was an "employer" within the meaning of section 9(a) of the California Unemployment Insurance Act during the year 1938 and therefore liable for contributions under the act on wages paid to its workers.

The foregoing conclusion at which we have arrived makes it unnecessary to discuss or decide the contention made by respondent that a writ of mandate is not the proper remedy in the present proceeding.

For the reasons herein stated, the judgment from which this appeal was taken is affirmed.

YORK, P. J., and DORAN, J., concur.

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66 Cal.App.2d 939

GRAND AVE. REALTY CO. v. SECURITY FIRST NAT. BANK OF LOS ANGELES.

SECURITY FIRST NAT. BANK OF LOS ANGELES v. GRAND AVE. REALTY CO. et al.

Civ. 14599.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

1. Corporations 🔑482(1)

Where trust indenture declared that a "Rental Guaranty Fund" of stated amount should be part of a trust estate securing bonds and that company executing indenture "covenants agrees that such fund shall be maintained with the trustee as long as any of the bonds secured hereby are outstanding", to preclude foreclosure company was required to replenish fund whenever it fell below stated amount, independent of income from property.

2. Corporations 🔑482(1)

Where trust indenture provided that funds deposited with trustee by company executing indenture should be applied in "order of priority", to payment of ground rent and taxes, and to replenishment of a "Rental Guaranty Fund" which company had covenanted to maintain in a stated sum, company's payment of money to trustee in response to notice of default, to pay past-due rent and taxes, did not cure default in covenant so as to preclude foreclosure of indenture.

3. Corporations 🔑482(1)

Where trust indenture provided that no delay of trustee to exercise any right arising from any default should impair right or be construed to be a waiver of default, trustee, after giving notice to company executing indenture that company was in default in covenant to maintain a "Rental Guaranty Fund" in a stated sum, in taking no further action to enforce the default for several years, did not abandon its intention to declare a default so as to preclude a foreclosure of the indenture.

4. Corporations 🔑482(1)

Where trust indenture provided that any request, consent, or direction given by a bondholder should bind all future holders, a holder's death subsequent to his signing a request to trustee to declare bonds due and foreclose indenture, did not invalidate request so as to preclude trustee's foreclosing indenture under its terms, on ground that public administrator had taken over holder's estate prior to filing of foreclosure proceedings.

5. Corporations 🔑482(1)

Where record in proceeding to foreclose a trust indenture disclosed that a request to trustee to foreclose by a bondholder who was an incompetent was signed by bondholder's executrix, request was not invalid so as to preclude trustee's foreclosure under terms of indenture on ground that executrix signed as incompetent holder's guardian and guardian was no longer guardian because holder had died.

6. Corporations 🔑482(1)

Where bondholder had signed a prior request to trustee to declare bonds matured and foreclose trust indenture, a request, signed by same holder after trustee's declaration of bonds' maturity, did not invalidate holder's request, so as to preclude trustee from declaring bonds due and foreclosing under terms of indenture.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Proceeding by the Grand Avenue Realty Company against the Security First National Bank of Los Angeles, trustee, etc., wherein trial was had before the court without a jury, and the Security First National Bank of Los Angeles filed a cross-complaint against plaintiff and others. From a judgment for the defendant and cross-complainant decreeing foreclosure of a trust indenture, plaintiff and cross-defendants appeal.

Judgment affirmed.

Hiram E. Casey, of Los Angeles, for plaintiff, cross-defendants and appellants.

Warren E. Libby, of Los Angeles, for defendant, cross-complainant and respondent.

McCOMB, Justice.

Appellant seeks reversal of a judgment in favor of respondent, after trial before the court without a jury, decreeing foreclosure of a trust indenture.

The essential facts are these:

June 23, 1937, the parties hereto executed a trust indenture which contained, among others, Article VII, section 7, which read so far as relevant here thus:

"Concurrently with the execution hereof the Company will cause the Trustee under its trust indenture dated as of April 20th, 1925, executed by the Company to secure its First Mortgage Leasehold Seven Per Cent (7%) Serial Gold Bonds, to pay over and deposit with the Trustee hereunder the sum of Three Thousand Eight Hundred Twenty-Five Dollars. ($3,825.00) as and for a 'Rental Guaranty Fund,' and the Company covenants and agrees that such sum shall be maintained with the Trustee as long as any of the bonds secured hereby are outstanding."

February 17, 1939, respondent, the trustee named in the trust indenture, served notice upon appellant, Grand Avenue Realty Company, that it had failed to maintain with the trustee the "Rental Guaranty Fund" mentioned in section 7 of Article VII of the trust indenture. Within sixty days appellant company paid to the trustee $4,923.87, which fund was used to pay taxes in the amount of $3,670.29 and an installment of rents due in the sum of $1,250. On October 7, 1942, the trustee again gave appellant company notice reading in part as follows:

"2. That the Company has failed to maintain with the Trustee the 'Rental Guaranty Fund' in the amount of $3,825.00 mentioned and referred to in Section 7 of Article VII of the trust indenture and that such default has continued for a period of 60 days after written notice thereof, and that by reason thereof an event of default exists as defined in Subdivision (e) of Section 1 of Article VI of the trust indenture."

The notice further stated that holders of not less than 25% in amount of the bonds secured by the trust indenture and outstanding have made written request upon the trustee to declare the principal of the bonds to be payable immediately and that the trustee declare all of the outstanding bonds due and payable and demand immediate payment thereof. The company did not at any subsequent time restore the "Rental Guaranty Fund."

There are four questions necessary for us to determine which will be stated and answered hereunder seriatim:

[1] First: *Was appellant company required under the provision quoted above of Article VII, section 7 of the trust indenture to replenish the "Rental Guaranty Fund" whenever it fell below the sum of $3,825 during the term of the trust indenture?*

This question must be answered in the affirmative. In addition to section 7, Article VII of the trust indenture set forth above, section 4, Article VII of the trust indenture declares that the "Rental Guaranty Fund" is a part of the trust estate securing the bonds in this language:

"* * * the words 'Property' or 'Trust Estate' shall, where not inconsistent with the context and unless otherwise expressly provided in this mortgage or deed of trust, be held and construed to include real and personal property of the Company of every kind and nature whatsoever that is subject to the lien of this mortgage or deed of trust, including all money held by the Trustee hereunder."

Likewise in Section 9, Article VII of the trust indenture appears this language:

"All moneys held by the Trustee in the Rental Guaranty Fund and in the Income Account shall be deemed, until paid out as aforesaid, a part of the trust estate and additional security for the bonds issued and outstanding hereunder."

Section 8, Article III, of the trust indenture reads in part thus:

"The Company covenants and agrees that this mortgage or deed of trust now is and always will be kept a first lien * * * upon the leasehold interest and other property described or mentioned in the granting clause hereof and upon all property that hereafter shall be acquired with the proceeds of bonds secured hereby."

It is thus clear from the very wording of the trust indenture that appellant company agreed to establish and thereafter maintain the "Rental Guaranty Fund" as a part of the trust estate, free from all liens ahead of the claim of the bonds.

The word "maintain" is thus defined in 38 C.J. (1925) page 335:

"'Maintain' ordinarily means to preserve something which is already in existence; to support what is already brought into existence; * * *"

In Bosqui v. City of San Bernardino, 2 Cal.2d 747, on page 758, 43 P.2d 547, at page 552, the Supreme Court of California said:

"The Supreme Court of Kansas, in a case construing a contract requiring an electric service company to maintain a transmission line, said: 'The ordinary meaning of the word "maintain" is to keep in a particular state or condition, especially with reference to efficiency; to support; to sustain, to keep up; nor to suffer to fail or decline.'" Citing numerous cases. See also Child v. Washed Sand & Gravel Co., 181 Minn. 559, 233 N.W. 586, 587.

This construction of the word "maintain" as used in section 7, Article VII of the trust indenture appears to be in accord with appellant's own views, for on page three of their brief they say:

"The plan (of reorganization) further provided that the newly executed Trust Indenture would replace certain other Trust Indentures which the Company had executed in 1925 to secure the payment of said 1925 bonds. One of these indentures bearing date June 15, 1925, was executed for the express purpose *of setting up* a so-called 'Rental Guaranty Fund' in the amount of $3825.00 *as additional security* for the payment of the bonds. Under the reorganization plan, this fund was transferred to the Trustee to be held *as additional security* for the payment of the newly issued bonds."

Through this statement, appellant concedes that the "Rental Guaranty Fund" was provided "as additional security" for the bonds. If this fund was not to be "maintained" by the company independently of the income of the property, it failed in being "additional security" for the bonds. In addition the covenant of the trust indenture is "that such sum shall be maintained with the trustee so long as any of the bonds secured hereby are outstanding" and that "the company covenants and agrees" that such sum shall be maintained. This constitutes a direct covenant of the company, independent of the income from the leasehold estate, to keep the "Rental Guaranty Fund" intact in the sum of $3825.

[2] Second: *Did appellant company by paying to the trustee $4,923.87 on July 20, 1942, in response to the notice of default of June 1, 1942, cure such default?*

This question must be answered in the negative. The letter transmitting the sum of $4,923.87 was dated July 20, 1942, signed "Grand Avenue Realty Company by Eugene J. Meyberg, Secy.," and reads in part thus:

"Enclosed find check for $1050.00 on account of rent collected. This added to the sum now in the 'Income Account' will enable you to pay the July 1st installment of $1250.00, rent due under the ninety-nine year lease. Also find enclosed check for $3670.29 to pay the last half of taxes that became payable last April and because there was not sufficient funds in the 'Income Account' or the 'Rental Guaranty Fund' to enable you to pay the same, you gave us a sixty day notice of default dated May 29, 1942."

It is apparent from the foregoing provisions of appellant company's letter that the money transmitted to the trustee was not for the purpose of replenishing the "Rental Guaranty Fund," nor can it be validly contended that this sum of money was deposited in the rental guaranty fund, since section 1, Article IV of the trust indenture read in part as follows:

"The funds deposited by the Company with the Trustee under Section 2 of Article III hereof shall be credited to a fund to be designated 'Income Account' and shall be applied, or set aside by the trustee in the following manner and *order of priority,* to wit:

"(a) To the payment of ground rent as the same becomes due under the terms of the ninety-nine (99) year lease, and taxes and/or assessments, before the same become delinquent.

"(b) To reimburse or replenish any sum that may be used out of the trust fund of $3,825.00 referred to in Section 7 of Article VII hereof and for the purpose of preventing forfeiture of the ninety-nine (99) year lease in the event that the income is insufficient to pay the rent when due."

[3] Third: *Did the trustee abandon its intention to declare a default pursuant to the notice served February 17, 1939, since the trustee took no further action to enforce the default for several years after the notice was served?*

This question must also be answered in the negative. Section 20, Article VI of the trust indenture read in part thus:

"No delay or omission of the Trustee or of any holder of bonds secured hereby to exercise any right or power arising from any default, shall impair any such right or power or shall be construed to be a waiver of any such default or acquiescence therein * * *."

The foregoing provision makes it clear that there was no waiver or abandonment by the trustee by delaying the enforcement of the default of appellant company.

Fourth: *Did holders of 25% of the outstanding bonds authorize and request the trustee to declare the maturity of said bonds and to foreclose the trust indenture?*

This question must be answered in the affirmative. So far as material on this point, Section 3, Article VI of the trust indentures provides as follows:

"If one or more of the events of default shall happen the Trustee, upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby and then outstanding, and upon being indemnified to its satisfaction, shall by notice in writing delivered to the Company in the manner prescribed in section 5 of Article VII hereof, declare the principal of all bonds secured hereby then outstanding to be due and payable immediately, and upon any such declaration the same shall become and be immediately due and payable, anything in this mortgage or deed of trust or in said bonds contained to the contrary notwithstanding."

Section 4, Article VI of the trust indenture reads thus:

"If one or more of the events of default shall happen, the Trustee, upon the written request of the holders of twenty-five per cent (25%) in amount of the bonds secured hereby and then outstanding, and upon being indemnified to its satisfaction, shall proceed to protect or enforce its right or rights of the bondholders under this mortgage or deed of trust or to enforce the guaranty of the guarantors of said bonds, by a suit in equity or action at law, either for the specific performance of any covenant or agreement contained herein, or in aid of the execution of any power herein granted, or for the foreclosure of this mortgage or deed of trust, or for the enforcement of any other appropriate legal or equitable remedy as the Trustee shall deem most effectual in support of any of its rights or duties hereunder; and upon instituting such proceedings or in order to take possession as hereinbefore provided, the Trustee shall be entitled to the appointment of a receiver of the trust estate and to the sale of the trust estate as an entirety."

Section 5, Article VII of the Trust Indenture reads thus:

"The Company shall at all times maintain an office in California where notices for it may be sent by the Trustee. The mailing of any notice by the Trustee to the Company at the last address of such office of which the Trustee shall have written notice, shall constitute sufficient notice to the Company for all purposes hereunder."

Section 2, Article VIII in the trust indenture reads thus:

"Any request, consent, direction, resolution or other instrument required by this mortgage or deed of trust to be signed and executed by bondholders may be in any number of concurrent writings of similar tenor, and may be signed or executed by such bondholders in person or by attorney or agent appointed in writing. Proof of the execution of any such request, direction, resolution or other instrument, or of the writing appointing any such attorney or agent, and of the ownership of bonds, if made in the following manner, shall be sufficient for any purposes of this mortgage or deed of trust and shall be conclusive in favor of the trustee with regard to due action taken by it under such request, consent, direction or other instrument.

"(a) The fact and date of the execution by any person of any such writing or instrument may be proved by the certificates of any officer in any jurisdiction who by the laws thereof has power to take acknowledgments within said jurisdiction, certifying that the person signing such writing or instrument acknowledged before him the execution thereof.

"(b) The ownership of registered bonds shall be proved by the register of such bonds.

"Any request, consent or direction given by any bondholder shall bind all future holders of the same bond."

It is conceded that $25,250 principal amount represents 25% of the bondholders or a total of 26 bonds. Appellant concedes that the owners of 29 bonds signed requests to the trustee to declare the bonds due and to foreclose the trust indenture. They claim however, that:

[4] (1) A. G. Judd, a holder of one bond, died subsequent to his signing a request to the trustee to declare the bonds due and foreclose the indenture and that the public administrator had taken over his estate prior to the filing of the foreclosure proceedings. Such fact is immaterial in the present case and does not invalidate the request to the trustee in view of the provisions of Section 2, Article VII of the trust indenture which reads thus:

"Any request consent or direction given by any bondholder shall bind all future holders of the same bond."

[5] (2) Annie T. Heintz signed, as guardian of the Estate of Fetnah White, Incompetent, and that at the time the request was signed, Annie T. Heintz was no longer guardian because Fetnah White had died.

This contention is without merit since the record discloses that the request was signed by Annie T. Heintz, executrix of the last will of Fetnah White, deceased.

[6] (3) The request signed by Frances O'Leary Brady owner of two bonds was signed on October 23, 1942, which was sixteen days after the declaration of the maturity of the bonds.

Such contention is also immaterial since the record discloses that Mrs. Brady had signed a prior request in September, 1942.

(4) The request signed by Frances K. and Harry B. West, as joint-tenants, owners of one bond, was dated October 11, 1942, which was subsequent to the date of the declaration of the maturity of the bonds.

This objection is likewise without merit since the record discloses that these bondholders had signed a prior request on July 30, 1942.

From the foregoing facts it is apparent that 25% of the outstanding bondholders did authorize and request respondent trustee to declare the bonds matured, and to foreclose the trust indenture because of appellant company's failure to maintain the "Rental Guaranty Fund" in the sum of $3825 as provided in section 7, Article VII of the trust indenture agreement.

In view of our conclusions, it is unnecessary to discuss other questions presented by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

W. J. WOOD, J., deeming himself disqualified did not participate in the foregoing decision.

BARRETT v. BROWN.

Civ. 14414.

District Court of Appeal, Second District, Division 3, California.

Nov. 21, 1944.

Hearing Granted Jan. 18, 1945.

1. Statutes ⚷63

A publication of delinquent tax list as required by statute subsequently held unconstitutional was without legal effect and tax sale held pursuant thereto was void. Pol.Code, §§ 3764, 3766, 3767.

2. Taxation ⚷788(5)

Under statutory provision that deed from the state is prima facie evidence that at a proper time and place the property was sold as prescribed by law and by the proper officer, the deed is not conclusive evidence that notice was given. Pol.Code, § 3786(5).

3. Taxation ⚷658(2)

A sale for taxes can be made only after valid notice of sale has been given.

4. Constitutional law ⚷48

It is not to be presumed that Legislature intended by curative act to do away with the essentials of notice of tax sale which courts have always held to be indispensable. St.1943, p. 1993, §§ 1, 2.

5. Statutes 🔑212

Presumption is that curative act was passed with knowledge of earlier court decisions and with expectation that courts would continue to draw the same distinctions between acts which are susceptible of validation and those which are not as had been drawn in the past.

6. Taxation 🔑688

The curative statute relating to tax sales did not cover tax sale where no notice thereof had been given. St.1943, p. 1993, §§ 1, 2.

7. Constitutional law 🔑278(1)

One cannot be deprived of his property without due process of law, and, if an act essential to due process has been omitted, the omission is fatal and beyond subsequent correction.

8. Constitutional law 🔑196

A tax levy unauthorized by law cannot be validated by curative legislation.

9. Constitutional law 🔑196

A levy upon real property in violation of the constitutional requirement that all property shall be taxed in proportion to its value cannot be validated.

10. Constitutional law 🔑285

Where a tax sale has been made without notice to owner, an essential of due process is lacking.

11. Constitutional law 🔑196

Where no legal notice had been given of tax sale, a curative act could not be construed as applicable thereto, since notice of sale was required by due process of law. St.1943, p. 1993, §§ 1, 2.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Lynn Warwick Barrett against Leonard H. Brown to quiet title. From a judgment for defendant, the plaintiff appeals.

Judgment reversed.

Edwin J. Miller, of Los Angeles, for appellant.

Raphael L. Dechter, of Los Angeles, for respondent.

SHINN, Acting Presiding Justice.

Plaintiff appeals from an adverse judgment in an action to quiet title. Defendant claims title under a tax deed from the state, the validity of which is challenged. Although several claims of invalidity are advanced, we find it necessary to decide only: (1) Whether the sale and deed to the state in 1937 were invalid because of a void publication of the delinquent tax list, and (2) whether the sale and deed to the state, if invalid, were validated by the curative Act of 1943. Stats.1943, chap. 458, p. 1993.

The property in question is situated in the incorporated city of Lynwood, Los Angeles County. The 1936–37 taxes were not paid and the property was sold to the state in 1937 and was sold to the defendant and deeded to him by the state July 20, 1942. Under Political Code section 3764 then in force, the tax collector was required to publish the list of delinquent taxes on or before June 8, 1937, stating the names of the persons and a description of the property delinquent and an amount equal to the amount of all taxes, assessments, penalties and costs due and which were a lien thereon. Section 3767 of the code required the publication to state the day and hour when the property would be sold to the state by operation of law. Under section 3766 the publication was required to be made once a week for three successive weeks in some newspaper of general circulation published in the county, or if there was no such newspaper, notice was to be given by posting. This was a general provision applying to all counties except those of the first class. As to that class a special and materially different procedure was directed. In each county of the first class the portion of the delinquent list covering property located in the unincorporated territory of the county and in the city in which the county seat was located, and as to certain other property in several contingencies not material here, was to be published in a daily newspaper of general circulation published at the county seat. That portion of the delinquent county or city and county tax list covering property located in any incorporated city or town, other than the county seat, wherein there was published at least once a week a newspaper of general circulation, was required to be published in the city or town in which the property was located. The tax list was published in accordance with these requirements. The list which was published in the county seat, Los Angeles, did not list the property that was located in Lynwood. That portion of the list covering property located in Lynwood was published once each week for three weeks in a paper published in the city of Lynwood. The provisions of section 3766, supra, which relate to publications to be made in counties of the first class would apply only to Los Angeles County, since it is the only county of that class. In all other counties the entire delinquent list and notice of sale was to be contained in one notice and was to be published in a single newspaper. Those provisions of the section which set up a procedure for Los Angeles County differing from the general law applicable to all other counties have been held unconstitutional as being an attempted local or special law for the assessment and collection of taxes, in violation of Article IV, section 25, subdivision 10, of the Constitution, which prohibits the passage of local or special laws for that purpose, and also as contrary to Article I, section 11, and of subdivision 33 of section 25, Article IV of the Constitution, the former of which provides that all laws of a general nature shall have a uniform operation, and the latter that the legislature shall not pass local or special laws where a general law can be made applicable. It was decided in Consolidated Printing & Publishing Co. v. Allen, 1941, 18 Cal.2d 63, 112 P.2d 884, 888, that the legislature has no power to classify counties for the purpose of prescribing different procedure for the assessment or collection of taxes, and that there was "no natural, intrinsic, or constitutional ground of distinction between the county of Los Angeles and other counties which would justify the application of a special procedure with reference to the sale of delinquent property." The provisions of former Political Code section 3766 were carried into section 3356 and sections 3391 to 3403 of the Revenue and Taxation Code in 1939, St. 1939, pp. 1321–1325, without change in the features which we have to consider. The court was considering the sections of the Revenue and Taxation Code but the decision is conclusive of the unconstitutionality of the same provisions in former section 3766.

[1-3] The only valid notice that could have been given by the tax collector was a single one which stated the facts with reference to names, descriptions, amounts for which the several parcels would be sold to the state, and the time of the sale, in a newspaper of general circulation published at the county seat and for the time required by law. Such a notice was not given and the attempted notice constituted no notice at all. Numerous cases, holding that a material defect in the publication of the delinquent tax list and notice will render void a sale pursuant to such notice, are cited in Miller v. McKenna, 1944, 23 Cal.2d 774, at page 777, 147 P.2d 531. Upon the authority of those decisions, which it is unnecessary for us to list here, we conclude that the deed to the state was void. Defendant seeks to escape this consequence by reliance upon section 3787 of the Political Code, which provides that the deed to the state is conclusive evidence of certain facts, contending that among them is the fact that due and proper notice of sale was given before the property was sold to the state. Section 3786 of the Political Code, which was in effect until the Revenue and Taxation Code was adopted, makes a deed to the state, as well as a deed from the state, prima facie evidence of the fact, among others, that "5. At a proper time and place the property was sold as prescribed by law, and by the proper officer." It was held in Bussenius v. Warden, 1925, 71 Cal.App. 717, 236 P. 371, that a deed to the state is primary evidence of the due publication of the delinquent list and notice of sale. The sale involved in that case was held invalid because of irregularities in the statements in the delinquent list. The same result has been reached in many later cases, among them being those above referred to, which are listed in Miller v. McKenna, supra. A sale for taxes to the state cannot be made "as prescribed by law" if valid notice of sale has not been given, for the publication of notice is an indispensable prerequisite to a sale. Section 3787 does not apply and the deed is not conclusive evidence that notice has been given.

The final question relates to the so-called validating Act, Stats.1943, chap. 458, upon which defendant relies and which reads in part as follows:

"Section 1. Every act and proceeding heretofore taken by any county, city and county or the officers thereof relative to the preparation, transmitting, computing, determining or fixing the budget or the tax rate or rates of any county or city and county, or to the assessment or equalization of property or to the levy of taxes thereon or to tax sales or certificates of tax sales, tax deeds or other conveyances resulting from such assessment, equalization and levy, are hereby confirmed, validated and declared legally effective.

"Sec. 2. (a) This act is limited to the correction of defects, irregularities and ministerial errors which the Legislature originally could have omitted from the statutory requirements of law under which the acts hereby confirmed, validated and declared legally effective were taken.

"(b) This act is limited to the validation of acts and proceedings to the extent to which the same can be effectuated under the State and Federal Constitutions."

[4-6] The adoption of an Act such as this would appear to have been called for to correct, if possible, the mistakes which defeated the levies held void in Otis v. Los Angeles County, 1937, 9 Cal.2d 366, 70 P.2d 633, and in the recent case of Gottstein v. Gray, 1944, 66 Cal.App.2d 587, 152 P.2d 742. Errors in adopting the budget and fixing the tax rate furnished the basis for those rulings. The curative Act is aimed at the several steps enumerated in section 1 from the adoption of the budget to the levy of the tax—not all of such steps, but only those which stand in need of validation. And also validated are "tax sales or certificates of tax sales, tax deeds or other conveyances *resulting from such assessment, equalization* and *levy*." (Emphasis added.) We think it may be doubted that it was the intention to attempt validation of sales, certificates and deeds other than those which needed validation because they rested upon irregular proceedings in the adoption of the budget, the fixing of the rate, the assessment, equalization or levy. All sales and deeds *result* from assessments and levies and yet many may be founded upon valid assessments and levies but void notices of sale. If the validation of any and all sales, certificates and deeds, and the notices upon which they depended was intended, we would then have a statute which purported to validate every tax sale and tax deed that had been issued in the history of the state and which could be validated, including countless deeds long considered void and worthless under former court decisions. We are not suggesting that it would be beyond the power of the legislature to do this, although, so far as we can discover, no former legislature has attempted it. The point has not been presented in the briefs nor has it required decision in any case which involved the Act. We do not regard it as one requiring decision here, inasmuch as there are other reasons why the Act must be denied effect to validate defendant's deed. There is, however, a question as to the proper construction of the Act, namely, whether it was the intention of the legislature to validate tax sales and deeds where there had been a void publication of the delinquent list. It cannot be doubted that the intention was to cure all purely technical irregularities and defects evidencing a failure to comply with the strict letter of the law as required in tax proceedings. The books are full of cases of this sort, where failure to observe the forms of law has been held to invalidate tax proceedings, even though the owner has been deprived thereby of no substantial right. The exceptions stated in section 2(a) and (b) of the Act exclude defects, irregularities and errors which the legislature could not have omitted originally from the statutory procedure and also to acts which under constitutional principles could not be validated. Evidently the legislature considered that a distinction could be drawn between the errors and omissions excluded by paragraph (a) and the failure to observe constitutional requirements mentioned in (b). There is, however, no such distinction. Under the doctrines stated in Chase v. Trout, 1905, 146 Cal. 350, 80 P. 81, and Baird v. Monroe, 1907, 150 Cal. 560, 89 P. 352, the legislature may enact schemes of taxation, from the assessment to the collection of taxes, with such procedure as it may see fit to prescribe, so long as the constitutional provisions for due process and other constitutional rights of the owner are observed, and it may validate proceedings which fail to meet statutory requirements if such proceedings could have been authorized originally. But we think it is clear that the legislature did not intend to attempt the validation of acts which the courts have held could not be validated. Such an omission was considered by the court in Warden v.

Broome, 1908, 9 Cal.App. 172, 98 P. 252. In that case the delinquent tax list stated the amount for which the property would be sold as $19.90 instead of the correct amount of $19.40. The sale which followed was held void and it was held that it was not competent for the legislature under the circumstances to make the deed to the state conclusive evidence of the regularity and validity of the proceedings. It was said, at page 176 of 9 Cal.App., at page 254 of 98 P.: "As this is the only notice required as a condition of transferring the owner's title to the state, it follows that the giving of it in the manner prescribed by the Legislature must be regarded as a jurisdictional prerequisite to the making of a valid sale, as to which the deed is not conclusive. As to the performance of non-essentials—those things which the Legislature might in the first instance have dispensed with without affecting the validity of the proceeding—it may make the deed conclusive evidence, but not as to the performance of those acts necessary to confer jurisdiction. 'The Legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to the land.' [Citing cases.]" The conclusion which the court reached has not been questioned in any later case and the reasoning is persuasive, although the statement that section 3787 was intended to apply to the matter of publication of the delinquent list is contrary to the holdings of the later cases. A notice which did not describe the property or which stated an excessive amount for which it would be sold would not be sufficient to support a sale. The requirement that those essentials be stated is for the benefit of the owner and the omission to state them would deprive him of a substantial right. We think the curative Act was not intended to do away with such matters of substance, for, as we shall point out, publication of the delinquent list is an indispensable step in the state's scheme of taxation. It is not to be presumed that our legislature intended by the curative Act to do away with the essentials of the notice of sale which our courts have always held to be indispensable. The qualifications expressed in section 2 are a forceful indication that it was not intended that the broad provisions of section 1 should be given a construction which would upset the settled and well understood procedure in tax sales. Upon the contrary, it is to be presumed that the Act was passed with knowledge of earlier court decisions and with the expectation that the courts would continue to draw the same distinctions between acts which are susceptible of validation and those which are not, as had been drawn in the past. We are of the opinion that the Act should not be given the broad scope contended for by defendant, for the reasons stated and for the additional reason that section 2(b) forbids that construction, since the elimination of a valid notice would contravene the requirement for due process. That is the next point for discussion.

[7] As to the limitations upon the power of the legislature to vitalize invalid steps in tax proceedings, it is enough to say here that an owner of property cannot be deprived of his property without due process of law, and if an act in the proceedings which has been omitted was essential to due process, its omission is fatal and beyond correction. We have such an omission here.

[8-10] A tax levy unauthorized by law cannot be validated by curative legislation. Harper v. Rowe, 1878, 53 Cal. 233; People v. Goldtree, 1872, 44 Cal. 323; People v. Lynch, 1875, 51 Cal. 15, 21 Am Rep. 677; People v. Van Nuys Lighting Dist., 1916, 173 Cal. 792, 162 P. 97, Ann.Cas. 1913D, 255; Texas Co. v. Bank of America etc. Ass'n, 1935, 5 Cal.2d 35, 53 P.2d 127; Brady v. King, 1878, 53 Cal. 44; Kelly v. Luning, 1888, 76 Cal. 309, 18 P. 335. A levy upon real property in violation of the constitutional requirement that all property shall be taxed in proportion to its value cannot be validated. Gottstein v. Gray, supra, 66 Cal.App.2d ——, 152 P. 2d 742. A tax sale made under proceedings lacking in the essentials of due process in respect of notice to the owner can have no more validity than a sale made under an assessment unauthorized by law due to the want of power to impose the tax, or to a sale under a levy which denies the equality and uniformity which the Constitution requires.

Due process of law requires notice of a proposed sale for taxes. Of the necessity for notice, Mr. Cooley says (Cooley on Taxation, 4th Ed., Vol. 3, section 1409): "The first proceeding usually required of the officer who is to make sale is, that he shall give public notice of his intention to do so. A notice of sale, as required by statute, is necessary to authorize a tax sale and the absence of the notice renders the sale void. This is one of the most important of all the safeguards that have been deemed necessary to protect the interests of persons taxed, and nothing can be substituted for it or excuse the failure to give it."

[11] Publication of the delinquent tax list has been a basic requirement of our tax laws since 1857, at least, and in the statutes of that year (p. 331, et seq.) are to be found provisions for publication of the list containing the essentials of the notice which is now required to be published. And it might be noted, as evidence of the importance the legislature attached to the notice, that in that early statute, while publication was to be made in each county where a newspaper was published or by posting if there was none, there was the additional requirement that in the County of Contra Costa, and in each county to the south, at least three notices in the Spanish language should be posted in each township. Throughout the history of later tax legislation scrupulous care has been taken to give landowners notice of tax delinquency. No form of law is better understood by landowners than the requirement that they will not be deprived of their property for nonpayment of taxes without notice of the delinquency. The extent to which compilation of a delinquent list and publication thereof is the accepted procedure in many states is shown in the cases listed in 61 C.J. pp. 1120 and 1142. Where land is involved, the methods of collection vary in different jurisdictions. A not uncommon procedure is by court action to foreclose the lien. Service of process as provided by law must be had in order that the court may have jurisdiction to enter a decree. See cases listed in 61 C.J. p. 1147, sec. 1558. We are aware of no principle under which a judgment void for failure to serve summons or other statutory process could be validated by legislative act. In our state the title of the owner is forfeited through a sale of the property, and that has been the method from the beginning as to real property, although the procedure has been changed from time to time and the conditions of forfeiture made less drastic. The notice given by publication of the delinquent list is the traditional procedure which the legislature has provided and the citizens of the state have expected as the due process to be followed in tax collections. In the absence of any other adequate notice to the property owner, publication of the delinquent list is an indispensable prerequisite to sale. The legislature is without power to dispense with it except by the substitution of some other form of notice which would meet the requirements of due process. Proceedings for the collection of taxes have long been governed by general laws, as they are required to be under the present Constitution. So far as the publication of the delinquent list is concerned, it was necessary that notice be given in the form and manner prescribed by general law. The notice that was published in the Lynwood paper was not such a notice. The legislature was without the power to authorize the method of publication here employed, and such publication was no more effective as a step in the proceedings by which plaintiff might be deprived of his property than would have been the publication of partial lists, without legislative authorization, in many newspapers in the several townships, cities and towns throughout the county. The state cannot exercise the power of taxation except by means of procedure authorized by the legislature. Where acts are performed under powers attempted to be given by statute but which could not lawfully be authorized for the reason that they are procedural steps forbidden by the Constitution, such as the publication here involved, the acts are void and cannot be validated. The sale and the deed to the state were void for failure to publish a valid notice of sale, which notice was necessary in order that the proceeding constitute due process of law. The validating Act recognizes the limitations of the legislative power in such matters, and the qualifications stated in sections 2 and 3 require the construction that it was not the intention to validate a published notice of sale so defective that it could not have been authorized by the legislature originally because it was expressly forbidden by the Constitution. Defendant's deed is no better than it was before the curative Act was passed.

Our holding upon the points discussed disposes of the case, and it is unnecessary to consider other alleged defects in the proceeding relied upon by plaintiff.

The judgment is reversed.

PARKER WOOD, J., and FOX, Justice pro tem., concur.

66 Cal.App.2d 865

SMITH v. BROWN et al. (DE MERT et al., Intervenors).

Civ. 14509.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1944.

1. Appeal and error 🔑113(2)

An order refusing to vacate an appealable order is nonappealable, if grounds upon which party seeks to have the order vacated existed before entry of original order and were available on an appeal from such order.

2. Appeal and error 🔑113(4)

Order denying motion to set aside order dismissing action was nonappealable, where ground relied upon for vacation of order was alleged error in denying motion for continuance on account of plaintiff's service in Army where such ground existed before entry of original order and was available on appeal from such order. Code Civ.Proc. § 581.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by Carlton I. Smith against Ben H. Brown, administrator of the estate of Matilda Cameron, deceased, and another, to enforce a forfeiture of real estate wherein, Louis R. De Mert and another intervened. From an order denying plaintiff's motion to set aside a previous order dismissing the action with prejudice, plaintiff appeals.

Appeal dismissed.

Shelby L. Chambers, of Los Angeles, for plaintiff.

J. H. O'Connor, Ned Marr, Ernest Purdum, and Montgomery G. Rice, all of Los Angeles, for defendant.

John Boyce-Smith, of Hollywood, for interveners.

McCOMB, Justice.

This is an appeal from an order of the trial court denying plaintiff's motion to set aside a previous order of the superior court.

These are the undisputed facts:

On August 19, 1943, the trial court dismissed with prejudice, under the provisions of Section 581 of the Code of Civil Procedure, an action instituted by plaintiff to enforce a forfeiture of real estate. Prior to the dismissal of the action on August 19, 1943, plaintiff's counsel moved for a stay or continuance of the action on the ground that plaintiff was in the United States Army. This motion was denied and the judgment became final.[1] On December 10, 1943, plaintiff made a motion to set aside the previous order of August 19, 1943, dismissing the action, on the ground that the trial court should have granted the motion for a continuance theretofore made on August 19, 1943. This motion to set aside the previous order was denied.

Respondents rely upon this proposition: *Since the order of August 19, 1943, was an appealable order, the order of December 10, 1943, denying plaintiff's motion to set aside the previous order was nonappealable.*

[1] This proposition is tenable. It is the general rule that an order refusing to vacate an appealable order is nonappealable, if the grounds upon which the party seeks to have the order vacated existed before the entry of the original order and were available on an appeal from such order. Neighbours v. Neighbours, 62 Cal.App.2d 840, 841, 145 P.2d 688, and cases therein cited.

[2] Applying the foregoing rule to the facts of the instant case, since the alleged error urged on the motion to set aside

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[1] A purported appeal from the judgment was dismissed by this court on June 28, 1944, for the reason that such purported appeal was not taken within the statutory period.

the order of August 19, 1943, was available on an appeal from such order, the order of December 10, 1943, denying plaintiff's motion to set aside the previous order was nonappealable. None of the exceptions to the general rule are applicable, and the purported appeal must be dismissed.

MOORE, P. J., and W. J. WOOD, J., concur.

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66 Cal.App.2d 852

CHIN SHARE WING v. CALIFORNIA BANK.

Civ. 14477.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1944.

Hearing Denied Jan. 18, 1945.

1. Appeal and error 🔑989

On appeal from judgment on trial court's findings, District Court of Appeal is required only to ascertain whether there is any substantial evidence supporting the findings and judgment.

2. Banks and banking 🔑189

In action to recover amount paid for drafts issued and delivered by defendant bank to plaintiff and his assignors and subsequently indorsed by them and delivered back to bank, bank's receipts therefor, reciting that drafts were subject to final payment, were not conclusive on issue whether bank purchased drafts or took them for collection, in view of other testimony in case.

3. Appeal and error 🔑1010(1)

A judgment supported by substantial evidence must be affirmed by District Court of Appeal as matter of law.

4. Banks and banking 🔑189

In action by a Chinaman to recover amount of drafts, issued to him and two other Chinese by defendant bank and delivered back to it by them, on theory of parol sale thereof to bank, amended complaint, alleging that bank's Chinese teller did not read to Chinese redelivering drafts recitals in bank's receipts therefor that drafts were subject to final payment, that such Chinese could not read or understand English, and that teller did not advise them of purport or meaning of such words, stated cause of action.

5. Banks and banking 🔑118

In action against bank by one of three Chinese, to whom bank issued drafts, subsequently indorsed and delivered back to it by them, to recover amount paid therefor by them, evidence that bank's Chinese teller, who conducted business involving drafts, conducted bank's business generally with Chinese customers in Chinese language, warranted inference by trial court that such teller had ostensible authority to bind bank by parol sale of drafts thereto.

6. Evidence 🔑444(6)

In action to recover amounts paid by plaintiff and his assignors for drafts issued to them by defendant bank and subsequently delivered back to it by them, admission of testimony varying terms of parties' written contract, as evidenced by bank's receipts, reciting that drafts were subject to final payment, was not error, as such receipts were only part of evidence and, standing alone, not conclusive evidence that drafts were taken for collection instead of being purchased by bank.

7. Appeal and error 🔑882(3)

A theory, first presented in defendant bank's briefs on appeal from judgment against it for amount of drafts redelivered to it by purchasers thereof, that transaction was bailment of drafts, with agreement that bank should collect them and that title should pass only when proceeds thereof were remitted by drawee, was not controlling, if subject to consideration, where trial court found that there was sale of drafts to bank.

* * *

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Chin Share Wing against the California Bank for the amount paid by plaintiff and his assignors for drafts issued and delivered to them by defendant and subsequently indorsed and delivered back to it by them. Judgment for plaintiff, and defendant appeals.

Affirmed.

Finlayson, Bennett & Morrow, Swanwick, Donnelly & Proudfit, and Donald O. Welton, all of Los Angeles, for appellant.

Harry M. Irwin, of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

In February of 1941 the defendant bank issued and delivered to three Chinese, drafts on Hong Kong China, for value paid to the bank. The Chinese kept the drafts until November, 1941, when they were endorsed and delivered back to the defendant. The Chinese alleged that this latter transaction was a parol sale to the defendant; the defendant alleged that it took the drafts for collection. The business under consideration was conducted for the bank by a Chinese teller, and the conversations between him and the other Chinese were in the Chinese language.

Upon delivery of the drafts, the bank transferred them to American Express Company for collection. Then Japan attacked the United States and war ensued between Great Britain and Japan; later Hong Kong fell to the Japanese, and the drafts became unpresentable and uncollectable, at least for the duration of the war. American Express Company on a stipulated judgment recovered from the defendant in the present action, leaving the issue above stated to be tried as between the Chinese and the bank. The action is brought in the name of only one plaintiff because of assignments to him by the other two.

[1] The trial court found that the drafts were purchased by the bank from the plaintiffs, and judgment was rendered accordingly. Therefore, all that this court is required to do is to ascertain whether or not there is any substantial evidence which will support the findings and judgment. The three Chinese, holders of the drafts, each testified that the transaction was a purchase, and was not for collection only. The Chinese teller admitted that in his talk with the other Chinese the words in the Chinese language used by the parties were "purchase" and "sale," and that Chinese words denoting "collection" were not used.

[2, 3] The most serious question in the case is the effect of receipts issued for the drafts by the bank to the Chinese in which the following recital appears: "all these drafts are subject for final payment." But the receipts were not the only evidence presented to the trial court. Whatever the effect thereof, standing alone, may have been, when considered along with the other testimony in the case, the receipts are not conclusive upon the issues involved. California Packers Co. v. Merritt Fruit Co., 6 Cal.App. 507, 511, 92 P. 509; Hiroshima v. Bank of Italy, 78 Cal.App. 362, 248 P. 947; Greer v. Los Angeles Athletic Club, 84 Cal.App. 272, 276, 258 P. 155. Therefore, it appears that there is substantial evidence supporting the judgment, making it necessary, as a matter of law, that it be affirmed by this Court. Waer v. Waer, 189 Cal. 178, 180, 207 P. 891; In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720; Whitcomb v. Emerson, 46 Cal.App.2d 263, 270, 115 P.2d 892.

[4] Appellant next questions the sufficiency of the complaint. The complaint was first framed on the theory of sale and purchase. The case was tried on that issue, by a jury, which rendered its verdict for the plaintiff. This verdict was set aside by the trial judge. On the second trial, after a jury had been impaneled and sworn, plaintiff presented an amendment to the complaint, alleging that the Chinese agent of the bank did not read to the Chinese the words "all these drafts are subject to final payment"; that the Chinese were not able to read or understand English; and that the teller did not advise them of the purport or meaning of these words. Upon filing the amendment to the complaint, the court determined it converted the case from one of law to an equity action, and discharged the jury.

A reading of the complaint as amended upholds the ruling that it states a cause of action.

[5] Then appellant contends that in any event the Chinese teller was not clothed with ostensible authority to bind the bank to a parol sale. To resolve this contention we must again apply the same rule: If there is substantial evidence to support the finding of the trial court, the appellate court is bound by it. In this respect the evidence shows that the teller conducted business of the bank generally with Chinese customers in the Chinese language. Therefore the trial court had the right to draw the inference that his authority was not so narrow as appellant contends.

[6] Finally complaint is made that the trial court erred in admitting testimony to vary the terms of the written contract as evidenced by the written receipt. As stated, the receipt was only a part of the evidence in the case. Standing alone it was not conclusive evidence of the transaction.

[7] In the briefs on appeal, defendant presents an additional theory, to-wit: that the transaction was a bailment of the drafts with an agreement to collect them and that title was to pass only when the money was remitted from Hong Kong. While possibly this theory, now presented for the first time, need not be considered by this court, it would not be controlling in any event, because of the finding and judgment of the trial court that there was a sale.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

66 Cal.App.2d 860

PEOPLE v. SIMON et al.

Cr. 3816.

District Court of Appeal, Second District, Division 1, California.

Nov. 20, 1944.

1. Gaming 🔑75(1)

Under statute denouncing as a crime the keeping or occupancy of any room, etc., with paraphernalia for purpose of recording bets or wagers on result of any horse race, it is not the actual making of bets but occupancy of room equipped with paraphernalia for purpose of recording and registering bets which constitutes the offense. Pen. Code, § 337a, subd. 2.

2. Gaming 🔑98(5)

To sustain conviction for occupying room with paraphernalia for purpose of recording bets on result of horse race, such causal connection between defendant and the paraphernalia found on premises must be established as would reasonably justify an inference that defendant occupied and kept a place where the paraphernalia was utilized for purpose of recording bets. Pen.Code, § 337a, subd. 2.

3. Gaming 🔑98(5)

Evidence was insufficient to sustain conviction for occupying room with paraphernalia for purpose of recording bets on result of horse race. Pen.Code, § 337a, subd. 2.

4. Criminal law 🔑561(1)

The prosecution has the duty of proving accused guilty of offense charged against him beyond a reasonable doubt.

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Arthur Simon and another were charged with having violated statute denouncing as a crime the keeping or occupancy of any room, common tenement, etc., with books, papers or other devices or paraphernalia for purpose of recording or registering bets or wagers on the result of any horse race, Arthur Simon was convicted, and he appeals.

Reversed and remanded.

George Stahlman, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

WHITE, Justice.

An information filed by the District Attorney of Los Angeles County charged appellant herein and one Sol Goldberg, in two counts, with the violation of section 337a of the Penal Code. In count one, the defendants were accused of violating subdivision 2 of the section, while count two alleged a violation of subdivision 4 thereof.

To the information, and each count therein contained, both defendants entered pleas of not guilty. A jury being waived, the cause proceeded to trial before the court, as a result of which defendant Goldberg was found not guilty on both counts, and the defendant Simon was acquitted of the violation charged in count two, but was adjudged guilty of the offense charged in count one, to wit: violation of subdivision 2, section 337a, Penal Code.

Defendant Simon's motion for a new trial was denied, and he was sentenced to 30 days imprisonment in the county jail. From the judgment of conviction and the order denying his motion for a new trial, said defendant Simon alone prosecutes this appeal.

The factual background surrounding this prosecution may be thus epitomized: On October 13, 1943, shortly after five o'clock in the evening, three investigators from the office of the District Attorney of Los Angeles County went to Apartment No. 206 located in an apartment house at 1825 North Whitley Avenue, in the Hollywood section of Los Angeles County. Upon arriving at Apartment 206, the officers knocked on the door thereof. Appellant Simon "answered the door" and was informed that the visitors were officers who desired admission. Without admitting the officers, appellant "went back into the room" and approximately two or three minutes later reappeared and opened the door. Entering the room the officers encountered one Victor Horwitz, who was just emerging unclothed from the bathroom. Another man named Coffey was also in the room. About 20 minutes after the entry of the officers, defendant Goldberg, who was acquitted, entered the apartment with a brown envelope in his hand, which was taken from him by the officers and he was searched. The envelope contained recording slips and betting markers. A search of the kitchenette in the apartment disclosed the presence on a table of several pieces of paper, scratch sheets and a "little black book". In the oven of the kitchen stove was a black leather fold or wallet containing an envelope bearing the name of Victor Horwitz. Also found in the apartment, and particularly in the kitchenette thereof, were numerous pieces of paper with figures on them; a "California Turf Digest" and a "Metropolitan Scratch Sheet" with some figures and notations therein. From the person of appellant there was taken a "California Turf Digest", a "black covered notebook" and a package of "recording slips"; but as to the last mentioned "slips" being taken from appellant, the officer later testified at the trial that he "wouldn't be sure of that". At about 5:25 p.m., the telephone in the apartment rang and was answered by one of the officers, from whom a voice on the other end inquired if the last race at Bay Meadows had been run, to which the officer answered "No". Thereupon, the person talking at the other end of the line said "I want Wing and Wing and Joda's Joe in the last race". At 5:30 p.m. the telephone rang and a lady's voice inquired for "Phil", stating that "the steaks were ready". Later "Phil" was identified as Phil Coffey, one of the men present in the apartment. About five minutes later, the phone rang and a lady's voice inquired whether "Ray had left for home yet, as his dinner was ready". Two minutes later the phone rang again and a man's voice "wanted the results of the last race at Bay Meadows". It is noteworthy that none of the phone calls inquired about or concerned appellant. He was asked by the officers "what he was doing up there", to which he replied that he "just stopped by".

It was established at the trial that Victor Horwitz, who was emerging from the bathroom without his clothing when the officers arrived, had rented the apartment here in question. In view of the concession made by appellant that the evidence was sufficient to establish the fact that the apartment with which we are here concerned was a place where bookmaking could have been conducted, it becomes unnecessary to narrate all of the evidence identifying and establishing the fact that the paraphernalia and documents found in the apartment were of the kind and type ordinarily used in the practice of bookmaking. Appellant did not take the witness stand in his own behalf and no testimony was offered in his defense.

[1, 2] Appellant's sole contention on this appeal is that the evidence is insufficient to sustain the judgment of conviction. Subdivision 2, section 337a, of the Penal Code denounces as a crime, among other things, the keeping or occupancy, for any period of time whatsoever, any room, tenement, etc., with books, papers, or other devices or paraphernalia for the purpose of recording or registering bets or wagers upon the result of any horse race. Manifestly, it is not the actual making of bets, but the occupancy of any room or apartment equipped with books, papers, etc., for the purpose of recording and registering bets which constitutes the offense defined by subdivision 2, section 337a of the Penal Code, People v. Manning, 37 Cal.App.2d 41, 43, 98 P.2d 748. But some causal connection must be shown between the paraphernalia found upon the premises and the defendant before a conviction can be sustained. People v. Rabalete, 28 Cal.App.

2d 480, 485, 82 P.2d 707. Such causal connection must be established as would reasonably justify an inference that the defendant occupied and kept a place where such devices were utilized for the purpose of recording and registering bets. Giving to the evidence herein the greatest possible weight to which the same is entitled, it merely shows that appellant was found in an apartment rented and occupied by another who was there present; that two other persons were also in the apartment; that appellant opened the door for the officers and had upon his person a "California Turf Digest". While such a publication may, as contended by respondent, be used by, and is a convenience to, bookmakers, it undoubtedly affords the same convenience to betters. The fact that appellant had such a Digest upon his person when there was another one in the room rented by Horwitz would rather indicate that he was acting independently of the operations conducted by the bookmaking establishment.

"Occupancy" is defined by Funk and Wagnalls Standard Dictionary as "the act of occupying; a taking possession". The same dictionary defines "occupy" as follows: "To use or employ in an exclusive manner; to take and hold possession of; inhabit". The evidence in the instant case clearly shows that Horwitz had rented the apartment; that his clothing and personal effects were at the apartment; that his conduct in the apartment was of a proprietary character in the use of such premises, while as to appellant none of the paraphernalia found in the apartment tended in any manner reasonably to connect him with the occupancy of the apartment in question. As heretofore pointed out, none of the telephone calls received at the apartment concerned appellant, and none of the betting paraphernalia found in the apartment bore his handwriting.

Respondent places great reliance upon the case of People v. Newland, 15 Cal.2d 678, 104 P.2d 778, asserting that the instant case is "strikingly suggestive of the Newland case"; that "the general pattern running through these two cases is almost identical". The only similarity we can find in the two cases is that in both of them the defendant stated to the officers that he was a visitor at the place in question. However, we do find in the Newland case facts and circumstances absent in the case at bar, and from which a reasonable inference could be drawn of the defendant's guilt. For instance, in the Newland case, the defendant had upon his person a key to the premises, and, when originally accused by the officers, he fled and made his escape, returning later to the apartment, at which time he was taken into custody.

In the case of People v. Kabakoff, 45 Cal. App.2d 170, 113 P.2d 760, also relied upon by respondent, we find the evidence revealed that the defendant was the only person found in the apartment and there was no evidence, as there is in the instant case, that any other person was the occupant of the premises, had rented the apartment, or had clothing or other personal effects therein. In the cited case, the defendant himself testified that he had occupied the apartment for two weeks prior to the date of his arrest; that it was his residence; that he slept there and was present therein every day during such two weeks time. As stated by the court in the Kabakoff case, 45 Cal. App.2d at page 172, 113 P.2d at page 762: "The narrative above recited establishes conclusively that appellant occupied an apartment containing: two telephones with different numbers and racing paraphernalia used by bookmakers. He had occupied the apartment every day for two weeks, was found alone and at that very time telephones were in use by outside parties who attempted to make bets. It was 2 o'clock in the afternoon when it is commonly known that races are being run, as emphasized by the experience of Officer Barry in answering the telephones during the brief space of time in which he was in the apartment."

[3] In the instant case, we are impressed that, not only are the facts insufficient to warrant a reasonable inference of guilt, but that the evidence as a whole shows by a preponderance thereof that one Horwitz, who was not made a defendant, was the one who rented the apartment, occupied it, and by his conduct manifested a proprietary control over not only the apartment but the racing paraphernalia allegedly used upon the premises for the registration and recordation of bets.

[4] To sustain the conviction of this appellant, we would be compelled to completely emasculate the doctrine of reasonable doubt and the presumption of innocence and to absolutely ignore the salutary rule of law which imposes upon the prosecution the duty and responsibility of

proving the accused guilty of the offense charged against him beyond a reasonable doubt.

For the foregoing reasons, the judgment and the order denying appellant's motion for a new trial are, and each is, reversed and the cause remanded.

YORK, P. J., concurs.

DORAN, Justice.

I concur but, in doing so, I do not wish it understood that I am affirming the validity of the evidence of telephone conversations referred to in the opinion. In my judgment the evidence of such conversations was hearsay.

66 Cal.App.2d 870

JACKSON et al. v. HOWSER et al.

Civ. 14556.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1944.

Rehearing Denied Dec. 15, 1944.

Hearing Denied Jan. 18, 1945.

1. Officers 🔑76

It is a jurisdictional prerequisite to an action for judicial relief to a discharged official that he must first exhaust administrative remedies provided by statute or charter.

2. Mandamus 🔑154(5)

A petition for writ of mandate, whereby petitioners sought reinstatement in their positions in office of district attorney of Los Angeles county, stated no cause of action, where petition alleged that petitioners had held "permanent positions" under rules of Civil Service Commission and failed to show that they complied with the provision of the charter by filing a written reply with the district attorney and the Civil Service Commission to the charges made against them.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Mandamus proceedings by Thomas E. Jackson and others against Fred N. Howser, etc., and others whereby the petitioners sought the reinstatement in their positions in the office of the District Attorney of Los Angeles County, wherein the respondents filed a demurrer. From a judgment for respondents, petitioners appeal.

Affirmed.

M. C. Schrager and Saul S. Klein, both of Los Angeles, for appellants.

J. H. O'Connor, of Los Angeles, for respondents.

McCOMB, Justice.

This appeal is from a judgment in favor of respondents dismissing a second amended petition for an alternative writ of mandate by which petitioners sought reinstatement in their positions in the office of the District Attorney of Los Angeles County.

Petitioners state the material allegations of their amended petition for an alternative writ of mandate to be these:

1) That the positions to which petitioners seek reinstatement are in the Civil Service of Los Angeles County.

2) That the petitioners were appointed to their respective positions in conformity with the provisions of the charter of Los Angeles County and the Rules and Regulations of the County Civil Service Commission.

3) That all the petitioners faithfully performed their duties in their respective positions continuously for more than six months.

4) That the positions held by the petitioners were under the provisions of the Rules of the Civil Service Commission—permanent positions.

5) That the petitioners were not dismissed from their respective positions in the manner provided by the Rules of the Civil Service Commission.

6) That the petitioners were dismissed from their respective positions solely for political reasons and not for any action or conduct of the petitioners related to or germane to the good of the Civil Service.

This is the sole question necessary for us to determine:

Did the second amended petition for an alternative writ of mandate state a cause of action?

This question must be answered in the negative and is governed by this established rule in California, to wit:

[1] It is a jurisdictional prerequisite to an action for judicial relief that the applicant must first invoke and exhaust administrative remedies provided by the provisions of a statute or charter. Alexander v. State Personnel Board, 22 Cal.2d 198, 199, 137 P.2d 433; United States v. Superior Court of Los Angeles County, 19 Cal.2d 189, 194, 120 P.2d 26; Abelleira v. District Court of Appeal, Third Dist., 17 Cal.2d 280, 292, 109 P.2d 942, 132 A.L.R. 715.

Article IX, section 34, subsection 13, of the Los Angeles County Charter provides as follows:

"For discharge or reduction in rank or compensation after appointment or promotion is complete, only after the person to be discharged or reduced has been presented with reasons for such discharge or reduction. Such reasons shall state the specific grounds and the particular facts upon which the discharge or reduction is based, and the person to be discharged or reduced shall be allowed a reasonable time in which to reply thereto in writing. Both the reasons and the reply must be filed with the Commission, whereupon, if the person to be discharged or reduced shall so request, the Commission shall hold a hearing; and if it finds that the reasons are not sufficient to justify such discharge or reduction, it shall so notify the appointing authority concerned and such notification shall be a bar to any discharge or reduction for the specific reasons which have been presented."

According to petitioners' own statement on page two of their opening brief, their amended petition alleged that the positions they held were "permanent positions" under the provisions of the rules of the Civil Service Commission. Therefore when they were discharged they came under the provisions of Article IX, section 34, subsection 7 of the Los Angeles County Charter.

[2] There is not any allegation in the petition as amended showing that petitioners complied with the provisions in Article IX, section 34, subsection 13, of the Los Angeles County Charter by filing a written reply with the district attorney and the Civil Service Commission to the charges made against them. Petitioners thereby failed to show a compliance on their part with the provisions of the Los Angeles County Charter and are therefore, under the doctrine of "exhaustion of administrative remedies", precluded from having a writ of mandate issue in the present action.

In view of our conclusions, it is not necessary to discuss other points urged by counsel.

For the foregoing reasons the petition as amended failed to state a cause of action and the trial court properly sustained a demurrer thereto and entered judgment in favor of respondents.

The judgment is affirmed.

W. J. WOOD, J., concurs.

MOORE, P. J., deeming himself disqualified did not participate in the foregoing decision.

Hearing denied; CARTER, J., dissenting.

66 Cal.App.2d 960

PEOPLE v. RAINES.

Cr. 3817.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

1. Criminal law 🔑1144(13)

On appeal from conviction, evidence must be viewed in light most favorable to the people.

2. Criminal law 🔑1159(5)

Whether a deal is a bona fide civil transaction or whether defendant intentionally obtained money from complaining witness by making false representations is a question of fact for trier of facts whose determination based upon substantial evidence is binding upon appellate court.

3. Criminal law 🔑1159(5)

The question of felonious intent must be determined by trier of facts from all circumstances, and unless determination is without any substantial support in the evidence, the trier of facts' finding is conclusive.

4. False pretenses ⚿14

That property purchased from accused was worth the consideration paid therefor did not constitute a defense to charge of grand theft if jury believed, supported by substantial evidence, that accused with intent to defraud knowingly made false representations that certain facts existed for purpose and with effect of inducing the prosecuting witness to part with something of value.

5. False pretenses ⚿22

It is not a valid defense to charge of grand theft predicated upon false representations to show that some law made it illegal for accused to complete the transaction.

6. False pretenses ⚿49(1)

Evidence that accused knowingly and with intent to obtain money from purchasers of accused's restaurant represented that accused would transfer to purchasers a number of ration points which accused in fact knew he did not have and could not deliver to the purchasers sustained conviction of grand theft.

7. Criminal law ⚿1178

Accused who failed to furnish the appellate court with argument or authority upon alleged error in admission and exclusion of evidence abandoned such point.

8. Criminal law ⚿1134(8)

Alleged errors in indictment, or irregularities occurring before an issue of fact is joined by the entry of a plea, may not be reviewed upon appeal from an order denying a motion for new trial.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Cecil L. Raines was convicted of grand theft, and he appeals from an order denying his motion for a new trial.

Affirmed.

Robert W. Kenny, Atty. Gen., and Walter L. Bowers, Deputy Atty. Gen., for plaintiff.

Alfred A. Grant, of Los Angeles, for defendant.

McCOMB, Justice.

From an order denying defendant's motion for a new trial after conviction of grand theft, defendant appeals.

[1] The evidence being viewed in the light most favorable to the people (respondent), and pursuant to the rules set forth in People v. Pianezzi, 42 Cal.App.2d 270, 277, 108 P.2d 685, the essential facts are:

On September 14, 1943, defendant entered into an agreement to sell Miss Brockman, one of the complaining witnesses, and three other ladies a restaurant in the city of Los Angeles for the total sum of $1,250, of which amount $500 was paid defendant in cash. Prior to the execution of the agreement defendant stated to the complaining witnesses' agent, Mr. North, that he, "was allowed plenty of points, of both meat points and processed points, processed food," and that if they "did business he would transfer these points through the bank and through the O.P.A." and that "he had not touched the September and October points * * * and that he had possibly between 8,500 and 9,000 points left for August." On September 13, 1943, he stated to the complaining witnesses that he would transfer to them, "between 8,500 and 9,000 points."

The purchasers went into possession of the restaurant but found that they could not make a success because of the lack of ration points. Defendant transferred to them a total of only 1,329 points, and upon examination it developed that defendant's ration point account at the bank had been overdrawn. Instead of having 8,500 or 9,000 points left for the month of August, he had actually drawn on the amount of points allowed him for September and October in order to cover an overdraft in his September account.

There are three questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Was the evidence sufficient to justify the verdict?*

This question must be answered in the affirmative and is governed by the following pertinent rules of law:

[2] 1) Whether a deal is a bona fide civil transaction or whether defendant intentionally obtained money from the complaining witness by making false representations is a question of fact for the deter-

mination of the trier of facts, whose determination based upon substantial evidence is binding upon an appellate court. People v. Jones, 61 Cal.App.2d 608, 143 P. 2d 726; People v. Rose, 9 Cal.App.2d 174, 175, 48 P.2d 1009.

[3] 2) The question of felonious intent is one to be determined by the trier of fact from all the circumstances of the case, and unless the determination is without any substantial support in the evidence the trier of facts' finding is conclusive upon an appellate court. People v. Walbeck, 59 Cal. App.2d 277, 281, 138 P.2d 405; People v. Deininger, 36 Cal.App.2d 649, 652, 98 P.2d 526.

[4] 3) The fact that the property purchased was worth the consideration paid therefor does not constitute a defense to the charge of grand theft if the jury believed, supported by substantial evidence, that defendant, with intent to defraud, knowingly made false representations that certain facts existed for the purpose and with the effect of inducing the prosecuting witness to part with something of value. People v. Bryant, 119 Cal. 595, 597, 51 P. 960; People v. Foster, 117 Cal.App. 252, 253, 3 P.2d 586.

[5] 4) It is not a valid defense to a charge of grand theft predicated upon false representations to show that some law made it illegal for the defendant to complete the transaction. People v. Abbott, 65 Cal.App. 120, 122, 223 P. 77.

[6] Applying the foregoing rules to the facts in the instant case, an examination of the record discloses direct testimony supporting each of the facts set forth above. From these facts the jury was fully justified in inferring that defendant knowingly, and with intent to obtain money from the prosecuting witnesses, represented that he would transfer to them a number of ration points which he in fact knew he did not have and could not deliver to them. Hence we are bound under rules (1) and (2), supra, by the implied finding of the jury that it was not a bona fide civil transaction and that defendant in fact made fraudulent representations for the purpose and by which he obtained property from the prosecuting witnesses.

Under rules (3) and (4) above it becomes immaterial whether (a) the property defendant transferred was of the value he received for it or (b) defendant was prohibited from complying with his representation because of some rule or regulation.

[7] Second: *Did the court err in the admission and exclusion of evidence?*

Since defendant has failed to furnish this court with either argument or authority upon this point it will be deemed to have been abandoned. Woodcock v. Petrol Corporation, 48 Cal.App.2d 652, 657, 120 P.2d 889; People v. Epstein, 21 Cal. App.2d 488, 489, 69 P.2d 454.

Third: *Did the trial court err in (1) overruling defendant's demurrer to the information and, (2) denying defendant's motion to set aside and dismiss the information?*

[8] This question likewise cannot be considered by us, for the rule is established in California that alleged errors in an indictment, or irregularities occurring before an issue of fact is joined by the entry of a plea may not be reviewed upon an appeal from an order denying a motion for a new trial. People v. Darcy, 59 Cal.App.2d 342, 347, 139 P.2d 118; People v. Duncan, 50 Cal.App.2d 184, 187, 122 P.2d 587; People v. Lovlee, 35 Cal.App. 2d 554, 556, 96 P.2d 177.

In the present case there is no appeal from the judgment, the appeal being solely from the order denying the motion for a new trial.

For the foregoing reasons the judgment is affirmed.

W. J. WOOD, J., concurs.

MOORE, Presiding Justice.

I concur in the judgment. The evidence supporting the finding of appellant's fraudulent intent is his own confession that he advertised the restaurant for sale; that he accepted $500 on account of the purchase price and kept it. The witness North, agent of the buyers, testified that appellant told him that he had not touched his points for September and October; that he was allowed approximately 90,000 meat points and 37,000 processed points and had more than 8,500 points left for August; that his points were in the Bank of America and would transfer the points at once through the bank and the O.P. A. The witness Brockman gave similar testimony. Appellant told the arresting officer he had 8,990 meat points in his account at the bank, when he sold the restaurant. The uncontradicted proof is that he received only 6,510 meat points for July and August; that at the time of the sale he had only 162 meat points; and only 1,374 points for processed foods on September 23. From such testimony the inference of a felonious intent was a rational step for the jury and its finding will not be disturbed on appeal. People v. Deininger, 36 Cal.App.2d 649, 98 P.2d 526; People v. Tellez, 32 Cal.App.2d 217, 219, 89 P.2d 451; People v. Perkins, 8 Cal.2d 502, 511, 66 P.2d 631.

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66 Cal.App.2d 867

In re HENEY'S ESTATE.

DRISCOLL v. HENEY et al.

Civ. 14531.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1944.

Hearing Denied Jan. 18, 1945.

1. Wills 🔑535

Before disinheritance clause in will becomes effective, testator must make valid disposition of his property, and it is insufficient that he merely evince an intention to disinherit certain heirs.

2. Wills 🔑535

Where testator by holographic will expressed desire that his possessions should be turned over to his mother but that testator would like to have a priest have $1,000 for saying funeral mass and other kindnesses, and that testator desired his mother to make a will and leave certain property to testator's sister for life with remainder to an archbishop and that others should receive not more than $10 each, and mother predeceased testator, the only bequest made was to the priest, testator died intestate as to the balance, and attempted disinheritance was ineffective. Probate Code, § 92.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

In the matter of the estate of James P. Heney, also known as James Peter Heney, deceased, wherein Catherine B. Driscoll filed a petition which was opposed by the legatees, John T. Heney and others. From a judgment construing the last will of James P. Heney, deceased, the petitioner appeals.

Affirmed.

Lawrence Paul Scherb, of Culver City, for appellant.

Hoffman & Hoffman, John C. Miles, and Burke, Hickson, Burke & Marshall, all of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment and decree of the Superior Court of Los Angeles County, sitting in probate, construing the last will and testament of James P. Heney, deceased.

The essential facts are these:

James P. Heney died testate on October 3, 1941, leaving surviving him three brothers and three sisters. His mother predeceased him. Decedent's holographic will reads as follows:

"November 27, 1939

"I, James Peter Heney being sound mind do this day make this my last will and Testament. In case I pass away before the passing of my beloved mother It is my desire that all of my possessions of every kind be turned over to her. I know that she will see that all of my just debts are taken care of and that I will have a Christian Burial. I would like to have my good friend Rev. Joseph J. Truxaw say my Funeral Mass and I would like for him to have ($1,000.00) One Thousand Dollars for this and other kindnesses he has given me. I would like very much for mother to make a will at once and I would like for her to leave the Property 1540 to 1548 W. Jefferson Blvd. to my sister Catherine B. Driscoll to belong to her during her life time Provided she keep up all payments and assessments the Balance will make her a nice living. At her death I want the property to be turned over the Archbishop of Los Angeles County to be used in Seminary Work of his choosing. I sincerely request that anyone not mentioned in this will and who is related to me will received not more than ($10.00) Ten Dollars each. This will is written entirely by my own hand and I hope my requests are carried out. Please give my big clock to some Institution.

"James Peter Heney."

This is the sole question necessary for us to determine:

Did the probate court err in ruling that (1) the only valid disposition in the will was a bequest to Joseph J. Truxaw; (2) there was not any valid disposition of the remainder of decedent's estate; (3) the attempted disinheritance clause in the will was invalid; and (4) the balance of decedent's estate went to his heirs at law?

This question must be answered in the negative and is governed by the following rules:

1) If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; except that when any estate is devised or bequeathed to any kindred of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or is dead at the time the will is executed but leaves lineal descendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator. Probate Code, § 92.

[1] 2) Before a disinheritance clause in a will becomes effective the testator must make a valid disposition of his property; it is not sufficient that he merely evince an intention to disinherit certain heirs. Campbell-Kawannanakoa v. Campbell, 152 Cal. 201, 207, 92 P. 184; In re Estate of Fritze, 85 Cal.App. 500, 505, 259 P. 992. See also In re Estate of Mathie, 64 Cal. App.2d 767, 781, 149 P.2d 485.

[2] A reading of decedent's will discloses that since his mother predeceased him, the only bequest made by his will was to Reverend Joseph J. Truxaw. As to the balance of his estate he died intestate. Therefore, under rule 2, supra, the attempted disinheritance clause in the will was ineffective, and under rule 1, supra, the portion of testator's estate as to which he died intestate passed subject to administration to decedent's heirs at law.

In Re Estate of Hayne, 165 Cal. 568, 133 P. 277, Ann.Cas.1915A, 926, there was not any clause attempting to disinherit all of a class, merely a provision relative to an advancement made to one of decedent's heirs. Therefore the case is not in point on the present appeal.

For the foregoing reasons the judgment and decree is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

66 Cal.App.2d 876

SORTINO v. LONEOAK et al.

Civ. 7063.

District Court of Appeal, Third District, California.

Nov. 20, 1944.

Hearing Denied Jan. 18, 1945.

1. Negligence 🔑93(1)

The negligence of automobile driver may not be imputed to a passenger unless passenger had authority to exercise control over operation of automobile.

2. Negligence 🔑93(1)

Truck driver's negligence could not be imputed to his employee whom truck driver was conveying to orchard to pick figs and who had no authority to direct operation of truck and made no attempt to do so.

3. Negligence 🔑93(1)

That passenger was an employee of truck driver who was conveying him to place where his work was to be performed did not establish a "joint enterprise" so as to impute negligence of driver to employee.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Enterprise".

4. Negligence 🔑93(1)

Existence of a common purpose and destination at time of accident is insufficient to create a "joint enterprise" so as to impute negligence of automobile driver to passenger, but passenger must also have the legal right to exercise joint control over operation of automobile.

5. Negligence 🔑93(1)

Negligence of employer in operating automobile is not imputable to employees injured while riding with him in absence of any direct showing of control by employees over employer.

6. Appeal and error ⚷1002

Jury's implied finding that defendant truck driver adequately complied with statute requiring audible warning of intention to pass and was not guilty of negligence proximately causing collision with truck in which plaintiff was riding was conclusive on appeal, where evidence on the question was in conflict. Vehicle Code, § 528, St.1935, p. 182.

7. Appeal and error ⚷1066

Where conflicting evidence warranted inference that collision was due to negligence of driver of truck in which plaintiff was riding, who was not a party to action, and not to any negligence of defendants and court at plaintiff's request correctly charged with respect to imputing truck driver's negligence to plaintiff, giving of instruction correctly defining contributory negligence and charging with respect to burden of proof thereof was not prejudicial to plaintiff, though evidence afforded no basis for imputing truck driver's negligence to plaintiff or otherwise charging him with contributory negligence.

8. Appeal and error ⚷1066

Instructing upon a principle of law relating to matters as to which there is an entire absence of evidence is not reversible error, unless jury was thereby misled to the prejudice of appellant.

◆

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Action by John Sortino against Jack Loneoak and another, for personal injuries sustained by plaintiff in an automobile collision. Verdict and judgment for defendants, and plaintiff appeals.

Judgment affirmed.

John D. Chinello, Lawrence Kennedy, and Rae B. Carter, all of Fresno, for appellants.

Chester O. Hansen and Eckhart A. Thompson, both of Fresno, for respondent.

THOMPSON, Justice.

In a suit for damages for personal injuries sustained by the plaintiff as a result of an automobile collision which occurred on a public highway while he was riding as a passenger in a Ford truck owned and driven by Frank Mortillaro, a jury returned a verdict for the defendants, pursuant to which judgment was rendered against plaintiff. A motion for new trial was denied. From that judgment this appeal was perfected. Mr. Mortillaro was not a party to the action.

The appellant contends that the judgment is not supported by the evidence because it appears, as a matter of law, that the defendants were guilty of negligence which was the proximate cause of the accident, by failing to "give audible warning", as required by Section 528 of the Vehicle Code, St.1935, p. 182, before attempting to pass with their truck the machine in which the plaintiff was riding as a passenger. It is asserted that the negligence of Mr. Mortillaro, if any, could not be imputed to the plaintiff because the latter had no control over the operation of the machine in which he was riding. It is conceded the plaintiff himself was free from contributory negligence. But it is claimed the court erred in giving to the jury an instruction defining contributory negligence and declaring the rule regarding the burden of proof with respect thereto, for the reason that there is no evidence to support the alleged imputed negligence of Mortillaro.

At 8 o'clock a. m. on September 25, 1942, the plaintiff was riding as a passenger in a Ford truck owned and driven by Frank Mortillaro. The plaintiff had been employed by Mortillaro and was accompanying him to his farm for the purpose of picking figs. The plaintiff had no control over the operation of that machine. He sat on a box at the rear of the driver's seat. They were proceeding northerly from Fresno along the easterly side of public highway number 99, at a moderate rate of speed. The defendants' International Truck was owned by J. P. Wadleigh and W. C. Petersen. Mr. Petersen was not served with process, and the cause against him was dismissed. The International truck which was loaded with oranges, and driven by the defendant Jack Loneoak, was following the Ford truck at a speed of about thirty miles per hour. There were no other machines on that highway in the vicinity where the accident occurred. It was broad daylight and the paved highway was dry. When the Ford truck reached a point about three miles south of Madera, near a bridge which crosses Cottonwood

Creek, beyond which the Firebaugh Road intersects the public highway, Mr. Mortillaro reduced the speed of his machine to eight or ten miles an hour and undertook to cross the highway to his left for the purpose of turning on to the Firebaugh Road. There is a conflict of evidence as to whether he gave the arm signal, or other warning, of a left turn as required by Section 544 of the Vehicle Code. Immediately after passing the bridge, Mr. Loneoak, the driver of the International truck, accelerated the speed of his machine and attempted to pass the Ford truck on the left side of the highway. The evidence as to whether Loneoak sounded the horn of his machine as required by Section 528 of the Vehicle Code, before he attempted to pass the Ford truck, may be conflicting, but there is substantial evidence that he did so several times. He claims to have been taken by surprise at the sudden left turn of the Ford machine, without warning, and that he was therefore unable to avoid the collision which occurred. The International truck struck the left rear portion of the Ford truck with great force and the plaintiff was thrown from the machine, striking his head on the pavement and fracturing his skull. He was seriously and possibly permanently injured.

[1] The cause was tried with a jury, which rendered a verdict in favor of the defendants. The defendants alleged in their answer that the plaintiff and the driver of the car in which he was riding at the time of the accident were then engaged in a joint enterprise. The evident purpose of that allegation was to fasten the negligence of Mortillaro upon the plaintiff by imputation. The evidence failed to support that claim. The court correctly instructed the jury that the negligence of the driver of an automobile may not be imputed to a passenger therein, unless it also appears that the passenger has authority to exercise control over the operation of the machine. The court also defined the term "contributory negligence" and announced the rule of the burden of proof with respect thereto.

[2-4] The negligence of Frank Mortillaro, who was driving the Ford truck at the time of the accident, may not be imputed to the plaintiff under the circumstances of this case. Mortillaro was not a party to this action. The plaintiff was a mere employee of Mr. Mortillaro, who was conveying him to his orchard where he was to pick figs. The plaintiff sat on a box behind the driver's seat at the time of the accident. He had no authority to direct the operation of that machine, and he made no attempt to do so. The mere fact that the plaintiff was an employee of the driver of the machine, who was then engaged in taking him to the place where his work was to be performed, did not furnish sufficient evidence to constitute a joint enterprise so as to impute the negligence of the driver of the automobile to his employee. It is not sufficient upon which to impute the negligence of the driver of an automobile to his passenger that they both have a common purpose and a common destination at the time of the accident. It is necessary, in order to create that relationship, that the passenger shall also have the legal right to exercise joint control over the operation of the machine. Peccolo v. City of Los Angeles, 8 Cal.2d 532, 537, 66 P.2d 651; Clark v. Janss, 39 Cal.App.2d 523, 103 P.2d 175. In the Peccolo case, supra [8 Cal.2d 532, 66 P.2d 654], it is said in that regard: "A joint enterprise which will hold each of those engaged therein responsible for the negligence of the others is one where there is not only a common purpose but also a common control or right to control the instrumentality of conveyance. That the two employees had a common purpose cannot be questioned, but it is not true that they had joint control of the operation of the machine or the right to such joint control."

[5] In 4 Blashfield's Ency. of Automobile Law and Practice, § 2498, at page 326, it is said: "While it is usual for the master to control a servant's operations, it is rarely indeed that the servant has a right even to participate in governing the master's. Therefore, the servant is not chargeable with the master's negligence, and where workmen riding with their employer are injured by his negligence, his negligence is not imputable to them, in the absence of any direct showing of control by them over the employer."

The foregoing text is supported by several cited cases.

In the present case the defendants did allege in their answer that the plaintiff and Frank Mortillaro were engaged in a joint adventure at the time of the accident. But the evidence fails to support that allegation. It is immaterial, for the purpose of this appeal, that Mortillaro may have been guilty of negligence in operating his

Ford truck, which might have rendered him liable to the plaintiff for the injuries which the latter sustained. The driver of that car was not a party to this action.

There is ample evidence to support the implied finding of the jury that the defendants were not guilty of negligence which proximately caused the accident. The defendants concede in their brief on appeal that "appellant himself was without fault." There is, however, a conflict of evidence regarding defendants' alleged negligence in failing to comply with Section 528(b) of the Vehicle Code by omitting to "give audible warning" before attempting to pass the Ford truck in which the plaintiff was riding. Jack Loneoak, who was driving defendants' International truck, testified that he sounded the horn of his vehicle "two or three times" before he attempted to pass the Ford truck. He said that he first sounded the horn "about two or three hundred feet * * * to the south of the point of impact." He testified that he later sounded the horn once or twice. He said "I was possibly ten or twelve feet behind him and blew my horn to indicate that I was going to pass." Regarding the blowing of defendants' horn a third time, this colloquy occurred:

"Q. * * * Now, did you toot your horn again at any time after that? A. Immediately I saw that other truck start across the highway from me, if I recall, I put my elbow on the horn and kept jiggling it.

* * * * *

"Q. Now how far from the * * * other truck were you when you started jiggling that horn? A. Possibly three or four or five feet."

The plaintiff testified that he did not hear the defendants' horn. He said in that regard:

"Q. * * * Now did you hear any signal of any kind given by the driver of the other truck before the crash? A. No, I didn't.

"Q. Were you in a position to hear? A. I imagine I was."

[6] In view of that conflict of evidence we may not interfere with the implied finding of the jury that the defendants adequately complied with the provisions of Section 528 of the Vehicle Code and that they were not guilty of negligence which proximately caused the accident.

[7] We are of the opinion that the instruction defining contributory negligence did not constitute prejudicial error. We are unable to perceive how the jury could have been misled or prejudiced by that instruction. At the request of the plaintiff the court properly instructed the jury that: "The negligence of the driver of an automobile cannot be imputed to a guest or passenger therein, and a guest or passenger is not chargeable with a driver's negligence, if any, unless the evidence shows that such guest or passenger exercised some control over the driver, or that the guest or passenger possessed the right or power to supervise or direct the manner in which such automobile should be operated."

The foregoing instruction was addressed to the issue created by defendants' allegation in their answer that the plaintiff and Mortillaro were engaged in a joint enterprise at the time of the accident. If they had been then engaged in a joint adventure, and the plaintiff further had the right to joint control of the operation of the Ford truck, the negligence of the driver of that machine, if any, might have been lawfully imputed to the plaintiff so as to defeat his right to recover damages against the defendants for the injuries received. It is true that the evidence fails to show adequately those facts.

It was not prejudicial error for the court to have supplemented the previously quoted instruction on the subject of imputed contributory negligence, by correctly defining the term "contributory negligence" and by charging the jury with respect to the burden of proof thereof. It seems quite appropriate and certainly it was not prejudicial for the court to have done so. That procedure properly left with the jury the right to determine from the evidence adduced whether there was proof, by necessary inference or otherwise, of plaintiff's joint right to control the operation of the machine. If the jury had been warranted in finding that the negligence of the driver of the machine in which the plaintiff was riding proximately contributed to the accident, and that the plaintiff and Mortillaro were then engaged in a joint enterprise and had joint control over the operation of the machine, the imputed negligence of Mortillaro would have constituted contributory negligence which would have resulted in barring plaintiff's right of recovery from the defendants on that account, even though the defendants were also guilty of negligence.

The challenged instruction reads:

"Contributory negligence in such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of a defendant, was the proximate cause of the injury complained of.

"Unless it is shown by, or may be inferred from the evidence offered by plaintiff, such negligence is a matter of defense, to be proven affirmatively by defendants.

"But if you find from a preponderance of all the evidence in this case that such contributory negligence has been shown, then the burden of proof rule has been met by the defendant."

The foregoing instruction does not infer that the plaintiff was in fact guilty of contributory negligence. The jury was clearly told in the previously quoted instruction that unless it found from the evidence that the plaintiff had authority to control the operation of the machine, the negligence of the driver of the vehicle in which he rode could not be imputed to him. There was no contention at the trial that the plaintiff was guilty of any other negligence.

[8] All that the appellant may reasonably contend for, regarding the alleged prejudicial nature of the challenged instruction, is that the court should not have defined the term "contributory negligence," since there is no evidence that he had any right to exercise control over the operation of the machine in which he rode. But we must assume the jury fully understood and correctly applied the court's instruction upon the subject of imputed negligence, and that they therefore concluded that since there was no evidence of plaintiff's authority to control the operation of the machine, he was not guilty of contributory negligence by imputation or otherwise. There is nothing from which we may presume the jury was prejudiced by those instructions. It is not reversible error for the court to instruct the jury upon a principle of law, even though there may be an entire absence of evidence on that particular subject, unless it also appears that the jury was misled and prejudiced thereby. That prejudice does not appear in the present case.

It has been uniformly held that "An instruction, erroneous or correct, which relates to matters as to which there is no evidence will not justify a reversal unless it has misled the jury to the prejudice of the appellant." Mehollin v. Ysuchiyama, 11 Cal.2d 53, 57, 77 P.2d 855, 857; Marston v. Pickwick Stages, Inc., 78 Cal.App. 526, 248 P. 930; Gambrel v. Duensing, 127 Cal. App. 593, 606, 16 P.2d 284; 2 Cal.Jur. 1026, sec. 611; 24 Cal.Jur. 830, sec. 95. In the Marston case, supra, it is said at page 533 of 78 Cal.App., at page 933 of 248 P., quoting with approval from People v. Cochran, 61 Cal. 548: "If an instruction in a case is asked which refers to facts which there is no evidence to prove, it is not error to refuse to give it. and if given, although in fact erroneous in the abstract, it will not be regarded as an error for which the judgment will be reversed, unless it be manifest that the jury was misled by it to the prejudice of the defendant."

In the present case there was no miscarriage of justice. There is an abundance of evidence to support the verdict in favor of the defendants. It seems evident that the jury must have assumed the defendants were entirely free from negligence, and that the accident occurred through the negligence of Mr. Mortillaro, the driver of the Ford truck in which the plaintiff was riding as a passenger. He was not a party to this action. Possibly it was a mistake to have failed to make him a party defendant. The challenged instruction was harmless.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

67 Cal.App.2d 123

RATTRAY v. SCUDDER, Real Estate Com'r.
Civ. 3172.

District Court of Appeal, Fourth District, California.

Nov. 30, 1944.

1. Appeal and error ⚷781(4)

Appeal from judgment canceling order revoking plaintiff's license as real estate broker would not be dismissed as moot, because license period had expired, where judgment, if allowed to stand, would have direct bearing on any renewal of plaintiff's license and a question of costs was presented which differed materially from usual question of costs on appeal, and important public questions were involved.

2. Appeal and error ⚷607(1)

Failure to give notice calling for preparation of record is not one with respect to a jurisdictional matter. Rules on Appeal, rule 5.

3. Appeal and error ⚷604, 607(1)

Where respondent agreed that appellant could file designation of things desired in record and that respondent would stipulate that transcript of proceedings before real estate commissioner would not have to be retyped, the stipulation constituted an agreement that such transcript could be included as part of record, in its original form, and operated as a waiver of default in failure to give notice calling for preparation of record and could not immediately be renounced. Rules on Appeal, rule 5.

4. Appeal and error ⚷607(1)

Regardless of whether parties may extend time for giving notice calling for preparation of record by stipulation or agree to waive an existing default in that regard, the fact that they have done so may be considered in passing on rights of parties, especially where there has been an immediate repudiation of agreement or waiver by party who is seeking final action in his favor, because of a technical defect in the proceeding. Rules on Appeal, rule 5.

5. Appeal and error ⚷607(1)

Where respondent had agreed to waive existing default in failure to give a notice calling for preparation of record but immediately renounced the agreement, there was sufficient showing of "good cause" within Rules on Appeal to support order granting timely application of appellant for relief from the default. Rules on Appeal, rule 5, 45(b), 53(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Good Cause".

Action by W. S. Rattray against Hubert B. Scudder, as Real Estate Commissioner of the State of California, for a writ of mandate directing defendant to cancel an order revoking plaintiff's license as a real estate broker. From an adverse judgment, defendant appeals. On plaintiff's motion to dismiss appeal and on defendant's motion for relief from default.

Plaintiff's motion denied and defendant's motion granted.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for appellant.

Mack, Werdel & Bianco, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action to obtain a writ of mandate directing the defendant to cancel and set aside an order made on April 10, 1944, revoking a license as real estate broker issued to the plaintiff for the license year 1943–1944. It appears that a petition for the writ was filed on April 20, 1944, a hearing was had early in June, and on July 17, 1944, judgment was entered directing the issuance of a writ, and for certain costs and disbursements.

On July 21, 1944, the defendant filed a notice of appeal to this court from the whole of said judgment. On August 14, 1944, the plaintiff moved for an order that the appeal taken should not operate as a stay of execution, and the defendant made a motion to retax certain costs. Both of these motions were denied and on August 21, 1944, the defendant filed notice of appeal from that portion of the order denying his motion to retax the costs.

On September 8, 1944, the plaintiff filed in this court notice of a motion to dismiss "the appeal in said cause" on the grounds (1) that the appellant has failed to take the necessary steps to procure the filing of a record on appeal as required by Rule 5 of the Rules on Appeal and (2) that the matters in controversy in this action and on this appeal have become moot. On the same day a clerk's certificate was filed which states, among other things, that no notice to prepare a transcript or notice designating papers, records or exhibits has been filed, and that no proceeding for the preparation of a record is pending in the trial court.

On September 21, 1944, the defendant filed in this court notice of a motion to relieve him from default. In the accompanying affidavit it is alleged, among other things, that the original petition for writ of mandate contained a statement that a transcript of the hearing before the real estate commissioner was filed concurrently therewith; that in fact this transcript was not filed until May 8, 1944; that it had been previously stipulated that said transcript would be filed as a part of the petition for a writ and that no other evidence would be introduced at the trial; that at the trial the plaintiff introduced this transcript "by reference"; that after appealing from the judgment and from the order refusing to retax the costs counsel for the defendant believed that the record on appeal would be sufficient on the judgment roll alone since this transcript was a part of the pleadings by reference and by stipulation; that appellant was under the belief that the county clerk should transmit the judgment roll as a matter of course and that this transcript was and would be a part of the judgment roll; that counsel then worked assiduously at preparing his brief; that on September 6, 1944, feeling that there was some slight doubt as to whether this transcript was a part of the pleadings in the case, the affiant telephoned to the plaintiff's attorney and requested him to stipulate that this transcript be included in the judgment roll; that the attorney for the plaintiff refused to stipulate but finally said "O.K."; that on the same day the affiant prepared a stipulation and sent it to plaintiff's attorney; that on the next day, September 7, 1944, the affiant received through the mail a copy of a notice to dismiss the appeal; that on the next day, September 8, 1944, the affiant received back his stipulation, unexecuted, with a letter of explanation from plaintiff's attorney; that affiant then went to Bakersfield and, believing that the trial judge was the proper party from whom to obtain relief, made an ex parte application and secured an order directing the county clerk to transmit this transcript along with the judgment roll to this court; that affiant believed that in giving prompt and expeditious notice of appeal, both as to the judgment and as to the denial of his motion to retax costs, sufficient notice had been given to the clerk to bring up the judgment roll and this transcript, which included everything that would be needed on an appeal; and that the plaintiff has suffered no damage or loss by reason of the delay since the license revoked by the license commissioner automatically expired on June 30, 1944.

On September 25, 1944, the plaintiff filed an opposition to the motion for relief from default on the grounds that the questions involved in the appeal had become moot and that the affidavit in support of the motion for relief is insufficient. This was accompanied by the affidavit of plaintiff's attorney stating, among other things, that the transcript of the hearing before the real estate commissioner was not made a part of the petition for a writ of mandate and was not filed until May 8, 1944; that the affiant had not made any stipulation that this transcript should be filed as a part of the petition for writ of mandate or that no other evidence would be introduced at the trial; that this transcript was introduced at the trial as plaintiff's Exhibit 1; that this transcript does not constitute a part of the judgment roll; that the affiant did not on September 6, 1944, or at any other time, agree to stipulate that this transcript could be included as a part of the judgment roll or as a part of the record on this appeal; that on September 7, 1944, affiant received a proposed stipulation from defendant's counsel; that on the same day he returned it with a letter in which he said: "In our conversation, I did not agree that I would stipulate as to what the record on appeal should encompass. The substance of my conversation with you, as I recall it, was that you file your designation with the Clerk of the Court and that I would stipulate that the transcript of the proceedings before the Commissioner introduced in evidence would not have to be re-typed, but that the original which was filed could be sent to the Appellate Court. I seriously doubt whether you even need this stipulation for the reason that this transcript constitutes an exhibit in the case and can be forwarded without copying pursuant to Rule 5-E." That this letter was written on September 7, and truly reflects the substance of the conversation between affiant and defendant's counsel which occurred the day before; and that since the license period ordered to be restored by the judgment has expired the questions upon this appeal have become moot and no useful purpose can be served by granting the motion for relief from default.

The motion to dismiss and the motion for relief from default were argued in this court on October 10, 1944, and ordered submitted when all briefs were filed. Although the record on the merits of the case is not before us at this time, it is stated in the appellant's brief that respondent's license for the year in question was revoked after a hearing on charges to the effect that the respondent, while acting as an agent for an owner of real estate, had by misrepresentation procured an option to buy the property himself and that he had persuaded the owner to reduce the price of the property to $10,250 net at a time when he had already sold the property to another for $13,500. It is argued by appellant that the questions involved are not moot because the question involved is a matter of public interest; because the judgment if unreversed will preclude the appellant on a matter vital to his rights and the rights and interest of the people of this state; because on a request for a renewal of the respondent's license the appellant, in passing upon the respondent's honesty, will be confined to his other acts and will be precluded from considering the respondent's conduct in the particular matter which was involved in the revocation of his license; because a strict adherence to the rule of "mootness—by lapse—of time" would prevent a passing upon the merits in all such cases where there was a short suspension or where a license was revoked near the end of a license period since, as a practical matter, it would then be impossible to perfect an appeal before the expiration date of the license; and because this appeal involves also the question of costs, not the costs on appeal but costs awarded in the trial court, being the cost of the preparation of the transcript of the hearing before the real estate commissioner which was introduced in evidence. The appellant also argues that he should be here relieved from his default for the reasons above mentioned, because he acted promptly upon learning of the respondent's unwillingness to stipulate concerning the matter of the transcript and its inclusion in the judgment roll, and because the granting of relief from default will not injure the respondent, whereas a denial of that relief will have a disastrous effect upon the rights of the people of this state.

In his briefs the respondent argues that the questions in the case are moot since his license for the year in question has expired, that option transactions are not within the purview of the Real Estate Act, St.1919, p. 1252, as amended, that the right of a broker to procure and take an option and to deal with the property as his own has long been recognized in this state, and that no question of public interest is involved which has not been settled.

[1] Apparently, this is a case where the appeal should not be dismissed if that action can be avoided. In any event, it should not be dismissed as moot, which is the ground most strongly urged. The continuing value of the judgment to the respondent is indicated by his strenuous efforts to keep it in force, and by his attempt on August 14, 1944, to get an order preventing this appeal from operating as a stay of execution, although the particular license had already expired. As a practical matter this judgment, if allowed to stand, will have a direct bearing and real effect upon any renewal of the respondent's license, and a question of costs is presented which differs materially from the usual question of costs on appeal. Moreover, important public questions are involved both directly, with respect to this judgment, and indirectly, through the effect on future appeals in such cases which could not be determined before the license in question had expired.

With respect to the question as to whether the transcript of the hearing before the Real Estate Commissioner should be a part of the judgment roll, the situation is somewhat uncertain. While there may be some justification for the appellant's belief that this transcript was intended to be a part of the pleading, and while he thought there was a stipulation that it be so considered, there is no satisfactory evidence in the record to that effect, and no attempt was made to comply with Rule 5, even as to the judgment roll.

[2, 3] The controlling question here is whether any good cause appears for relieving the appellant from his default in failing to serve and file any notice calling for

the preparation of a record. Rule 53(b) provides that a reviewing court may, for good cause, grant relief from any default through failure to comply with the new rules, except for the failure to give timely notice of appeal. The failure to give the notice here in question is not one with respect to a jurisdictional matter. Averill v. Lincoln, Cal.Sup., 151 P.2d 119. The fact that all of the matters material here took place within the period of time during which an extension of time could have been granted by the trial court, if properly applied for (Rule 45(b), indicates that the delay which appears has not been, on its face, beyond reason.

While no extension of time was sought, other things occurred which should be taken into consideration. Each side made motions in the trial court and a separate appeal was taken on August 21. The appellant was under the impression that some sort of stipulation existed with respect to what was to constitute the record. Whatever the facts in this regard, while matters were in this state, the respective counsel had a telephone conversation on September 6. While there is some dispute as to what was then said, counsel for respondent here admits that his letter written on September 7 correctly gives the substance thereof. In that letter he stated that what he had said in that conversation (in which he was asked for a stipulation relating to the record) was "that you file your designation with the Clerk of the Court and that I would stipulate that (the other transcript) would not have to be retyped, but that the original which was filed could be sent to the Appellate Court". This was a clear consent that a designation of the things desired in the record could then be made, and an agreement that the other transcript, the subject of dispute, could be included as a part of the record, in its original form.

On the same day that letter was written the appellant's counsel received a copy of the notice of motion to dismiss the appeal, and the original notice was filed in this court the next day. In all fairness, the respondent should not be allowed to immediately renounce his agreement of September 6, confirmed in writing on September 7, and to then take advantage of the prior default. In a very real sense he had agreed to the preparation of a record after that time, and he should be held to have waived the prior default in that respect.

[4, 5] Whether or not the rules contemplate that the parties may extend the time for giving such a notice by stipulation, or agree to waive an existing default in that regard, the fact that they have done so is still a matter to be considered in passing upon the rights of the parties, especially where there has been an immediate repudiation of the agreement or waiver by the party who is seeking final action in his favor, because of a technical defect in the proceeding. And the existence of such facts should be a sufficient showing of good cause, within the meaning of Rule 53(b), to support an order for relief to the other party, for which timely application has been made. Under the circumstances here appearing, we hold that good cause appears for granting relief to the appellant.

The respondent's motion to dismiss the appeal is denied. The appellant's motion for relief from default is granted, and he is given 10 days from the time this decision becomes final, within which to serve and file proper notices for the preparation of a record on appeal.

MARKS and GRIFFIN, JJ., concur.

66 Cal.App.2d 950

PEOPLE v. FEGELMAN.

Cr. 3792.

District Court of Appeal, Second District, Division 2, California.

Nov. 22, 1944.

Rehearing Denied Dec. 7, 1944.

Hearing Denied Dec. 21, 1944.

1. Criminal law 🔑576(1)

If case is not brought to trial within sixty days after filing of information, and defendant does not consent to a continuance, prosecution fails to show good cause for continuance, business of court will not permit trial, illness of trial judge prevents trial, or some good reason for delaying trial is presented, it is mandatory upon trial court upon defendant's motion to grant a motion to dismiss the cause. Pen. Code, § 1382; Const. art. 1, § 13.

2. Criminal law 🔑576(1)

Where superior court was open and functioning and its business would have permitted a trial within 60 days of filing information and no good reason was presented for the delay, it was mandatory on trial court to dismiss the action since defendant's right to a speedy trial was denied. Pen.Code, § 1382; Const. art. 1, § 13.

3. Criminal law 🔑1023(3)

An order denying motion to dismiss action was not appealable.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Joseph Fegelman was convicted of grand theft, and he appeals.

Reversed with direction.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

Morris Lavine, of Los Angeles, for appellant.

McCOMB, Justice.

There is also a purported appeal from orders denying defendant's motions to dismiss the case.

So far as material for the determination of this appeal, the essential facts are:

On September 2, 1943, defendant entered a plea of not guilty to an information charging him with the crime of grand theft, which information was filed August 12, 1943. The date of trial was fixed for November 1, 1943. When the case was called for trial November 1, 1943, at 9 a.m. in department 41 of the Superior Court, Judge Condee presiding, both the people and defendant announced they were ready for trial, whereupon the deputy district attorney, representing the people, requested that the case be continued for one day in order that he might obtain evidence to lay a foundation for the admission of the preliminary testimony of absent witnesses.[1]

No showing was made that the people

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[1] The reporter's transcript shows that the following occurred when the action was called for trial:

"Mr. Leavy: * * * However, if I get a continuance of the trial here for a day, which I believe is within the sixty-day period of the time of the defendant's plea, I will be able, I am sure, to make a showing as to Officer Walker under Section 686 [Pen.Code], and thereby read his testimony also. In other words, it is necessary for me to try here, to be given time in order to make a showing as to Officer Walker so as I can read his testimony.

"Mr. Lavine: Your Honor, there is no showing, but merely his statement, that any diligence has been shown in the procurement of these witnesses. The section is mandatory that a full showing be made and that it be so construed.

"The Court: Mr. Lavine, the District Attorney is only an employee of the People, and the purpose of the trial is to try the issues on the facts through the witnesses.

"Mr. Lavine: We are entitled to go to trial on the day it is set for trial. We are ready for trial.

* * * * * *

"The Court: Mr. Lavine, the request of the District Attorney seems reasonable enough, and he only seeks one day. I can keep you here one day anyway, because I have some other matters that require my attention. If you should prefer not to wait around all day you can come back in the morning.

"Mr. Lavine: We cannot consent to a continuance, your Honor.

"The Court: Very well. I will mark the case ready. You stay right here in the courtroom at all times.

"Mr. Lavine: Yes, your Honor, I will be right here.

"The Court: I have some other matters that I must take up.

"Mr. Lavine: At this time defendant objects to any delay in the trial by reason of any matters which the District Attorney has set forth in his grounds; that there has been no adequate showing made as provided by Section 686 of the Penal Code. The District Attorney has made no showing, as far as this court is concerned, upon which this court can exercise any discretion as to any showing of due diligence.

"At this time the defendant moves for a dismissal of the case on the ground that he has been denied his right of speedy trial, and that the delay which the court now intends to enforce upon the defendant is not due to the fact that the courtroom is disengaged or that there are no other superior court departments available to try this case on this day.

"We are prepared to show and we offer to prove that this court and other courts are available to try this case on this day. We are prepared to show that had used due diligence to obtain the presence of the absent witnesses. After considerable argument between the court and counsel the matter was continued until 1:45 p.m. on November 1, 1943, in department 41. At 1:45 p.m. the case was again called and the trial judge announced that another department of the superior court could try the case,[2] whereupon the deputy district attorney renewed his motion for a continuance of the trial of the case to which defendant objected.

The court, after listening to counsel for both sides, continued the trial of the case until November 2, 1943.[3] The case was on November 2, 1943, transferred to de-

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other superior courts as well as this court are open for the trial of this case on this day and that the delay that has been asked by the District Attorney would not give the defendant his constitutional rights under 686 of the Penal Code.

"Mr. Leavy: May I reply?

"The Court: It is not necessary. I have denied the District Attorney's motion for a continuance. Mr. Lavine knows more about the court than I do, it seems. I have the case here on my docket and I will proceed to trial just as soon as I can reach the matter. I have some matters in chambers and I have some other matters, but I will probably be ready to try the case today. Mr. Lavine will wait in the courtroom.

"Mr. Lavine: I will be here.

"The Court: If you desire to let it go until tomorrow morning and that would accommodate you—

"Mr. Lavine: I have no notion of being accommodated on that matter.

"The Court: Very well. You will stay in the courtroom. Do not go out, because I may take it up at any time.

* * * * * *

"The Court: We have delayed other matters sufficiently. We will now proceed. The matter of People vs. Fegelman will be taken up again at 1:45."

[2] "The Court: We have a department that we can transfer the case to."

[3] The minutes of department 41 on November 1, 1943 relative to the present case, People vs. Fegelman, show the following note:

"Trial is continued to November 2, 1943 at 9:00 A. M."

The record also discloses the following:

"The Court: Mr. Lavine, as an officer of this court, you would not want to get this man off on a technicality, would you?

"Mr. Lavine: Your Honor, it is my duty to preserve the rights of my client. My client stands here today ready for trial.

"The Court: You set this case the very last day.

"Mr. Lavine: No, we did not have anything to do with the setting, your Honor. We had no voice in the matter. The matter was set by the—

"The Court: That record also will stand on its own feet. I do not know what the record does show.

"Mr. Lavine: The case was set on the date set by the presiding judge. We made no objection. We have asked for no continuance. The District Attorney has not been in a mood to grant us any quarter in this case and we have asked for none. We are simply seeking our constitutional and statutory rights, because those are fundamental rights that are preserved to a person, and under our position here The People have failed to make a showing of due diligence, because they have done none of the things since October 16th that they had within their knowledge in regard to getting this witness here today.

"The Court: Suppose the District Attorney has been rather negligent—I am not saying that he has—The People of the State of California are not responsible for that, and the court hopes to give everybody a fair trial, but does look with disfavor upon technical efforts to get an advantage for the defendant. We want to give the defendant every reasonable advantage that he is entitled to I will consider the matter.

"Of course, you are in a dilemma, Mr. Leavy, because you may not be able to get this man here in three or four days. I am sure you will find Mr. Lavine very busy.

"Mr. Leavy: That is why I am asking the court to continue it until tomorrow morning, if the court please, with that particular reason I would ask the court to advise Mr. Lavine that he should be ready for trial in the morning.

"Mr. Lavine: Oh no.

"Mr. Leavy: If we should not be fortunate to have Mr. Walker here for the trial, we will continue the case until the following day and on the following day to the following day and under that the defendant would not be deprived of his constitutional rights. I am not trying to lay a foundation to read Mr. Walker's testimony. I am trying to lay a foundation for a continuance.

"Mr. Lavine: Now, as to the continuance from day to day, your Honor, certainly we have some rights in these matters, and I submit it is a very unfair thing for the District Attorney to ask partment 40 of the superior court where defendant moved to dismiss the case on the ground that he had been denied the right to a speedy trial as provided in Article 1, section 13 of the State Constitution and section 1382 of the Penal Code. The judge presiding in department 40 declined to entertain defendant's motion and refused to rule upon the same for the reason that the judge of department 41 had previously denied defendant's motion to dismiss the case.

Defendant urges, among others, this proposition as grounds for reversal of the judgment:

That the trial court erred in not granting his motion to dismiss the case pending against him, upon the ground that he had not been afforded a speedy trial within the provisions of Article 1, section 13 of the State Constitution and section 1382 of the Penal Code.

This proposition is tenable, and is governed by the following rule:

[1] If a case is not brought to trial within sixty days after the filing of an information, and the (a) defendant does not consent to a continuance, (b) prosecution fails to show good cause for a continuance, (c) business of the court will not permit the trial, (d) illness of the trial judge prevents the trial, or (e) some good reason for delaying the trial is presented, it is mandatory upon the trial court upon motion of the defendant, to grant a motion to dismiss the cause. People v. Godlewski, 22 Cal.2d 677, 682, 140 P.2d 381; Harris v. Municipal Court, 209 Cal. 55, 60 et seq., 285 P. 699; People v. Angelopoulos, 30 Cal.App.2d 538, 543, 86 P.2d 873. See also People v. Molinari, 23 Cal.App.2d Supp. 761, 67 P.2d 767.

Applying the foregoing rule to the facts of the instant case, it appears that defendant was not brought to trial within sixty days after the filing of the information. Defendant did not consent to a continuance beyond that period. Neither did the district attorney make a reasonable showing for a continuance to a time beyond the sixty day period. The superior court was open and functioning and, according to the record, its business would have permitted a trial within sixty days after September 2, 1943. Since no good reason was presented for a delay of the trial beyond the period within which a criminal action must be brought to trial it was mandatory upon the trial court to dismiss the action. People v. Angelopoulos, supra, 30 Cal.App.2d 543, 86 P.2d 873.

[2] A defendant is not to be deprived of his constitutional rights by the improper action of a trial judge in pretending that matters which he has in chambers, as indicated by the trial judge in the instant case, will prevent a trial within the statutory period nor by the judge's effort to coerce defendant's counsel into consenting to a continuance beyond the statutory period.

Neither People v. Lyons, 80 Cal.App. 257, 251 P. 648, nor People v. O'Shaughn-

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us to return here from day to day.

"The Court: I do not think so. When you start a lawsuit you have got to be prepared for it to last several days anyway. The court cannot act on these things all at once. This court is busy. It is possible I could get some other judge on the floor to hear the case. I am not yet prepared to rule on this motion. I am going to let the case trail here in its proper place, and I will take the motion under advisement and possibly will rule on it tomorrow morning, if I have a chance to read these cases. If you have any other cases that you want me to read, give the citations to the clerk.

"Mr.Lavine: Yes, your Honor.

"The Court: The case will be called again. All the witnesses will return to this department tomorrow morning at 9:30.

"Mr. Leavy: At this time I wish to call the court's attention to the fact that this defendant on previous occasions has failed to appear when he has been on bond, and I wish to advise the court.

"The Court: We can take care of that situation if you want to start over.

"Mr. Leavy: I am not attempting to start over.

"The Court: We will take a chance on that. I will give the defendant full faith and credit. I do not presume any defendant guilty. Of course, I am not the District Attorney, I am only the judge.

"Mr. Lavine: May the record show that this is being done over the objection of the defendant?

"The Court: This is not continuance, Mr. Lavine, Make the most of it if you can, on appeal. The court cannot do everything at once. I am handling this case just as rapidly as I can. The court is going to settle the matter. I will see you again tomorrow morning at nine o'clock."

essy, 135 Cal.App. 104, 26 P.2d 847, are applicable in the present case. In each case the continuance was granted after adequate showing had been made for the continuance in the trial court.

In view of our conclusions, it is unnecessary to discuss other points urged by counsel as reasons why the judgment should be reversed.

[3] Since an order denying a motion to dismiss an action is not appealable, defendant's purported appeal from such orders is dismissed. People v. Bentson, 132 Cal.App. 295, 297, 22 P.2d 734.

For the foregoing reasons the judgment is reversed and the trial court is ordered to grant defendant's motion to dismiss the cause.

MOORE, P. J., and W. J. WOOD, J., concur.

Hearing denied; EDMONDS, J., dissenting.

66 Cal.App.2d 873

KELSO et al. v. ULRICH et al.

Civ. 14652.

District Court of Appeal, Second District, Division 2, California.

Nov. 20, 1944.

1. Appeal and error ⇨801(4)

Generally, where issues presented on motion to dismiss appeal are identical with those presented on appeal itself, motion will be denied.

2. Appeal and error ⇨786

Where defendant's opening brief on his appeal from judgment forfeiting his rights under agreement for sale of realty urges that complaint does not state cause of action for forfeiture or liquidated damages, that plaintiffs waived right to declare forfeiture by entering into escrow agreement with defendant, and that trial court erred in forfeiting defendant's rights because of offer in his answer to pay all sums due plaintiffs, appeal will not be dismissed on plaintiffs' motion as frivolous and taken solely for delay.

3. Appeal and error ⇨786

An appellate court has inherent power to dismiss appeal where mere examination of judgment roll demonstrates that appeal is frivolous.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Elliott L. Kelso and another against Harry F. Ulrich and others to forfeit defendant's rights under an agreement for sale of realty. From a decree for plaintiffs against named defendant, he appeals. On respondents' motion to dismiss the appeal.

Motion denied.

Edward D. Garratt, of Los Angeles, for plaintiffs and respondents.

William R. Law, of Los Angeles, for appellant.

McCOMB, Justice.

Respondents move to dismiss the appeal on the ground that it is frivolous and taken solely for the purpose of delay. The appeal is from a judgment decreeing a forfeiture of appellant's rights under an agreement for the sale of real property. In appellant's opening brief he urges that:

1) The complaint does not state a cause of action for forfeiture or for liquidated damages.

2) Respondents waived the right to declare a forfeiture by entering into an escrow agreement with appellant after October 1, 1943, and

3) The case being in equity the trial court erred in forfeiting appellant's rights, since in his answer he offered to pay all sums due respondents.

[1-3] This is the sole question presented for our determination:

Under the foregoing facts will an appellate court in California dismiss an appeal upon the ground that the appeal is frivolous and taken solely for the purpose of delay?

This question must be answered in the negative. It is the general rule in California that where the issues presented on a motion to dismiss an appeal are identical with those presented on the appeal itself, which is the case on the present motion, the motion will be denied. It is to be noted that the determination of the questions on the appeal would require us not merely to examine the judgment roll, but also to read appellant's opening brief.* (In re Estate of Sayles, 212 Cal. 437, 438, 298 P. 971; Christin v. Story, 211 Cal. 381, 382, 295 P. 515.)

For the foregoing reasons the motion is denied. Respondents are allowed twenty days from the date of the filing of this opinion within which to prepare, serve, and file respondents' brief, and appellant is allowed ten days after respondents' brief is filed within which to prepare, serve, and file a reply brief.

MOORE, P. J., and W. J. WOOD, J., concur.

67 Cal.App.2d 138

STREETER v. STREETER.

Civ. 12721.

District Court of Appeal, First District, Division 1, California.

Dec. 1, 1944.

Rehearing Denied Dec. 30, 1944.

1. Husband and wife 🔑278(2)

Validity of a property settlement between spouses must be determined in light of factual background of each case and appropriate considerations of public policy.

2. Divorce 🔑249(2)

A trial court cannot modify an unqualified property settlement agreement, but must apply thereto the rules applicable to an ordinary judgment. Civ.Code, §§ 137–139.

3. Divorce 🔑249(2), 297

The court's power to modify an unqualified property settlement differs greatly as between a settlement confined to interests of husband and wife and an agreement involving rights or support of minor. Civ.Code, §§ 137–139.

4. Divorce 🔑254

A divorce decree in its entirety must be the guide in determining whether a property agreement incorporated therein is a complete settlement of property rights and results in full satisfaction of all claims for support and maintenance. Civ.Code, §§ 137–139.

5. Divorce 🔑254, 309

A decree based upon an unqualified property settlement, made part of the court's order directing payments in installments for an unlimited period, may not be modified except in a particular affecting child's welfare, and amount to be paid may be increased, but not reduced. Civ.Code, §§ 137–139.

6. Divorce 🔑309

Where original property agreement between spouses as incorporated in divorce decree was ambiguous as to whether it constituted a division of property or an agreement for support of child, and spouses subsequently executed modifying agreements manifesting intent that monthly payment provided therein was for support of child, provision in the decree for monthly payments was subject to modification. Civ. Code, §§ 137–139.

7. Divorce 🔑245(1), 309
Husband and wife 🔑299(3)

An award of alimony, maintenance, or support, distinguished from a property settlement, is subject to modification. Civ. Code, §§ 137–139.

8. Army and navy 🔑14
Divorce 🔑309

That child of divorced spouses was being fully supported by armed forces, into which he had been inducted, constituted a changed condition justifying modification of provision in divorce decree for payment of $35 monthly for support of child. Civ. Code, §§ 137–139.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Action for divorce by Morgan H. Streeter against Gertrude Dorothy Streeter. From an order modifying a final decree of divorce, defendant appeals.

Affirmed.

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* To the general rule there is this exception, to wit: An appellate court has inherent power to dismiss an appeal where a mere examination of the judgment roll demonstrates that the appeal is frivolous. (Sonoma M. Co. v. National, etc., Corp., 189 Cal. 433, 434, 208 P. 962; Scarpel v. East Bay Street Rys., 42 Cal.App.2d 32, 33, 115 P.2d 862.)

Anthony S. Devoto, of San Francisco, for appellant.

Hyman & Hyman, of San Francisco, for respondent.

WARD, Justice.

An appeal from an order modifying a final decree of divorce. The interlocutory decree, dated December 22, 1930, in favor of plaintiff husband was made and entered upon the ground of defendant wife's extreme cruelty, an agreement theretofore made between the parties being attached to, approved and made a part of the decree except that instead of following the provision in the agreement that the mother have the custody of the minor child of the parties, with certain privileges reserved to the father of visiting him, etc., the decree gave the parents joint custody of the child.

The agreement provided that the wife should be given the household furnishings, etc.; that the husband assume certain obligations for medical and surgical services rendered, for the balance due on the purchase of a radio and for an indebtedness to a furrier, and that he be given the family automobile. The husband agreed to pay his wife $75 a month "until twelve such payments shall have been made, whereupon said payments of $75 a month shall cease." He agreed to pay thereafter the sum of $35 a month "until the minor child of said parties * * * shall have attained the age of majority, namely, 21 years of age, whereupon said payments shall cease." The final decree was made and entered on December 31, 1931. With reference to the agreement and the custody of the child, the final decree follows the language of the interlocutory.

The original agreement was subsequently modified by two agreements in writing. The first, dated September 1, 1933, reduced the payment to be made to $25 a month; the second, dated May 1, 1934, referred to the first modification and provided for a further reduction to $20 a month. The modifications, as hereinafter appear, are important. The first provides: "That, whereas, on the 1st day of December, 1930 the parties hereto entered into an agreement providing for their respective property rights, rights of support and incidentally for the custody and support of their minor child * * * and it was therein provided that the second party hereto should pay the first party for the support *of said child* the sum of $35 per month on the first day of each and every month until said child reached the age of majority * * *." The first modification further provides that: "Said second party agrees to pay said sum of $25 per month for the support *of said minor child* to the said first party * * ." (Italics added) The second modification referring specifically to the first provides for additional reduction.

A motion was made to modify the decree, on the hearing of which it was stipulated "that the minor child of the parties, Morgan H. Streeter, Jr., was inducted into armed forces of the United States on July 30, 1943, and ever since has been and now is a member of the armed forces of the United States, and fully supported by same."

The court found that all payments provided for in the agreement falling due after November 1931 "are for the support of the minor child of the parties" and that the support and maintenance of the child "is fully provided for by the United States of America." The modifying order further provided "that the said decree of divorce be and the same is modified and amended discontinuing any further payments by the plaintiff until such time as the said minor child is discharged from the armed forces of the United States of America and plaintiff is relieved from further payments for said period."

[1] The validity of a property settlement between spouses "must be determined in the light of the factual background of each case and considerations of public policy appropriate thereto." Hill v. Hill, 23 Cal.2d 82, 93, 142 P.2d 417, 422. As regards the background, and the public policy appropriate thereto, in a case such as this, where the marital relations of the parties have been discontinued with no apparent hope of resumption and the property settlement and the agreement to pay a stated amount for the support of the child is merely incidental to a divorce, the state as a "quasi party" to the divorce proceeding is preeminently interested in the children.

[2] A trial court is not permitted to modify an unqualified property settlement agreement, but must apply thereto the rules applicable to an ordinary judgment. In Leupe v. Leupe, 21 Cal.2d 145, 150, 130 P.2d 697, 700, the court said: "An entirely different problem is presented with respect to the suggestion that the award of alimony made in the interlocutory decree was

not subject to modification. The Civil Code specifically provides that the court may from time to time modify the award in accordance with the circumstances of the parties. Civ.Code, § 139; McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A. L.R. 1257." See, also, Moran v. Moran, 3 Cal.2d 342, 44 P.2d 546; Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; Dupont v. Dupont, 4 Cal.2d 227, 48 P.2d 677.

In Puckett v. Puckett, 21 Cal.2d 833, 136 P.2d 1, 3, mainly relied upon by appellant herein, the wife, unlike the present case, was the innocent party. After the commencement of an action for divorce the parties entered into a property settlement agreement which provided that she was to receive $5,000, household furnishings, certain real property and a new automobile upon delivery to the husband "of the one she had." It was specifically provided that for the support and maintenance of the wife the husband should pay $250 a month; that (page 836 of 21 Cal.2d, page 3 of 136 P.2d) " 'From and out of the said sum of * * * ($250.00) * * * per month reserved to be paid as aforesaid the wife promises and agrees that she will, without further demand upon the husband, support, educate and maintain the said minor child during her minority.'" The agreement was approved by the court as to form and contents and the gist and substance thereof were embraced in the decree. In that case the court said (pages 839, 840 of 21 Cal.2d, page 4 of 136 P.2d): "The parents may contract with each other with respect to the custody and support of their minor children. Civ.Code, sec. 159 [and cases cited]. But inasmuch as the children's welfare is the factor of paramount concern, the children are not bound by the contract, and the law vests in the court power to provide for the custody and control of minor children. No such contract may, insofar as the children are concerned, abridge the power of the court in appropriate proceedings to provide for the support of the children by their parents or for their custody. Hence, a decree of divorce providing for the custody and support of a minor child may be modified as circumstances require, even though it is based upon an agreement or stipulation of the parties. Civ.Code, sec. 138 [and cases cited]." "* * * if there is a property settlement agreement providing as a part thereof for periodical payments to be made to the wife by the husband and the agreement is approved by the court and the payments ordered by the decree to be paid pursuant to the agreement, that order will not be subsequently modified, except by the consent of the parties. [Citing cases]" The issue in the Puckett case was whether the agreement was a property settlement, a compliance with which had been ordered by the decree, or whether payments provided thereby were merely in the nature of alimony or payments to be paid for the support of the minor. The court there determined that the monthly payments to the wife for her support, and from which she agreed to care for the minor, were an inseparable part of the property settlement and therefore could not be modified. It was the court's view that under such circumstances it could not "alter the limitation imposed" but it was stated (page 841 of 21 Cal.2d, page 5 of 136 P.2d): "A different rule prevails of course with respect to the support of minor children." Harlan v. Harlan, 154 Cal. 341, 98 P. 32. McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257.

[3, 4] There is a vast difference between a property settlement confined to the interests only of husband and wife, and an agreement wherein the rights or the support of a minor is involved. In the final analysis it is the decree in its entirety that must be the guide in determining whether a property agreement incorporated in the decree is a complete settlement of property rights and results in full satisfaction of all claims for support and maintenance. In the Puckett case, supra, the court further said (page 842 of 21 Cal.2d, page 6 of 136 P.2d): "The presence of the provision that the monthly payments are for the support and maintenance of plaintiff and the child do not necessarily indicate alimony rather than a property settlement. The agreement must be taken as a whole. See Ettlinger v. Ettlinger, 3 Cal.2d 172, 44 P.2d 540; Hodgson v. Hodgson, 6 Cal.App.2d 496, 44 P.2d 544; Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Moran v. Moran, 3 Cal.2d 342, 44 P.2d 546; Parker v. Parker, 193 Cal. 478, 225 P. 447." From the record in the Puckett case it does not appear that payments of support to the wife were to cease upon the child reaching her majority. It was the intention of the parties that the husband should support the wife following their divorce so long as she should remain unmarried. It was plain that the amount agreed upon was to be paid the wife, and that from such amount

she was to support the child. There was no agreement that the husband should support the minor. The seeming difficulty is that in the Puckett case the court said (page 843 of 21 Cal.2d, page 6 of 136 P.2d): "Insofar as the motion was predicated upon the ground that the minor child did not require the amount ordered to be paid for her support, suffice it to say that by reason of the foregoing rules, the amount could not be reduced because it was a part of a property settlement. The only contingency in the agreement contemplating a reduction was the remarriage of plaintiff, in which event the parties were to mutually agree upon an amount for the child's support. In the event of failure to so agree the court could fix the amount. That contingency has not arisen. For the reasons heretofore discussed, the amount payable for the child's support could be changed by the court at any time insofar as the child is concerned, having in mind its welfare. In brief, the payments ordered to be made are not subject to reduction, but they might be increased by the court if the child's welfare requires it, and that without regard to what the liabilities of the parties may be, and their rights inter se under the agreement." In the Puckett case the trial court impliedly found that the agreement covering payments for the support of the child was in fact a part of the property settlement. In the present case the court found to the contrary.

There are decisions in this state holding that, regardless of a property settlement approved by the court, an order in a decree directing support for a minor child may in some instances be modified to provide for a reduction. Civil Code, sec. 138; 9 Cal. Jur., pp. 803, 804, sec. 144; Henzgen v. Henzgen, 62 Cal.App.2d 214, 144 P.2d 428, decided subsequent to and which considered the Puckett case, wherein no petition for hearing in the Supreme Court appears. In Rosher v. Superior Court, 9 Cal.2d 556, page 560, 71 P.2d 918, 920, the court said: "In Moore v. Superior Court, 203 Cal. 238, 263 P. 1009, 1011, it is said: 'The language of section 138 of the Civil Code is read into every decree of divorce which purports to deal with the care, custody, and support of the minor children of the parties to the action, and, this being so, whatever orders or decrees the trial court may make or enter in the premises are not in the nature of final judgments which determine the relation of the parties to each other, or to the action or to the subject-matter over which the court has thus retained all of the jurisdiction which it had during every stage of the proceedings and pendency of such action.' It follows that it cannot be said that any vested right with regard to his duty to support or care for his minor children is acquired by a divorced parent as a result of the divorce decree or custody orders made in connection therewith." Meek v. Meek, 51 Cal.App.2d 492, 125 P.2d 117; Wylie v. Wylie, 26 Cal.App.2d 167, 79 P.2d 152; Avila v. Leonardo, 53 Cal.App.2d 602, 128 P.2d 43; Lewis v. Lewis, 174 Cal. 336, 163 P. 42; Adams v. Adams, 2 Cal.App.2d 173, 37 P.2d 729; Ross v. Ross, 1 Cal.2d 368, 35 P.2d 316; Armstrong v. Armstrong, 132 Cal.App. 609, 23 P.2d 50; Hodgson v. Hodgson, 6 Cal.App.2d 496, 44 P.2d 544.

[5] Irrespective of the facts and of judicial views expressed in some of the cases cited in the last paragraph, we accept without reservation the rule stated in the Puckett decision as applicable to the facts of that case to the effect that a decree based upon an unqualified property settlement, made a part of the order of the court, directing payments in installments for an unlimited period may not be modified except in a particular affecting a child's welfare. The amount to be paid may be increased but not reduced.

[6] In the present case the court found that the payments made subsequent to the twelve of $75 each "are for the support of the minor child." Inferentially we conclude the court found that, separate and apart from the property settlement and the portion of the decree ordering an apportionment of property between the parties and an assumption by the husband of indebtedness, the award of $35 a month was for the maintenance of the child and was not a part of the property settlement. If the implied finding herein is substantiated by the facts, then the specific holding in the Puckett case, as applied to the facts of that case, should not be followed herein. The parties there did not, as they did here, enter into a subsequent written modification of the original agreement wherein they themselves construed the meaning of the disputed provision. For that reason the decision therein is not here controlling.

The original agreement as incorporated into the decree is ambiguous. In Johnston v. Landucci, 21 Cal.2d 63, 70, 71, 130 P.2d 405, 409, 148 A.L.R. 1355, the court said: "It is, of course, proper when a contractual provision is ambiguous, for the courts to look at the subsequent conduct of the parties to ascertain how they construed the provision in question. The contemporaneous and practical construction of a contract by the parties is strong evidence as to the meaning of equivocal provisions. Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; Keith v. Electrical Engineering Co., 136 Cal. 178, 68 P. 598; Retsloff v. Smith, 79 Cal.App. 443, 249 P. 886." If the provided $35 payment was intended as an agreement for the support of the child, it was, under all the authorities, subject to modification. On the other hand, if it was not an agreement for the support of the child but a part of the division of the property of the parties, under the Puckett case it was not subject to modification. If only the original agreement and the decree appeared in the record before us, there might be greater merit in appellant's contention that the clause in question is not an agreement for support but part of the property settlement between the parties, the minority of the child being used as a possible method of designating the period for which the payments should continue. But that is not all that is before us. There were two modifying agreements. The first of these expressly referred to the payment here involved as being for the support of the child. There is no ambiguity in that statement. It constitutes an interpretation of the original agreement by the parties themselves.

[7] The husband and wife herein modified the original agreement and therein specifically stated that the $35 payment was for the support of the child. A third contract by reference to the first and second further modified the obligation by a further reduction in amount. These modifications clearly show the intent of the parties that the $35 payment was not a part of the property settlement but was for the support of the minor. An award of alimony maintenance or support distinguished from a property settlement, is subject to modification. Miller v. Superior Court, 9 Cal.2d 733, 72 P.2d 868; Wylie v. Wylie, supra; Robertson v. Robertson, 34 Cal.App.2d 113, 93 P.2d 175; Queen v. Queen, 44 Cal.App.2d 475, 112 P.2d 755; Lazar v. Superior Court, 16 Cal.2d 617, 107 P.2d 249.

[8] The contention of appellant is that the amount of $35 is a payment to the wife and not to the child. Reference to the reduction or the reason therefor, is passed over by her as a fact "wholly immaterial and beside the point." Under such circumstances it is not necessary to further consider this case. There appears in the record a changed condition justifying a modification. Civ.Code, secs. 137, 138, 139; Beal v. Beal, 218 Cal. 755, 24 P.2d 768; Marts v. Marts, 15 Cal.App.2d 224, 59 P.2d 170; Adams v. Adams, supra; Moog v. Moog, 203 Cal. 406, 264 P. 490; Miller v. Superior Court, supra; Henzgen v. Henzgen, supra; McClure v. McClure, supra; Leupe v. Leupe, supra; Moran v. Moran, supra; Ettlinger v. Ettlinger, supra; Harlan v. Harlan, supra; Rosher v. Superior Court, supra.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

67 Cal.App.2d 1

KING v. CITY OF LONG BEACH.
HANKINS v. SAME.

Civ. 14486, 14487.

District Court of Appeal, Second District, Division 3, California.

Nov. 24, 1944.

Hearing Denied Jan. 22, 1945.

1. Automobiles 🔑244(42, 58)

Undisputed evidence that at time of collision with policeman's automobile plaintiff was violating a city blackout ordinance by driving during a blackout and that he was driving without lights on a dark night when street lights were not burning and at a speed of between 20 and 25 miles per hour in center lane of travel authorized finding that plaintiff's negligence proximately contributed to collision and barred recovery from city.

2. Automobiles 🔑204

That soldier told plaintiff, who had stopped in center lane of traffic on main street at time of air raid alarm, to "get going" did not indicate that military authority had superseded the civil power and that plaintiff was driving pursuant to orders from military authority, so as to relieve plaintiff from charge of contributory negligence in a collision with a policeman's automobile which occurred during plaintiff's attempt to drive home in violation of city blackout ordinance requiring traffic to stop off main portion of traveled road.

3. Automobiles ⚷244(42)

In action against city for injuries sustained in collision between plaintiff's automobile and one driven by a city policeman during a blackout, the negligence of other motorists in driving in violation of city blackout ordinance did not excuse the plaintiff from charge of contributory negligence.

4. Automobiles ⚷204, 226(2)

Plaintiff's violation of Vehicle Code requirements that vehicle driven from a half hour after sunset to a half hour before sunrise be equipped with proper lights constituted negligence as a matter of law barring recovery for injuries in an accident to which such negligence proximately contributed. Vehicle Code, § 618 (a), St. 1935, p. 201.

5. Negligence ⚷93(1)

Negligence of driver of automobile cannot be imputed to guest.

6. Automobiles ⚷224(5, 6), 226(2)

Evidence that a motorist was negligent in driving during a blackout during an air raid alarm in violation of a city blackout ordinance and in driving without lights in violation of Vehicle Code and in driving at an excessive speed and that guest made no protest and failed to leave automobile when he had an opportunity to do so, authorized finding that guest was guilty of negligence proximately contributing to his injuries sustained when automobile collided with automobile driven by city policeman and sustained judgment denying guest recovery against city. Vehicle Code, § 618 (a), St.1935, p. 201.

7. Automobiles ⚷224(1)

Guest in automobile is bound to exercise ordinary care for his own safety.

8. Appeal and error ⚷931(1)

Evidence together with inferences therefrom must be viewed most favorably to respondent.

9. Appeal and error ⚷1010(1)

Finding of trial court based on substantial evidence may not be disturbed on appeal.

Appeals from Superior Court, Los Angeles County; Harold B. Jeffery, Judge.

Separate actions by Thomas E. King and by Carl M. Hankins against the City of Long Beach for injuries sustained in a collision between automobiles which cases were consolidated. From judgments for city, plaintiffs appeal.

Affirmed.

Eugene S. Ives, of Los Angeles, and Kenneth A. Davis and John O. Akin, both of Long Beach, for appellants.

Irving M. Smith, City Atty., Dewey L. Strickler, and Clifford E. Hayes, Deputy City Attys., all of Long Beach, for respondent.

FOX, Justice pro tem.

The plaintiffs, Thomas E. King and Carl M. Hankins, filed separate actions for damages against the city of Long Beach. The cases were consolidated for trial, and also on appeal. These cases arose out of an accident which occurred in the city of Long Beach during the early morning of February 25, 1942, when an automobile owned and operated by plaintiff King, and in which plaintiff Hankins was riding, collided with an automobile owned and driven by Engebret Larson, a police sergeant of said city. As a result of the accident both plaintiffs were injured and the police sergeant killed. The actions were tried by the court, sitting without a jury, and judgment rendered for the defendant city in each case. The plaintiffs have appealed.

The evidence showed that on the said date the police department of the city of Long Beach received from the United States Army an air raid blue alert at 2:23 a. m., and an air raid red alert at 2:28 a. m. Immediately thereafter an air raid warning was sounded in the city of Long Beach. After the police department received the blue alert, Sergeant Larson received a call at his home to report for duty at the fire station located at 2540 Santa Fe Avenue. The accident occurred just prior to 3:02 a. m. and just prior to an anti-aircraft barrage which was fired on said morning.

The plaintiffs were employed at California Shipbuilding Corporation. They left their place of employment at about 2:30 on said morning and went to King's car. He drove his car from the parking lot and entered Ford Avenue and traveled north on said avenue to Anaheim Street, and east on Anaheim Street until he came to a stop in the traffic line on said street. At that time a soldier told him to turn off his lights. King had been driving his car in the third lane of traffic from the curb. When he reached Anaheim Street the street lights were on but they were turned off while he was driving east on that street. After being stopped for a few minutes the traffic ahead of the King car began to move forward. A soldier came along and told King to "get going." King then continued east on Anaheim Street to its intersection with Santa Fe Avenue where he turned north on said avenue. He drove north on Santa Fe Avenue at a speed of approximately 20 to 25 miles per hour, traveling next to the center line of the avenue. At Pacific Coast Highway he made a boulevard stop and waited for a truck and trailer to pass through the intersection. After crossing said highway King traveled at a speed of approximately 25 miles per hour until he passed a point north of the aforesaid fire station, at which time he collided with the car driven by Sergeant Larson. The King car was near the center line while the Larson car was to the left of the center line. Both cars were being driven without lights. The night was dark but clear. The street lights on Santa Fe Avenue were not lighted. King testified that he saw cars traveling south on Santa Fe Avenue but could not tell whether the cars were police cars or taxis, as the lights on top of the cars were not lighted. When asked how far away the cars were when he could see them he said: "You would have to be right on them before you would see them." Plaintiff Hankins testified he could see about 50 feet. Witness Smith, a passenger in a truck driven by witness Pamplin, which was traveling about 10 miles per hour and which was passed by King just before the accident, testified that he could see ahead but "A very short distance." When asked if he could see 25 feet ahead, he replied: "I don't believe I could see very well that distance." He further testified: "I had my head out of the window on the right side watching the edge of the road so we could—directing Pamplin so we could stay right at the edge of the road. That was the object of it." Plaintiff King drove approximately 1.4 miles from the place where he stopped in the traffic line on Anaheim Street to the point where the collision took place on Santa Fe Avenue. In that distance he crossed some 17 intersecting streets.

Prior to the date of the accident the city of Long Beach had enacted what was commonly known as a "Blackout Ordinance" which required, in the event of a blackout, all vehicular traffic (with certain exceptions not here involved) to stop at the side of the highway and off the main traveled portion thereof until the "all clear" signal was given. Such signal had not been given when the accident happened.

The King Appeal.

In the King case the trial court, in addition to finding that King violated the Blackout Ordinance, found that he "drove, operated and propelled his automobile in a northerly direction on Santa Fe Avenue in a negligent, careless and reckless manner, without lights, at a speed of approximately 25 miles per hour, and without regard for his own safety; that the night was dark and no street lights were lighted along Santa Fe Avenue; that the said negligent, reckless and careless conduct on the part of the plaintiff proximately contributed to and caused the collision between the cars driven by the plaintiff and Engebert Larson and the resulting injuries and damages sustained by the plaintiff."

The first question is: Does the evidence support this finding? In our opinion it does.

[1] The evidence is undisputed that King was driving his car without lights on a dark night, when the street lights were not burning, at a speed of around 20 to 25 miles per hour. This is sufficient to support the court's finding of negligence on the part of plaintiff King. Also, the inference is readily deducible from the facts herein recited that King's negligence proximately contributed to the accident in accordance with the trial court's finding. This bars any recovery on his part.

[2] Plaintiff King seeks to avoid the legal consequences of his acts on the theory that the civil power had been superseded by the military and as a consequence he was driving pursuant to orders from the military authority. The answer to this proposition is that there is no evidence in the record that the military authority had made any order suspending civil power or prohibiting or regulating the operation of

motor vehicles during the period of an air raid alarm. The trial court may well have concluded that the directions of the soldier to the operators of the vehicular traffic on Anaheim Street to turn out their lights and later to plaintiff King to "get going" were simply as an assistance to the civil authorities and in order to clear the street, which is a main thoroughfare, for military and other emergency traffic. In this connection it must be remembered that King's car was in the third lane from the curb. It was virtually in the center of the street and would have constituted a traffic hazard standing there without lights. The reasonable interpretation of the soldier's direction, and which is consistent with the trial court's findings and judgment, is that King was to get his car out of the way and to a place of safety which he had ample opportunity to do. There is no basis for saying that the direction of the soldier to "get going" gave King any legal right to drive home, a distance of more than 1.4 miles, on a dark night without lights, at a speed of approximately 25 miles per hour.

[3] King also seeks to justify his conduct on the ground that other motorists were, on that occasion, also driving without lights. The evidence, however, does not disclose that other motorists drove at the speed at which King was driving prior to and at the time of the accident, and if they had been their negligence would not have excused his own.

[4] In considering the sufficiency of the evidence to support the trial court's finding we have done so without relation to subdivision (a) of section 618 of the Vehicle Code, St.1935, p. 201, which requires every vehicle on the highway (with certain exceptions not here applicable) at any time from a half hour after sunset to a half hour before sunrise to have sufficient light to render clearly discernible any person or vehicle on the highway at a distance of 200 feet. Of course the violation of a statutory provision constitutes negligence as a matter of law. Garns v. Halpern, 1924, 193 Cal. 193, 196, 223 P. 545; Rapolla v. Goulart, 1930, 105 Cal.App. 417, 424, 287 P. 562; Hudgins v. Standard Oil Co., 1935, 5 Cal.App.2d 618, 622, 43 P.2d 597; Linde v. Emmick, 1936, 16 Cal.App.2d 676, 683, 61 P.2d 338.

Since we find sufficient evidentiary support for the court's findings and judgment it becomes unnecessary to consider other questions raised by counsel.

The Hankins Appeal.

In the Hankins case after repeating the finding herein quoted as to the manner in which King drove his car on the occasion in question, the court also found that "the plaintiff (Hankins) did not protest to the defendant, Thomas E. King (Hankins, in his action, joined King as a defendant); that the plaintiff had an opportunity to alight from the automobile driven by the defendant, Thomas E. King, but that the plaintiff did not do so; that the carelessness and negligent conduct of the plaintiff in continuing to ride in the automobile driven by the defendant, Thomas E. King, proximately caused and contributed to the injuries sustained by the plaintiff and the damages resulting therefrom."

The principle question on this appeal, also, is: Does the evidence support this finding? In our opinion it does.

[5, 6] Plaintiff Hankins was a guest, and not a passenger for hire, in King's car —consequently the negligence of the latter may not be imputed to the former. Baldwin v. Pacific Electric R. Co., 1929, 208 Cal. 364, 368, 281 P. 380; Cate v. Fresno Traction Co., 1931, 213 Cal. 190, 201, 2 P. 2d 364. However, the evidence shows that Hankins continued to ride a distance of 1.4 miles in the automobile driven by King, and that he did not make any protest. He was apparently apprehensive about King continuing to drive for he testified that "* * * I asked him if he had driven before like this and he said yes." Hankins made no further comment about proceeding, nor did he object to the speed at which King was driving in the darkness and without lights. Hankins had an opportunity to get out of the car when he ascertained, at the place where they were stopped on Anaheim Street, that King contemplated driving on for there was some delay in getting started because, according to King's testimony, he had locked his car and removed the key while standing there and had to have the assistance of the soldier's flashlight before he could unlock his car and get it started. Hankins also had an opportunity to alight from the car when King stopped at the intersection of Santa Fe Avenue and Pacific Coast Highway to allow a truck and trailer to pass through the intersection.

[7-9] Hankins was bound to exercise ordinary care for his own safety. Whether or not he exercised such care is primarily a question of fact. The trial court has decided that question against the plaintiff. Viewing the evidence herein recited, together with the inferences which may reasonably be drawn therefrom, most favorably to the respondent, as we must on appeal, we conclude that there is substantial evidentiary support for the trial court's finding. Under such circumstances the finding may not be disturbed on appeal. This finding of contributory negligence on the part of plaintiff Hankins bars any recovery by him.

The judgment in each case is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

67 Cal.App.2d 132

PEOPLE v. BLANKS.

Cr. 630.

District Court of Appeal, Fourth District, California.

Nov. 30, 1944.

1. Criminal law ⇨543(2)

Testimony of witnesses taken at preliminary examination was inadmissible where no attempt was made to introduce any evidence of any kind in connection with matter of due diligence in attempt to produce the witnesses at trial and there was no evidence in record as to what, if anything, was done in an effort to locate the witnesses. Pen. Code, § 686, subd. 3.

2. Criminal law ⇨543(2)

The question as to whether a search has been made for witnesses with sufficient diligence to authorize introduction of testimony of witnesses taken at preliminary examination is matter largely within discretion of trial court, but an abuse of that discretion appears when the showing of diligence is entirely insufficient. Pen. Code, § 686, subd. 3.

3. Criminal law ⇨543(2)

In the absence of any evidence tending to show diligence in attempting to locate witnesses, there is no room for exercise of any discretion as to admissibility of testimony of witnesses taken at preliminary examination. Pen. Code, § 686, subd. 3.

4. Criminal law ⇨826

Where accused, while on witness stand, admitted prior convictions, and after close of giving of instructions a juror stated that he did not understand certain instruction about testimony being impeached, refusal to give instruction, subsequently requested, to effect that admission of testimony with reference to prior convictions was for sole purpose of impeachment, on ground that request came too late because of trial court's rule requiring presentation of instruction before first witness is sworn, was error. Code Civ.Proc. § 607a.

5. Criminal law ⇨784(7), 829(15)

Requested instruction that circumstantial evidence must not only be consistent with defendant's guilt, but must also exclude every reasonable hypothesis except that of such guilt, should have been given, but refusal to do so, standing alone, would not justify reversal in view of instructions given.

6. Criminal law ⇨1186(4)

Where evidence tending to connect defendant with commission of burglary charged was weak, error in admitting testimony given by two witnesses at preliminary examination without proper foundation being laid and error in refusing to give instruction that evidence relating to prior convictions should be considered only as affecting credibility of defendant was prejudicial and did not come within curative provisions of Constitution. Pen. Code, § 686 subd. 3; Const. art. 6, § 4½.

Appeal from Superior Court, Riverside County; O. K. Morton, Judge.

Charlie Allen Blanks was convicted of burglary, and he appeals.

Reversed and remanded for a new trial.

P. E. Bingman, of San Bernardino, and Loyal C. Kelley, of Riverside, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with the crime of burglary alleged to have been committed on February 9, 1944, and with several prior convictions of felonies. He pleaded not guilty but admitted the prior convictions. A jury found him guilty and he was sentenced as an habitual criminal. He has appealed from the judgment and from an order denying his motion for a new trial, contending that the evidence is insufficient and that certain errors were committed which were prejudicial to him.

It appears without question that a building in Beaumont used as a cocktail bar and liquor salesroom was burglarized on February 9, 1944, sometime between 12:15 A. M. and 8 o'clock the following morning. The locks on several doors were broken and about eight cases of whiskey were taken, including nine bottles of "Hill and Hill."

This cocktail bar was located at the northwest corner of a quarter block, bounded by streets on the north and on the west and by alleys on the south and on the east. The two street frontages were completely occupied by store buildings, but what may be roughly described as the southeast quarter of this quarter block consisted of vacant lots, parts of which were frequently used for parking automobiles. On a portion of these vacant lots, and along a part of the alley to the south, there was an old foundation of a building which had burned some years before. The walls of this foundation stood about four inches above the surrounding ground on the outside and eight inches or more above the surface of the ground within the foundation.

The evidence tending to connect the appellant with the commission of this crime is entirely circumstantial. Some three months previously he had worked as a bartender at this cocktail bar and was familiar with the premises and the place where the whiskey was kept. About 4 o'clock on the morning of that day a lady who was on her way to work, while backing her automobile in a northerly direction along the alley to the east of this quarter block, noticed an automobile parked on the north portion of the vacant lots to which we have referred. She merely observed its general appearance and that it had a "lot of nickel on it and different shiny stuff over it." She testified that it looked somewhat similar to a picture of appellant's car. However, an officer testified that he could find no signs of a car having been parked in that location on that morning.

The officers did find, the next morning, the tracks of an automobile which had apparently been driven easterly on the alley south of this quarter block, then over the southerly wall of the old foundation in a northeasterly direction, then over the easterly wall of that foundation, and then back in a southeasterly direction, over a part of the vacant lots, into the alley again. Between the easterly wall of this foundation and the alley this automobile had passed over a large rock imbedded in the soil and its left rear wheel had passed over the metal cover of a water meter box. On that metal cover was left the clear impression of an Atlas tire, and there were marks on the rock indicating that a metal object had recently dragged across it.

About a week later the officers found the appellant's car at a trailer camp, where he was living, at the edge of San Bernardino. His left rear tire was an Atlas, the markings of which exactly corresponded with the tire mark left on the metal cover by some automobile. An expert witness testified that he compared particles of concrete and dirt found on the underside of appellant's car with the concrete where it had been scraped on the old foundation and with dirt found around that foundation. He found that the concrete was the same in kind and texture, and that the dirt found on the appellant's car contained particles of wood charcoal. He also gave the opinion that markings recently made on the stone imbedded in the soil corresponded exactly with recent scratchings and dents on the underside of the muffler of appellant's car, and gave what appear to be excellent reasons for this opinion.

The only other evidence tending to connect the appellant with the commission of this offense is the testimony of two witnesses to the effect that shortly after February 9 the appellant stated to them that he could and would get them some whiskey. One of them testified that he asked for Hill and Hill whiskey and that the appellant said he could procure six or seven bottles of that brand. However, both witnesses testified that he did not deliver any whiskey to them.

No whiskey was found in the appellant's possession and he, his wife, his mother, his stepfather and another man testified to facts which would establish an alibi for him, if believed by the jury.

While the appellant was familiar with the premises from which the liquor was taken, while the evidence justifies the inference that his car had passed over this old foundation and over the rock at some time within thirty days of the date in question, and while other evidence indicates that some car with an Atlas tire on the left rear wheel passed over the metal covering of the meter box within eighteen hours of the morning after the burglary, it must be conceded that the evidence tending to connect the appellant with the commission of this offense is weak, at best. Under such circumstances any errors appearing in the record assume an importance that might well not be accorded them in a case involving stronger evidence connecting the person charged with the offense committed. This is especially true since the prior offenses here admitted by the appellant included burglary and receiving stolen property, which fact may well have had a considerable effect upon the jury.

With respect to the errors complained of it is first contended that the court erred in permitting the district attorney to read into evidence the testimony given by two witnesses at the preliminary examination, on his statement that these witnesses could not be produced, and without any foundation having been laid therefor as required by subdivision 3 of section 686 of the Penal Code. It is argued that no showing was made that due diligence had been exercised in attempting to locate these witnesses. These are the witnesses who testified at the preliminary hearing that shortly after February 9 the appellant tried to sell whiskey to them, and the respondent strongly relies on that evidence as a circumstance tending to show the appellant's guilt.

[1-3] The record shows that during the trial the deputy district attorney stated that he would like to file the subpoenaes issued for these two witnesses, showing the returns of the sheriff that one "had moved, address unknown, but thought to be in Arizona" and that the other "is now in the Army, and somewhere in Oregon," and that he was unable to produce these witnesses in court. He then asked leave to read the transcript of their testimony at the preliminary examination. Objection to this was made on the ground that "if they desire to use the testimony previously given by a witness, there must be a showing of due diligence in procuring his presence at the trial." Counsel then went on to urge that subpoenaes had not been issued early enough and "that the foundation is not present for the reading of their prior testimony." The objection was overruled and the testimony of these witnesses taken at the preliminary hearing was read into evidence. The two subpoenaes with the return of the sheriff of San Bernardino County on each were "filed." In one return the sheriff states: "I hereby certify that after diligent search and careful inquiry, I have been unable to find Jasper Bailey. (Now in the Army somewhere in Oregon)." In the other: "I hereby certify that after diligent search and careful inquiry, I have been unable to find M. Jacobsen. (Moved, address unknown, thought to be in Arizona)." The statements made in the returns of the sheriff are mere conclusions, are not sworn to, and no facts of any kind or nature are included therein. No attempt was made to introduce any evidence of any kind in connection with the matter of due diligence and there is no evidence in the record as to what, if anything, was ever done in an effort to locate these witnesses or either of them. It clearly appears that the statutory provision was not complied with and, in the absence of a proper foundation being laid, the evidence in question was inadmissible. While the question as to whether a search has been made with sufficient diligence is a matter largely within the discretion of the trial court, an abuse of that discretion appears when the showing of diligence is entirely insufficient. People v. McDonald, Cal.App., 152 P.2d 448. In the absence of any evidence at all tending to show diligence there is no room for the exercise of any discretion.

[4] Error is assigned in the refusal of the court to give an instruction requested by the appellant, which was to the effect that the admission of testimony with reference to prior convictions was for the sole purpose of impeachment and that such evidence was to be considered only in relation to the credibility of the defendant as a witness and as to the weight which should be given to his testimony.

It appears that the appellant, while on the witness stand, was asked as to these prior convictions and admitted that he had been convicted of burglary and of receiving stolen property in other states. At the close of the giving of the instructions a juror asked permission to ask a question. He then stated that he did not understand a certain instruction "about the testimony being impeached, if they had been convicted of a felony previously" and requested that this be repeated. The court then repeated the instruction which was: "You are instructed that a witness may be impeached by the party against whom he was called, by showing that he had previously been convicted of a felony." The juror then stated that he did not understand "by the party against whom he was called." This was explained and the juror expressed himself as being satisfied. Immediately thereafter, a recess was taken during which the appellant presented the proposed instruction, here in question, which was refused on the ground that "it was not requested by counsel for defendant until after jury had been fully instructed and was not presented to court until 1:40 P.M. on this date."

The substance of the refused instruction was not otherwise given. The respondent argues that such an instruction need not be given unless requested, and that this request came too late because a rule of the trial court adopted section 607a of the Code of Civil Procedure, which requires the presentation of instructions before the first witness is sworn. Considerable argument is presented with respect to whether the provisions of section 607a are applicable to criminal cases. This requires no consideration here. To refuse an instruction on the ground that it is presented too late may be erroneous even in a civil case. Blanton v. Curry, 36 Cal.App.2d 575, 98 P.2d 221. In this case the matter did not arise until the jury had been instructed and immediately thereafter a juror expressed his misunderstanding in this connection and requested enlightenment. It was an important matter in view of the appellant's admissions as to prior convictions and the meager nature of the evidence connecting him with the crime. Under the circumstances appearing here the jury should have been instructed that the evidence relating to prior convictions should be considered only as affecting the credibility of the appellant and not for other purposes. This was not done and it should not be held, under all the attendant circumstances, that no prejudice could have resulted.

[5] The further contention is made that the court erred in refusing to give an instruction proposed by the appellant to the effect that circumstantial evidence must not only be consistent with the defendant's guilt but must also exclude every reasonable hypothesis except that of such guilt. While we think this instruction should have been given the refusal to do so, standing alone, would hardly be sufficient to justify a reversal since the substance thereof was more or less covered in two other instructions which were given, although they are not worded as clearly as might be desired.

[6] Because of the weak nature of the evidence connecting the appellant with this crime it cannot be held that the errors which appear are without prejudice. He was entitled to a fair trial and the errors are in connection with matters which would naturally be given great importance by the jury. The fact that he had previously been convicted of the same or similar crimes, and the fact that he claimed a little later to be able to deliver whiskey, may have had a great influence on the jury's verdict. It cannot be held, in a close case, that errors having such a direct bearing upon important issues, and probably upon the result, were without prejudice. The general situation here presented does not come within the curative provisions of section 4½ of article VI of the Constitution.

The judgment and the order denying a new trial are reversed and the cause is remanded for a new trial.

MARKS and GRIFFIN, JJ., concur.

In re ST. CLAIR ESTATE CO

Civ. 3118.

District Court of Appeal, Fourth District, California.

Nov. 22, 1944.

Rehearing Denied Dec. 19, 1944.

Hearing Denied Jan. 18, 1945.

1. Appeal and error 🔑1011(1)

Where there were thousands of pages of oral testimony, as well as much evidence in writing, and all of it was conflicting, appellate court would not disregard findings of fact made by trial court and pass upon the entire record de novo.

2. Compromise and settlement 🔑23(3)

Evidence sustained finding that 1915 agreement among stockholders of family corporation constituted a full settlement as to what constituted the assets of the corporation and as to the conduct of its affairs up to that time.

3. Compromise and settlement 🔑23(3)

Evidence sustained finding that 1929 agreements among stockholders of family corporation constituted a full settlement of all claims and demands of dissatisfied stockholder against other stockholders and the corporation, that dissatisfied stockholder thereby waived right to question any previous transactions or any prior conduct of corporate affairs.

4. Compromise and settlement 🔑18(1)

A supplemental agreement reaffirming provision in compromise and settlement agreement for release of claims as respects dissatisfied stockholder but changing contract in respect of other matters and persons did not affect settlement as respects claims of dissatisfied stockholder so reaffirmed.

5. Compromise and settlement 🔑17(2)

Where dispute was between one dissatisfied stockholder of family corporation and the other three stockholders and all stockholders and the corporation were parties to compromise and settlement, the compromise agreement was binding on dissatisfied stockholder both as an individual and as a stockholder.

6. Compromise and settlement 🔑20(1)

Any failure to conduct family corporation in accordance with compromise and settlement agreement among stockholders would not destroy such agreement.

7. Corporations 🔑625

Evidence in voluntary dissolution proceeding sustained findings that stocks were purchased by corporation and that directors did not buy them personally and pass them on to corporation when purchases proved unprofitable. Civ.Code, § 403.

8. Corporations 🔑629

In voluntary dissolution proceeding court properly directed that amount which one stockholder had been paid in excess of other stockholders in family corporation be deducted from amount due such stockholder upon distribution, particularly in view of contract guaranteeing that dividends to such stockholder should be at least certain amount and that when larger, excess should be paid to guarantor. Civ. Code, § 403.

9. Compromise and settlement 🔑19(2)

That one party to compromise and settlement agreement consented that he be charged with certain sum notwithstanding such agreement did not open up such agreement with respect to other matters or parties not consenting.

10. Compromise and settlement 🔑23(3)

Evidence sustained finding that compromise and settlement agreement among stockholders in family corporation had not been breached in the subsequent conduct of corporation by wrongful investments.

11. Compromise and settlement 🔑21
Corporations 🔑190
Limitation of actions 🔑197(1)

Evidence sustained finding that claims by minority stockholder in family corporation against controlling stockholders on account of alleged mismanagement and breaches of compromise and settlement agreements were barred by laches and limitation, irrespective of whether the three or four year statute applied.

12. Appeal and error 🔑1056(1)

Exclusion of accountant's reports was not reversible error where they contained opinions on matters in issue, practically all the figures, accounts and computations contained therein were admitted by stipulation and accountant testified at great length and covered or could have covered all material matters to which he could testify.

13. Corporations 🔑610(4½)

In voluntary dissolution proceedings allowance of attorney's fees and costs rested in sound discretion of trial court, and refusal to allow attorney's fees to petitioners, though corporation had benefited therefrom, was not an abuse of discretion. Civ.Code, § 403.

◆

Appeal from Superior Court, Kern County; Pat R. Parker, Judge.

Proceeding in the matter of St. Clair Estate Company, in the process of voluntary winding up, wherein Cora M. St. Clair, Leonard St. Clair and Security-First National Bank of Los Angeles, as trustee, were petitioners and objectors to account filed by corporation and its directors, and the St. Clair Estate Company, L. P. St. Clair, E. S. St. Clair and F. C. St. Clair, individually, and as directors of St. Clair Estate Company, were defendants. From the judgment rendered, the petitioners and objectors appeal.

Judgment affirmed.

Warren E. Libby, of Los Angeles, and Burum and Shortridge, of Bakersfield, for appellants.

Hanna & Morton and James McRoberts, all of Los Angeles, and Borton, Petrini, Conron & Borton and Harry M. Conron, all of Bakersfield, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment overruling objections to, and approving and confirming, a statement of assets and an account filed in connection with the voluntary dissolution, under the supervision of the court, of a corporation.

The St. Clair Estate Company was organized as a corporation in 1903 by the St. Clair family consisting of the father, mother, three sons and one daughter. All assets then owned by the family seem to have been turned over to the corporation, of which the father was president. The father and mother died before the end of 1904, and thereafter all of the stock of the corporation, consisting of 1,200 shares, was divided between the three brothers, L. P. St. Clair, E. S. St. Clair and F. C. St. Clair, and the sister, Cora St. Clair, each owning 300 shares. The three brothers were directors of the corporation and L. P. St. Clair acted as president until 1915, when he was succeeded by E. S. St. Clair.

It rather conclusively appears from the evidence that for a number of years the affairs of the corporation were by common consent conducted in a decidedly informal manner. Few, if any, corporate records were kept and no formal meetings were held. Corporation affairs were discussed from time to time by various members of the family as they met in Bakersfield, where they all lived. Some of the monies belonging to the corporation were deposited in two bank accounts in the name of L. P. St. Clair and these bank accounts were frequently used in carrying on the business of the corporation. It also appears that all of the stockholders, including the sister, withdrew funds from time to time from these two bank accounts and possibly from a bank account maintained by the corporation. As the trial court observed: "They had gone along as a family concern, everybody reaching in the pot, everybody taking out money, putting it in and taking it out;" The evidence fully justifies the inference that this informal method of handling the corporate affairs was known to and approved by all of these stockholders for some years.

In 1913, Cora St. Clair married a man named Cooper and moved to Oakland. Very shortly thereafter dissension arose between her and her brothers, which has continued with slight, if any, interruption ever since. In fact, it may be said to have begun even prior to that time, for in 1910 she employed an attorney to examine into the manner in which the brothers were conducting the business. In 1914, she hired another attorney, and after much negotiation L. P. St. Clair turned over practically everything standing in his name to the corporation and an agreement was reached in the form of a resolution adopted and approved by all of the stockholders on February 23, 1915. This stated, among other things, that no books or records of any kind had ever been kept by the corporation; that a report then made by the secretary was considered a fair, just and equitable report of all of the assets and business affairs of the corporation; that it was then agreed between all of the stockholders that this report was a full, true and correct statement of all assets and business transactions as far as could be ascertained; and that it was the intention of the corporation to open and correctly keep full and correct books and records showing all assets and transactions of the corporation.

Shortly after this 1915 settlement Mrs. Cooper pledged 240 of her 300 shares of stock to a bank in Oakland to secure a debt which she did not pay. Being advised of a proposed sale of this stock and in order to prevent it from falling into the hands of an outsider, the three brothers purchased this stock at a pledgee's sale in 1915, taking it in the name of E. S. St. Clair. The other 60 shares of her stock were attached in 1917 in a suit brought by the corporation and were purchased at an execution sale in 1917 in the name of E. S. St. Clair. While Mrs. Cooper now contends that she did not learn until January, 1928, that her brothers claimed that she had no interest in the corporation, it appears that in 1922 she again employed an attorney who demanded an accounting of the affairs of the corporation on the ground that she was the owner of one-fourth of this stock. He was advised in writing by E. S. St. Clair that she had no interest in the corporation and, in 1923, she testified in a debtor's examination that she was not a stockholder and L. P. St. Clair testified to the same effect.

While the three brothers seem to have taken the position that their sister was not a stockholder between 1917 and 1928, they continued to give her at least $150 a month, and larger amounts at intervals, so that she received from them during this period something over $65,000. In addition to this, the brothers, through the corporation, built a house for her use in Hollywood costing about $15,000.

In 1928, Mrs. Cooper hired another lawyer and filed an action in Kern County seeking to have it declared that one-fourth of the stock of this corporation was held in trust for her by her brothers. After negotiations extending over several months a settlement was reached early in 1929, before that action was tried. In connection with that settlement three instruments were executed. The first of these was signed by the corporation, the three brothers and Mrs. Cooper, and was acknowledged on February 2, 1929. It recites in brief that the 300 shares of stock formerly owned by Mrs. Cooper had been transferred on the books of the corporation to E. S. St. Clair; that Mrs. Cooper had filed an action claiming that these shares were held by E. S. St. Clair under an implied trust in her favor; and that E. S. St. Clair, without conceding her claim but for the purpose of compromising that action, was willing to transfer these shares to a trustee for her benefit. It was then agreed that E. S. St. Clair would immediately transfer these 300 shares to a Los Angeles bank in trust for Mrs. Cooper and after her death for her son, on terms and conditions which are set forth. It was then agreed by the three brothers, as stockholders and officials of the corporation, that insofar as they could legally do so from that day on, the "surplus profits" of the corporation should be distributed annually to the stockholders, Mrs. Cooper's share to be paid to the bank as trustee for her; that upon the sale of any assets of the corporation the portion of the receipts representing capital, as distinguished from profit, should not be reinvested but should be distributed among the stockholders; and that in referring to "surplus profits" for the purpose of dividends only future surplus profits were contemplated. The contract then contained a provision to the effect that in order to preserve the cash on hand for the payment of dividends a right to purchase 800 shares of the common stock of the Union Oil Associates, which was owned by the corporation, would be transferred to the three brothers to enable them to exercise that right for themselves if they so desired. It was then recited that in consideration of the foregoing agreements Mrs. Cooper would immediately dismiss her pending action against the corporation and her brothers, and that "it is further understood and agreed that other than as expressed in this agreement, all claims and demands of all the parties hereto, one against the other, are hereby cancelled, annulled and abrogated."

Under date of February 2, 1929, these same parties executed a supplemental agreement referring to the agreement above described and making one or two changes therein which are not material here. In addition, this supplement contained a paragraph reading as follows: "It is further agreed that the paragraph on Page six providing for a general release of claims is to be construed as operative only between Cora St. Clair Cooper on the one hand and L. P. St. Clair, E. S. St. Clair, F. C. St. Clair, and St. Clair Estate Company on the other hand. It is not intended to be operative among or between L. P. St. Clair, E. S. St. Clair, F. C.

St. Clair and St. Clair Estate Company or either or any of them."

At the same time, a third instrument was executed by L. P. St. Clair and Mrs. Cooper. This agreement recited that whereas differences had arisen between Mrs. Cooper on the one hand and L. P. St. Clair and his two brothers on the other hand regarding the management and control of the St. Clair Estate Company, and whereas an agreement had that day been reached compromising and disposing of said differences under the terms of which it had been agreed that an annual distribution of certain surplus profits should be made, with a part payable in trust to Mrs. Cooper, and in consideration of the adjustment and compromise of the differences theretofore existing and as an inducement to Mrs. Cooper to sign the compromise agreement, L. P. St. Clair thereby guaranteed to Mrs. Cooper that such dividends for her benefit should equal $500 a month during the continued existence of the corporation; that during any month that her dividend should fall below that amount he would pay to her trustee the difference; and that during any month when any dividend exceeded $500 Mrs. Cooper would cause the excess thereof to be paid to him until such time as all advances under this guarantee had been repaid.

Following this 1929 agreement the attitude of Mrs. Cooper toward her brothers appears not to have improved. She continued as before to write letters attacking both their honesty and their management of the corporation. She complained to her brothers and others that her attorney had misled her into signing the agreements by telling her that he would break the trust as soon as she had received the benefits of the settlement. Early in 1930, she demanded of L. P. St. Clair that the trust holding the corporation stock for her be broken. When he explained to her that he had been advised by counsel that this could not be done she pulled out a gun and started for him. She was disarmed but stated, "You are all milking the trust for your personal use." She made similar remarks to the other brothers and to outsiders during 1931 and 1932. In 1931, she hired another lawyer and the same year wrote to still another lawyer that she was going to sue her brothers. In 1934, she wrote to E. S. St. Clair, saying that L. P. St. Clair "has told me so many lies I will never believe him any more." In 1936 or early in 1937, she pulled a loaded gun on E. S. St. Clair and the police were called in.

Immediately after the agreement of 1929 the trust with the bank in favor of Mrs. Cooper, provided for therein, was created and at all times thereafter at least $500 a month was paid to her trustee for her benefit. At times extra dividends were declared and paid to her with the result that between 1929 and the time of the hearing that resulted in this judgment a total of $92,500 was distributed to her trustee for her benefit.

On December 22, 1938, Mrs. Cooper filed a minority stockholder's suit against her three brothers, the complaint charging them with numerous acts of misconduct throughout the life of the corporation. Shortly thereafter, proceedings were started for a voluntary dissolution of the corporation. Upon petition of Mrs. Cooper, her son and her trustee, under the provisions of section 403 of the Civil Code, the court assumed supervision over the dissolution and appointed an accountant to examine the books of the corporation and to file an account of its assets and liabilities for the period from January 31, 1929, to January 31, 1938. Later, an order was made extending the scope of the audit to cover the period from 1903 to 1938. On March 25, 1940, the auditor filed a partial report. In June, 1940, an attempt to take depositions was opposed on the ground that issues of fact had not been properly raised. See, St. Clair Estate Co. v. Superior Court, 41 Cal.App.2d 389, 107 P.2d 45. Thereafter, by agreement of the parties, the corporation and its directors filed a statement of its assets and liabilities with a petition for the approval of the account. Mrs. Cooper, her son and the trustee filed exceptions thereto. The corporation and its directors filed an answer to these exceptions and the matter proceeded to trial on the issues thus raised.

Depositions were taken and the trial commenced on November 13, 1941. After some days of trial a recess was taken during which the parties agreed upon certain stipulations as to many of the facts involved in the accounting, without waiving the right to rely upon the statute of limitations and laches as a bar to any of these matters. On March 2, 1942, the trial was resumed, and for many days testimony was received relating to the period from 1903 to 1915. At the conclusion of that testimony the court ruled that a complete settlement of all these matters had been had by the agreement of February, 1915. On motion of the three brothers the court then heard arguments on the question as to whether or not the 1929 agreement constituted a full settlement between the parties of all matters between 1915 and 1929. After hearing the evidence offered in that connection the court held that that agreement was a complete settlement and the objectors could not question matters occurring prior to February 1, 1929. Thereafter, evidence was received as to matters occurring after that date.

The court found in favor of the brothers on practically all points in issue, finding, among other things, that all matters occurring prior to February 23, 1915, were fully compromised and settled and the claims of all parties released by the 1915 agreement; that all matters prior to January 31, 1929, were settled, compromised and disposed of by the 1929 agreement; and that Mrs. Cooper, for value, had released all her claims against her brothers or on behalf of the corporation up to that time and had estopped herself and all holding under her from further litigating any such matters. The court then found in favor of the brothers with respect to each of the exceptions which had been filed to the statement and account rendered by the directors of the corporation, except for one or two matters which were otherwise covered. It was then also found that the matters complained of, arising after the 1929 settlement, were barred by the statute of limitations and by laches. A judgment was entered approving the account as filed by the directors, with slight modifications, and overruling and disallowing the objections made thereto. From this judgment Mrs. Cooper, her son and her trustee have appealed.

[1] The appellants make the preliminary suggestion that "because a substantial part of the record upon appeal is by deposition, written documents and stipulations of fact," this court should disregard the findings of fact made by the trial court and "must review and pass upon the entire record originally." The transcripts contain about 3,700 pages and there are many thousands of pages of documentary exhibits. While many facts were stipulated to, these stipulations relate to matters of detail and not to ultimate facts. As the trial court observed in this connection, "This is a fragmentary stipulation; it is not an agreed statement of fact." While much of the evidence was in written form, that portion not only contains innumerable conflicts but there are thousands of pages of oral testimony in the record which is strongly conflicting on most, if not all, of the issues presented. The clearest thing disclosed by an examination of the record is that the evidence in its entirety is decidedly conflicting and the usual rules apply.

The main issues raised on this appeal naturally fall into two classes, those relating to the affairs of this corporation prior to the 1929 agreement and the effect of that agreement thereon, and the matters occurring after 1929, including the effect thereon of the claimed breaches of that agreement.

With respect to the first of these classes the appellants contend that the court erred in that it failed to compel, and pass upon, a complete accounting as to all transactions of this corporation between 1903 and 1929. In this connection it is argued that the agreements of 1915 and 1929 were not complete compromises and settlements as held by the trial court, but were merely "accords and satisfactions" which were of no binding effect because the respondents did not thereafter comply with their terms, respectively, and because the respondents not only continued to be guilty of fraud in handling the affairs of the corporation but by concealing their actions lulled the appellants into a sense of security and confidence.

[2] Although the matter is relatively unimportant here, the evidence fully sustains the finding that the agreement of 1915 constituted a full settlement between the parties as to what then constituted the assets of the corporation and as to the conduct of its affairs up to that time. Mrs. Cooper herself testified that her understanding of what then occurred was that "the slate was wiped clean both ways." In this regard the appellants rely on evidence of various subsequent transactions as indicating that the 1915 agreement was not intended as a full settlement and on inferences which it is claimed might be drawn from certain later transactions from which it is claimed that it may be further inferred that certain portions of the 1915 agreement were conditions precedent which were never performed, with the result that no settlement ever took place. Assuming that any of these inferences are possible,

there are other possible inferences and other evidence, and the most that can be said is that a conflict appears.

[3] The appellants attack the findings to the effect that the 1929 agreements constituted a full settlement between the parties up to that time on a number of grounds. It is first contended that the first and main one of these agreements was not intended as a settlement or to relate in any way to an accounting as to the affairs of the corporation, and that it was intended only as a settlement of the action filed by Mrs. Cooper to get back her stock in the corporation. It is argued that this contract discloses that this was its only purpose because in its preamble, after reciting that Mrs. Cooper had filed an action asserting her right to the 300 shares of stock purchased and held by E. S. St. Clair, it goes on to recite that "the said E. S. St. Clair, without conceding said claim, but for the purpose of compromising said action, is ready and willing" to return the stock to her through the trust therein provided for. While the preamble thus asserts that this one brother, for the purpose of compromising the action, was willing to return the stock in this manner, the contract goes on to provide that certain things are agreed upon in consideration of "the mutual concessions and agreements herein made." Many things are then agreed upon and it is then provided that in consideration of these agreements Mrs. Cooper agrees to dismiss the action which she had brought, with prejudice, and that it was further agreed "that other than as expressed in this agreement, all claims and demands of all the parties hereto, one against the other, are hereby cancelled, annulled and abrogated." In addition to the rather plain language of the instrument there is much evidence that this first contract was intended as a full settlement between the parties and that a large part of the consideration therefor was a desire to bring to an end not only the litigation which had been started by the sister, but also her many oral and written attacks upon the integrity of her brothers and upon the manner in which they had been conducting the affairs of the corporation up to that time. A large amount of evidence along this line was received and it clearly appears not only that a dispute then existed between the sister and her brothers with respect to her ownership of the stock, but also as to whether or not the corporation affairs were being honestly conducted by the brothers. In spite of certain conflicting evidence and possible inferences which the appellants are seeking to draw it must be held that the court's finding in this regard was, up to this point, sufficiently supported by the evidence.

[4] The appellants further argue in this connection that any such effect of this first contract of 1929 is destroyed by a provision of the second or supplemental contract, which was drawn after the drafting and partial execution of the first instrument and which was executed by the parties in connection with the closing of the whole deal. While the main purpose of the supplemental contract appears to have been to increase the amount of dividends which were to be immediately declared and to accelerate the time of payment of certain future dividends to Mrs. Cooper's trustee, it was also agreed therein that the provision of the first agreement "for a general release of claims," was to be construed as operating only between Mrs. Cooper on the one hand and her brothers and the corporation on the other hand, and was not to be operative between the three brothers and the estate company or either or any of them. There is evidence that this clause was inserted in the supplemental agreement because it had been discovered that the original clause would have had the effect of cancelling a debt owed by the estate company to E. S. St. Clair and because a dispute then existed between E. S. St. Clair and L. P. St. Clair over another item, and it was not intended to cancel or interfere with these items. Not only did these matters not affect Mrs. Cooper's rights very directly but the clause making this change reaffirmed the release of claims provision in the first contract insofar as Mrs. Cooper was concerned and specified that it was to remain fully operative as between her and the other parties to both agreements. Moreover, in the third agreement executed at this time between Mrs. Cooper and L. P. St. Clair in which, in effect, he guaranteed that her dividends would amount to $500 a month, it is recited that whereas differences have arisen between Mrs. Cooper on the one hand and L. P. St. Clair and his two brothers on the other hand regarding the management of the estate company, and whereas "this day an agreement has been made and entered into compromising and disposing of said differ-

ences," it is then provided that "in consideration of the adjustment and compromise of the differences heretofore existing," he agrees to guarantee the amount of dividends to her in the manner described. Both the instruments themselves and the evidence received in this connection support the finding that this was intended as a full settlement insofar as the rights of Mrs. Cooper were concerned up to that time, and that she thereby waived the right to question or attack any previous transactions or any prior conduct of the affairs of the corporation by her three brothers.

[5] However, the appellants further contend that even though Mrs. Cooper thus personally made a full settlement with her brothers up to that time the effect of the supplemental agreement was to make that settlement and release of claims inoperative as between the brothers and the estate company as a corporation. It is then argued that the corporation is a separate entity, that the brothers as directors of the corporation occupied a fiduciary capacity and were under the duty of fully accounting to the corporation, that anything that is for the benefit of the corporation is also for the benefit of its stockholders, and that it follows that Mrs. Cooper as one of the stockholders was entitled in this proceeding to go into all of the affairs of the corporation and anything that had been done by its directors prior to 1929, irrespective of her personal agreement to the contrary. It is pointed out that the trial judge, in a preliminary order for judgment in which he gave a general expression of his views on many of the matters in issue and which was later referred to and adopted as a part of the findings, used the expression that "the corporate entity may and must be disregarded." However, the judge in that document further pointed out that this was a family corporation, that its affairs were informally conducted for many years with the apparent consent of all of the stockholders, that in making the agreements of 1929 all of the stockholders had joined, that these had been made after a full and complete investigation and with the aid of counsel at all times, and that all of the stockholders had entered into the same with the idea and for the purpose of fully settling all matters as between Mrs. Cooper on the one hand and the brothers and the corporation on the other. It was then pointed out that in order to do justice in such a case some of the ordinary rules governing corporate management should not be applied and that the facts in this case compel an abandonment of the theory of corporate entity "in as far as all acts of the parties may be weighed by that standard." It is here argued that since the corporate entity cannot be entirely disregarded in such a proceeding for dissolution, the view thus expressed by the trial judge was erroneous and of itself requires a reversal.

There is a very real sense in which the corporate entity should be disregarded in this case, to a certain extent and for certain purposes, and this seems to be what the trial court had in mind in making the statement referred to. While the corporation remains as a separate entity its only stockholders were the four members of this family and the entire controversy is between the sister on the one hand and the three brothers on the other hand with respect to whether or not the brothers have properly and honestly managed her property, consisting of her interest in this corporation. Mrs. Cooper's personal interest in the only property in question and her interest in the same property as a stockholder in the corporation are, as a practical matter, identical and cannot be distinguished and separately treated without leading to an obvious injustice. It would be clearly unjust and unreasonable to hold that she was personally bound by her agreement to abide by the settlement made in 1929 but, because the corporation was a separate entity, she was not bound as a stockholder, and that through that side of her dual nature she was entitled to compel an accounting with respect to prior matters in total disregard of her agreement, while still retaining the benefits she had received both personally and as a stockholder as a result of that settlement. By means of that agreement she not only got back the stock which had been lost to her through her own fault but she escaped the necessity of accounting for some $65,000 she had received between 1915 and 1929, and between 1929 and the beginning of these proceedings she received an additional $92,500 in dividends. She had agreed that all of her claims and demands against her brothers and against the corporation should be cancelled, annulled and abrogated as of 1929. As a practical matter the brothers did the same thing except that a few minor matters were left for adjustment between them. All of the stockholders having thus agreed to a settlement, at least insofar as Mrs. Cooper's rights are concerned, and the corporation having been a party to that agreement, it should not now be considered as an entirely separate entity insofar as the rights of Mrs. Cooper are concerned and merely for the purpose of permitting her to do indirectly what she could not do directly. No other rights are involved, no one else is complaining, and we think that to this extent and for the purpose of determining Mrs. Cooper's rights in this regard the corporate entity should be disregarded in the sense that it may not be relied upon for the purpose of restoring to her the rights and privileges which she has specifically waived. We find nothing in this theory of separate entity on the part of the corporation which is sufficient to overcome or upset the findings made. The corporate entity may and should be disregarded to the extent that it should not be taken as controlling in order to permit her to distinguish between her personal rights and her rights as a stockholder, and this for the express purpose of destroying and setting aside a settlement made many years ago with the only other stockholders.

[6] It is further contended that the 1929 agreement did not constitute a full settlement up to that time for the reason that the respondents did not, in the succeeding years, comply with certain of its provisions and that while continuing to maintain full control over the affairs of the corporation they lulled the appellant into a sense of security and confidence. It is sufficient to say here that the claimed subsequent breaches of this contract, if they occurred, did not have the effect of destroying the settlement made up to that time. Assuming that such breaches occurred they were with respect to agreements concerning the future conduct of corporate affairs, and were not as to matters which were conditions precedent to the settlement made. The claims that these agreements were not complied with and that the appellants reposed full confidence in the brothers will be later considered.

[7] With respect to what occurred after the 1929 agreement, the appellants first contend that seven groups of findings with respect to the exceptions made to specific items of the report and account filed by the respondents are not sustained by the evidence. For the sake of reasonable brevity, it will be necessary to treat these contentions in their broader aspects without going too much into detail. The main contention in this regard is that certain purchases of Union Oil stock were made by two of the brothers personally, and that these were passed over to the corporation and treated as corporate transactions when, as it later developed, a loss was incurred. In August, 1929, the directors of the corporation authorized the purchase of 1,500 shares of Union Oil stock through a brokerage firm. $30,000 was borrowed from a bank on an estate company note. In ordering the stock an estate company check for $30,000 was sent in a letter signed by the corporation through its president. The estate company finally paid for all of the stock and retained it and received dividends on it for years. The stock went up four points after the purchase but this was followed by the market crash of November, 1929. The appellant contends that the record shows that the brokerage firm entered this order on E. S. St. Clair's account; that the books of the corporation in connection with this transaction were not properly kept; that no entry was made on its books of any obligation to pay the balance of the purchase price to the brokerage firm; that the income tax return for the corporation for 1929 did not disclose this purchase; that certain balance sheets and statements furnished to the appellant and to her trustee did not show the purchase; that in January, 1930, certain journal entries in the corporation books were changed and then restored in February, 1930; that a statement made in May, 1931, failed to reveal the existence of the note payable to the bank; and that the statements furnished to the trustee in January, 1930, and January, 1931, failed to show a loss on this transaction. It is, therefore, argued that it conclusively appears that the brothers intended to take the profit from this transaction personally, but changed their minds and turned it over to the corporation when the loss finally resulted. While certain irregularities appear and some of them may even be said to look suspicious, the entire question was one of fact for the court. In view of the documentary evidence and the records kept it would seem impossible that any of the brothers could have ever established a claim to this stock personally. At least two of the brothers purchased other Union

Oil stock about the same time, on which they took their loss, and the brothers all testified that the transaction here in question was an estate company purchase and was at all times so considered and handled. In spite of any possible inferences to the contrary, which might be drawn from portions of the evidence, the evidence is sufficient to support the findings made.

About the same time two other purchases of Union Oil stock were made, one of 500 shares by the Bakersfield Laundry, which was wholly owned by the estate company, and one of 200 shares in the name of an old employee of the laundry. It is also contended that these were individual purchases by the brothers and shunted over to the estate company when a loss ensued. The 200 shares purchased in the name of the old employee were taken over by the laundry in 1929, before the crash occurred. It appears that the original intention was to reward a faithful employee but that the laundry took it over when the market started to go down. In spite of a number of irregularities in this connection it appears that this stock was paid for with laundry funds and that the laundry retained the stock and collected dividends thereon for years. Again, no more than a conflict in the evidence appears.

[8] It is next contended that the court erred in charging Mrs. Cooper with $4,500 to be deducted from the amount found to be due her upon the distribution. Between 1929 and 1938 she had been paid this amount over and above the dividends paid to each of her brothers. This arose from the fact that L. P. St. Clair had guaranteed that her dividends would be at least $500 a month. She now contends that this was a personal agreement with this brother, that she was entitled to consider all she received as dividends and that she is entitled to her full share on distribution regardless of this $4,500, and that if she has received any such other payment it is a matter to be adjusted (she apparently means litigated) between her and L. P. St. Clair personally. Not only is she not entitled to payment of the same amount twice but the contract between Mrs. Cooper and L. P. St. Clair provided that during any month when the dividends exceeded $500 she should "cause the excess thereof to be paid" to L. P. St. Clair until such advances had been repaid. The court followed the intent of the contract and no reason appears for prolonging the litigation between these parties merely on the ground that a different form of bookkeeping should have been used.

[9] It would serve no useful purpose to comment in detail on the remaining findings which are objected to. One relates to an item which arose in 1920 and which was fully settled by the 1929 agreement; one relates to a purchase of shares in another corporation by E. S. St. Clair in 1931 in which the court found, on sufficient evidence, that it was his individual purchase; and the others relate to matters in which nothing appears but a conflict in the evidence with the exception of two matters where error was conceded and correction was or is to be made by consent of the respondents. In the latter connection, an amended account was filed at or near the conclusion of the trial in which E. S. St. Clair was charged with certain items amounting to $6,681.81 arising from matters which arose prior to 1929. Some question arose as to these matters and E. S. St. Clair consented that he be charged with them. It is now argued that because this concession was made the whole matter of accounting between 1915 and 1929 was opened up. Nothing appears in the record to sustain this contention and it is without merit. Complaint is made that in certain instances uncertainty and conflict appears in the findings and in others that no findings at all were made. The alleged uncertainty and conflict arises from the fact that the findings referred in general terms to certain paragraphs of what may be called the pleadings, but on investigation and analysis any uncertainty and any apparent conflict disappears. In the cases where no findings were made none were necessary because of the court's holding that all matters prior to 1929 were barred. All necessary findings were made and we are unable to discover any finding which is not sufficiently supported by the evidence.

[10] The appellant further contends that the respondents breached the 1929 agreement by purchasing the shares of Union Oil stock later in 1929 and by making one or two other investments. In effect, it is argued that under that agreement the directors of the corporation had no right to continue business or to incur debts but were obligated to use all monies received for the purpose of increasing dividends and distributing the same to the

stockholders. The court found that no such violation of the contract occurred and the evidence supports that finding. The 1929 contract contains no provisions prohibiting the brothers, in conducting the affairs of the corporation, from borrowing money or making investments or from continuing to do business in the manner which had been followed for many years. While the agreement provided that the "surplus profits", and that part of the proceeds of the sale of any assets which represented "capital" as distinguished from "profit", should be distributed, there was no provision restricting the use of other funds or forbidding a continuance of any business transactions. Moreover, as to what part of the funds used in these investments came from capital and not from profit we are not advised. While some of the evidence is somewhat suggestive of a violation of this part of the agreement, the most that can be said is that there is a conflict both with respect to the evidence and the reasonable inferences therefrom. And it may be inferred that Mrs. Cooper knew of these transactions as early as 1934. Her testimony is that she knew about them in 1934 or 1935, that she was not sure of the exact date because "I didn't draw a ring around it," and that she then protested that this was a violation of the 1929 agreement.

[11] The court found that all matters involved herein, with the exception of the $4,500 item above mentioned, are barred by the statute of limitations and by laches. We think these findings are supported by the evidence. Although she now contends that she reposed great confidence in her brothers and was lulled by them into a sense of security through these more than thirty years, the record quite clearly indicates the contrary. She employed attorneys to investigate the conduct of the affairs of the company as early as 1910 and many times thereafter. She had a rather full knowledge of the way these affairs were conducted up to 1913 and not only has had considerable knowledge since that time but at frequent intervals through all these years she has started investigations, made complaints, and has repeatedly, both orally and in writing, charged her brothers with dishonesty, with concealing and misrepresenting the facts in connection with the corporation, with mishandling its affairs, with taking the assets of the corporation and using them for their own purposes, and with cheating her in various ways. In many letters, running from 1923 down to shortly before these proceedings began, she not only repeatedly made these charges but expressly said that she could not believe her brothers and that she had no confidence in them. As the trial judge observed in his order for judgment: "Coming to this phase of confidence, the record amply supports the compellable conclusion that from a period beginning around 1910 the objector had confidence in nobody. Her first expressions show lack of confidence not only in the petitioners but likewise in other members of her family. She was constantly, from 1910, consulting attorneys, bankers and businessmen, carrying to them a story of the brothers' thievery, dishonesty and mishandling of the affairs of the family. She has continuously questioned the honesty and integrity of all counsel who had ever advised her, and while it is possible that some counsel of high repute may from time to time display the wolf under lamb's clothing it isn't likely that the seven or eight or even ten counsel contacted by her through the years would all betray her. Likewise at the time when some phases of litigation were carried on in the courts of Los Angles County she has no hesitation in announcing the corruption of the courts. Further, her reference to the settlement of 1929 wherein she still maintains that it was her theory to go ahead and make a settlement with the petitioners solely for the purpose of setting it aside after she had gained the fruits of that settlement. Considering all of these things and drawing the only permissible inferences therefrom, it would seem absurd to make a finding that she was always one who had the utmost confidence and faith in the integrity of those handling the affairs of the corporation. Whatever presumptions otherwise may be indulged in on this point would certainly receive a severe jolt from the broadcast letters reflecting on the integrity of all concerned."

There can be no question that the appellant had ample means of knowledge of the things of which she now complains (Consolidated Reservoir & Power Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268), and the court's findings in this regard are amply supported by the evidence. Some argument is presented as to whether the three-year statute or the four-year statute of limitation applies. Since it so clearly appears that all material matters, with a slight exception, are barred in either case, as well as by laches, it is unnecessary to go into this matter further. As the trial judge further said: "There is not a word of testimony which would convince or remotely persuade that the equitable features which excuse laches and delay are present. And further, taking the case itself in all of its ramifications, if there ever was a case presented where the rule of laches should be enforced it is a case of this sort. The record itself discloses how difficult and almost impossible it is to run down the hundreds of transactions covering this period of years and reach any maintainable conclusion. Indeed, as counsel for the objector stated during the argument, 'the main trouble in this case is that almost every fact points four or five different ways.'"

[12] It is contended that the court erred in not admitting in evidence the reports of an accountant who had been appointed by the court to examine the books and records of the corporation for the period from January 31, 1929, to January 31, 1938, and later ordered to report on the entire period of time from 1903 to 1938. He filed partial reports, stating that he was unable to get much of the information he desired. His reports contained not only accounts and summaries of various items but also opinions and conclusions on matters which were for the court to decide. Objections to their receipt in evidence in toto were sustained but the figures, accounts and computations contained therein, or practically all of them, were admitted by stipulation. This accountant was himself a witness and testified at great length. Any material matters to which he could testify were either covered or could well have been. We find no reversible error in this connection.

[13] The last point raised is that the court erred in refusing an allowance of costs and attorney's fees to the appellant. This part of the proceeding was for the benefit of the appellant and the only benefit which appears to have accrued to the corporation is a reduction of the claim of one of the brothers against the corporation in the amount of $6,681.81. Whether this error would have been discovered or corrected in any event we cannot know. Attorney's fees were allowed to neither side and the entire matter was one resting in the sound discretion of the trial court. If there was any abuse of that discretion it has not been brought to our attention.

This appeal has been ably presented by counsel on both sides. It has seemed to us neither necessary nor advisable to prolong this opinion by considering in detail all of the suggestions and arguments made, or by reviewing the entire evidence in connection with each of the many points directly and incidentally made. Some of the bitterness that has grown with the years has crept into the briefs, and many of the charges here made are based upon suspicion, conclusions and disputable inferences. Without completely reviewing all of these matters, we have attempted to present the general picture and to briefly consider and pass upon the controlling issues.

The situation has been unfortunate, and the entire blame cannot be placed on either side. While the brothers, in conducting the affairs of the corporation, have done things that should not have been done, the record also discloses that they have had much to contend with, and all of the so-called "equities" are not in favor of the sister. The appellants claim the corporation had $550,000 in assets at the time of the 1929 agreement. Since then the dividends amount to some $360,000. According to the account filed and approved about $400,000 still remains to be distributed. In view of the well-known losses sustained by many corporations during the years following the 1929 crash, this showing is hardly conclusive of inefficient or dishonest management. Moreover, Mrs. Cooper received large sums prior to the 1915 agreement, and received $65,000, as well as a house to live in, between then and 1929, even though she may not have been legally entitled to all of it.

The trial court was faced with a complex factual situation where many things had been done which could not be undone, where other things could not be changed without working an injustice, and where, in fairness to all parties, practical considerations could not be ignored. Its findings and conclusions are not only supported by the evidence but the record indicates that they are in accord with justice. This long continued controversy should be ended, and the voluntary dissolution of the corporation concluded as speedily as possible.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

66 Cal.App.2d 894

PEOPLE v. PEAK.

Cr. 2298.

District Court of Appeal, First District, Division 1, California.

Nov. 22, 1944.

Rehearing Denied Dec. 7, 1944.

Hearing Denied Dec. 21, 1944.

1. Assault and battery 🔑48, 56

In a simple assault there must be an ability and attempt to commit the offense, while in an assault with a deadly weapon the character of the weapon and method of its use become an essential of the offense. Pen.Code, §§ 240, 245.

2. Assault and battery 🔑56, 82

In offense of assault with a deadly weapon, malice is not an element, and an intent to use deadly instrument may be implied from manner of its use. Pen.Code, § 245.

3. Assault and battery 🔑56

Although it is not an assault with a deadly weapon to fire a gun into the air for purpose of frightening another, it is an assault, without regard to aggressor's intention, to fire a gun at another or in direction in which he is standing. Pen.Code, § 245.

4. Assault and battery 🔑92

Evidence supported conviction of assault with a deadly weapon based upon defendant's shooting of his daughter and son-in-law during family dispute. Pen.Code, § 245.

5. Criminal law 🔑20

If intent is not made an affirmative element in an offense performed knowingly, the law imputes a criminal intent. Pen. Code, §§ 7, 8, 20, 21, 26.

6. Indictment and information 🔑166

Intent need be alleged and proved only in offenses where voluntary commission of an unlawful act is based upon the essential element of specific intent, and the element of criminal negligence is a substitute for proof of specific intent. Pen.Code, §§ 7, 8, 20, 21, 26.

7. Assault and battery 🔑92

Evidence that defendant had made threats to shoot son-in-law, together with actual shooting and surrounding circumstances, authorized conviction of assault with a deadly weapon. Pen.Code, §§ 7, 8, 20, 21, 26, 245.

8. Witnesses 🔑193

A third person who overhears communication between husband and wife, whether with or without their knowledge, and whether surreptitiously or openly, may testify regarding what he thus learns, although communication may be, as between husband and wife, one of a confidential character. Code Civ.Proc. § 1881, subd. 1.

9. Criminal law 🔑394

If evidence offered in support of a fact in issue in criminal prosecution is relevant, it is generally admissible, although it may have been obtained unethically, wrongfully, or illegally.

10. Criminal law 🔑395

In prosecution for assault with deadly weapon based upon defendant's shooting of daughter and son-in-law, letters exchanged between defendant's daughter and son-in-law, which were offered by defendant for purpose of establishing cordial relationship existing between daughter and defendant during absence of son-in-law in army, although illegally obtained by defendant's wife, were admissible under statute. Pen.Code, § 245; Code Civ.Proc. § 1881, subd. 1.

11. Criminal law 🔑1169(2)

Where letters exchanged between defendant's daughter and son-in-law were offered in evidence by defendant for purpose of establishing cordial relationship existing between defendant and daughter during absence of son-in-law in army, and one of the letters was admitted in evidence, rejection of other letters merely reiterating letter which was admitted was not prejudicial to defendant. Pen.Code, § 245; Code Civ.Proc. § 1881, subd. 1; §§ 1938, 1939, 2044.

12. Criminal law 🔑675

Generally, if a party is not prejudiced by rejection of additional evidence of a cumulative character, the court in its discretion may limit number of witnesses or number of documents to prove a particular link in the chain of evidence.

13. Criminal law 🔑822(8)

In prosecution for assault with a deadly weapon based upon defendant's shooting of daughter and son-in-law, instruction on self-defense and defense of habitation, when read as a whole, were not erroneous.

14. Criminal law ⚷815(1), 823(18)

Where a so-called formula instruction is given, directing verdict in the event jury finds certain facts to be true, it must embrace all elements essential to a recovery, and omission therefrom of any of such elements amounts to error, the prejudicial effect of which is not overcome by inclusion of omitted elements in other instructions.

15. Criminal law ⚷815(1)

An instruction distinguishing the relationship between owner and guest on one hand, and that of landlord and tenant on the other, and stating that, if jury found that defendant was not a tenant of son-in-law but that defendant was using premises as licensee of son-in-law, defendant did not have any right to assault son-in-law and his wife with a deadly weapon when they were attempting to enter premises, was not a formula instruction, and hence was not required to be a complete statement of law upon which jury could base verdict ignoring all other instructions. Pen.Code, § 245.

16. Criminal law ⚷815(5)

Defendant could not complain that certain instruction ignored doctrine of self-defense, where instruction did not purport to be a formula instruction, and jury was instructed upon every phase of self-defense suggested by defendant. Pen.Code, §§ 197, 245.

17. Criminal law ⚷822(1)

If instructions harmonize as a whole and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, or because a separate instruction does not contain all of the elements which are gathered from the instructions as a whole.

18. Criminal law ⚷351(3), 552(2)

Flight, standing alone, is not sufficient to establish guilt, but flight immediately after commission of offense or after one is accused of a crime is a circumstance that may be considered by jury. Pen.Code, § 1127c.

19. Criminal law ⚷778(11)

Instructions covering subject of flight were not erroneous on ground that they were without evidentiary support, where defendant disappeared the day grand jury returned indictment against him and remained away for approximately one week and then returned and surrendered. Pen. Code, § 1127c.

20. Witnesses ⚷280

Trial judge did not abuse his discretion in refusing to require witness called by state in rebuttal to answer question, "Tell me everything you did from the time you got there until you left * * *", asked by defendant on cross-examination.

21. Criminal law ⚷1170(2)

Refusal to require witness called by state in rebuttal to answer question asked by defendant on cross-examination was not prejudicial, where answer to question appeared numerous times in testimony.

PETERS, P. J., dissenting.

Appeal from Superior Court, Marin County; Ben R. Ragain, Judge.

George Peak was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Leo R. Friedman and Wm. H. Penaat, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., David K. Lener, Deputy Atty. Gen., and Harold J. Haley, Dist. Atty., of San Rafael, for respondent.

WARD, Justice.

The appellant, George Peak, shot and seriously wounded his daughter Jane Epidendio and her husband Ernest Epidendio with a shotgun during a family dispute over the attempted removal by the Epidendios of certain furniture and personal belongings of which they were the owners from a dwelling owned by Ernest Epidendio and in which appellant was then living. There was but one shot fired, and appellant was charged in one indictment, containing two counts, with violating section 245 of the Penal Code—assault with a deadly weapon. He was found guilty by a jury on each count and he appeals from the judgments of conviction and the orders denying his motions for new trial.

Ernest Epidendio who with his wife Jane operated a grocery store in Larkspur, Marin County, lived at 12 Sycamore Street, which property belonged to him. Upon Ernest's induction into the United States Army, Jane invited her parents to live with her at the Sycamore Street residence. Prior to such time the Peaks had been caring for the child of the Epidendios. For this they were paid $35 a month in cash and given a $15 drawing account on the grocery store. At the time they took up their residence with Mrs. Epidendio it was agreed that the $35 a month payment should cease; that the Peaks were to pay no rental; that Mrs. Epidendio was to pay the bills for the utilities and furnish the groceries; that Mrs. Peak was to buy all the meat. Shortly thereafter, members of Ernest's family who had assisted his wife at the store after he went into the service, being unable to continue such work, Mrs. Epidendio arranged for her father to help her with the business. At first he refused to accept payments, but finally agreed to take $35 a week for four weeks and thereafter $50 a week, also one-half of the profits of the store during the time of his employment. Mrs. Epidendio said she made the payments of salary in cash and kept no record of them; Mr. Peak denied that he was paid any salary.

Upon Ernest's discharge from the army he returned to the Sycamore Street address and the two families lived together. Discord developed almost immediately, however, and the record is replete with recitals of quarrels, during some of which Mrs. Epidendio persuaded her husband to leave the house in order to avoid any violence. Shortly after Ernest's return, Mr. Peak ceased to report for duty at the store, and Ernest tendered him a check for $585 which he said represented as nearly as he could figure one-half of the profits of the business during the time of Peak's employment. Peak did not accept the check, and Mrs. Epidendio claims the trouble started when her father claimed he was being cheated and wanted more money. Owing to the continued discord, Epidendio and his wife moved to an apartment over their store, taking with them only what clothing they needed for immediate use. From time to time Mrs. Epidendio went back to the house and procured articles of clothing for herself and her husband, trying all the while to persuade her parents to leave so that she and her husband could move back into their home. On such occasions arguments developed and bitter words were exchanged.

On November 14th, Ernest, his wife, two of his brothers and four other men in two trucks, one a moving van, proceeded to the Sycamore Street residence. Upon their arrival the party alighted from the trucks and started to ascend the stairs of the dwelling. Mrs. Epidendio was leading, and as she opened the screen door and inserted her key in the lock, her mother came to the inside of the door, threw on the safety catch and called Mr. Peak. Mrs. Epidendio states that she told her mother that since the Peaks would not move out, she and her husband wanted to remove their furniture and belongings. Her mother said she was told they had come to move the furniture and to dispossess her parents at the same time. The father had in the meantime come to the front of the house and could be seen through the front room window at the left of the outside door. He had pulled aside the curtain and was pointing a double barreled shot gun at his daughter. Calling vile names he threatened to shoot unless the party departed. Mrs. Epidendio told him to go ahead; she believed "he was too yellow." Since entrance to the house could not be gained, Mrs. Epidendio left, going to the assistant chief of police of Larkspur, to whom she gave an account of the happenings. She then returned to her apartment, armed herself with a small gun and went back to the scene of the trouble. Upon her arrival there the gun was immediately taken away from her by one of her husband's brothers, who put it in his truck. Mr. and Mrs. Epidendio then left with the moving man—who had arrived at the conclusion by this time that his services would not be required—and called their attorney, who advised them to take their personal possessions but to leave the furniture. They accordingly went again to the house and, with their friends, once more ascended the stairs, Mrs. Epidendio telling her parents that she had been advised by her attorney that she had the right to take her personal effects. She saw her father just inside the door with the gun still in his hands—and he threatened to shoot if they did not go away. Ernest opened the screen door and put his key in the lock. At the same instant Peak discharged the gun through the glass partition of the door, injuring his daughter in both legs and feet, and her husband in one foot.

[1] Appellant contends that the state failed to establish any intent on his part to injure or inflict bodily harm upon any person. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Penal Code, sec. 240. "Every person who

commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable" as provided by section 245 of the Penal Code. The difference between the offenses referred to in sections 240 and 245 is that in the latter a deadly weapon is involved. In re Shull, 23 Cal.2d 745, 146 P.2d 417. In the simple assault offense there must be an ability and an attempt to commit the offense. In the greater offense the character of the weapon and the method of its use become an essential of the offense. People v. McCoy, — Cal.App.2d —, 147 P.2d 54; People v. Cook, 15 Cal.2d 507, 102 P.2d 752.

[2-4] In the offense of assault with a deadly weapon, malice is not an element of the crime; an intent to use the deadly instrument may be implied from the manner of its use. If the act is wrongful and the firing of a gun under the circumstances is unlawful, the intent may be inferred from the method used, including the position of the parties and all of the surrounding circumstances. "Where the act is both unlawful and wrongful, and well calculated to inflict serious personal injury, the law will imply malice and an unlawful intention and override any actual intention existing in the mind of the aggressor. Thus, while it is not an assault to fire a gun into the air for the purpose of frightening another, it is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing. The law will not tolerate such a reckless disregard for human life." 4 Am.Jur., p. 130, sec. 6. See 3 Cal.Jur., pp. 202, 203, sec. 19; People v. Leyba, 74 Cal. 407, 16 P. 200; People v. Lim Dum Dong, 26 Cal.App.2d 135, 78 P.2d 1026; People v. Bumbaugh, 48 Cal.App.2d 791, 120 P.2d 703. In the present case, the manner of the use of the shotgun and other circumstances are all questions of fact that may be decided by the jury. The implied finding in the verdict—that a felonious assault as designated in Penal Code section 245 had been committed by appellant—may be sustained. People v. Bumbaugh, supra.

The cases cited by appellant as holding that in the offense of assault with a deadly weapon there must be a specific intent, do not go that far. A fair sample is People v. Dodel, 77 Cal. 293, 19 P. 484. In the Dodel case the defendant, moving away from the complainant, had a knife in his hand but did not use or attempt to use it. Two instructions are there criticized, the gist of the second being that there must have been an attempt to use the weapon. The drawing of a weapon, the manner in which it was held, and the statements made, if any, by the holder of the instrument are all circumstances which may be considered in determining whether there was in fact an assault with a deadly weapon. People v. Adams, 76 Cal.App. 188, 244 P. 114.

The court instructed the jury that in the offense of assault with a deadly weapon no specific intent is necessary, and gave additional instructions upholding the first principle criticized. The cases cited involve offenses wherein specific intent must be proved, viz., assault with intent to commit rape, People v. Johnson, 106 Cal. 289, 39 P. 622; murder, People v. Jones, 160 Cal. 358, 117 P. 176; People v. Flannelly, 128 Cal. 83, 60 P. 670; and assault with intent to commit murder, People v. Mize, 80 Cal. 41, 22 P. 80; People v. Miller, 2 Cal.2d 527, 42 P.2d 308, 98 A.L.R. 913; and People v. Snyder, 15 Cal.2d 706, 104 P.2d 639. The latter offense is the nearest approach to the offense of assault with a deadly weapon. In the assault to murder, the crime must be proved by evidence or inferences reasonably deducible therefrom that there was a specific intent to kill; the specific intent to kill is lacking in the offense where the assault is made only to produce bodily injury. In such a case the means or instrument used, together with other circumstances, is sufficient proof of the general intent to inflict bodily injury.

[5-7] In every public offense there must exist a joint operation of act and intent, or criminal negligence. Penal Code, sec. 20. There are some crimes in which a wrongful intent is presumed based solely upon the commission of the act itself. If intent is not made an affirmative element in an offense performed knowingly, the law imputes a criminal intent. The law assumes an intent as an essential of a crime. Even in a case where the felony is designed and the life of another is taken accidentally the law presumes an intent to kill. It is only in offenses where the voluntary commission of an unlawful act is based upon the essential element of specific intent that intent should be alleged and proved. The element of criminal negligence is a substitute for proof of specific intent. Penal Code, secs. 7, 8, 20, 21, 26; 7 Cal.Jur., pp. 850, 851, sec. 11 et seq.; 14 Am.Jur., p. 782 et seq., sec. 23. In the present case

there is evidence that appellant had made threats to shoot Ernest Epidendio. If believed, that evidence, together with the actual shooting and the surrounding circumstances, is sufficient proof of the offense charged in view of the fact that the appellant's explanation was not acceptable to the jury.

At the time of the trial appellant's attorney had in his possession six letters written from Jane to Ernest and one from Ernest to Jane. It is contended that the letters establish the cordial relationship existing between Jane and her father during the absence of Ernest in the army, and that "They disclosed a background showing animosity on the part of Ernest Epidendio's family toward defendant and established a condition showing that this animosity would operate upon Ernest Epidendio to the extent of causing him in turn to entertain animosity toward the defendant." Several of the letters were read by Jane to her mother before mailing. These letters were admitted in evidence upon the theory that Jane had waived the privilege by publication of their contents to her mother. All of the letters were obtained by the mother from the botton drawer of a dresser in the bedroom used by Jane and Ernest or from other places in the house.

The admissibility of the letter written by Ernest to Jane, marked as an exhibit for identification, may be disposed of immediately. It reads: "Hello Sweetheart I just received your letter and Alice's [Ernest's sister] as well and it sure upset me an awful lot to hear about your misunderstanding you two had. I wrote Alice and told her to tell you that Im sure she did not know what she was saying after all if it wasnt for your Dad that the store would have had to close in two weeks if it depended on my family. So Honey I want you to do me this one favor and please keep peace in the families and gives Alice another Chance at least to help while you are away with me in New York wont you please? Well honey as always I sure cant tell you how much I really love you and hope you feel the same." This letter, written in the month of August 1943, does not show animosity on the part of Ernest to the defendant Peak, or that Jane after reading the letter held any animosity toward her father. It does not indicate favoritism on the part of Ernest for his own family, and was not proper impeaching evidence of any statement made by Ernest based upon facts which were not discovered until his return from the army in September 1943.

[8] The purpose of section 1881 of the Code of Civil Procedure is to hold intact the confidence which naturally arises from the relationship of husband and wife. It is not the act of communication but the substance thereof that is held legally inviolate. The propriety of the rules covering the admission of written communications between husband and wife which have fallen into the hands of third parties, is similar to the oral communications rule; that is, conversations between spouses overheard by a third party. "* * * the rule is well settled that a third person who overhears a communication between husband and wife, whether with or without their knowledge, and whether surreptitiously or openly, may testify regarding what he thus learns, although the communication may be, as between the husband and wife, one of a confidential character." 63 A.L.R., pp. 108, 109. "For, even though a conversation between a husband and wife was intended to be confidential, a third person who overheard it, whether his presence was known or not, may testify as to what was said. 40 Cyc. p. 2359; State v. Center, 35 Vt. 378; 5 Wigmore on Ev. (2d Ed.) § 2339, and § 2326." Nash v. Fidelity-Phenix Fire Ins. Co., 106 W.Va. 672, 146 S.E. 726, 727, 63 A.L.R. 101, 104.

[9] Evidence produced by third parties without connivance of a spouse, or obtained without the use of force or violence upon a spouse but merely by accident or by design of the third party, is similar to oral admissions accidentally or designedly overheard. "In criminal prosecutions, in particular, evidence is frequently obtained by methods that are morally reprehensible and offensive to fair dealing, under circumstances which meet with disapprobation of the courts, and, in many instances, by means that are illegal. If, however, evidence offered in support of a fact in issue is relevant and otherwise competent, it is generally admissible, although it may have been obtained unethically, wrongfully, or unlawfully or illegally, as where it was secured by trespass, unless its admission will violate a constitutional guarantee of the person against whom its admission is sought or is in contravention of a statutory enactment." 20 Am.Jur., pp. 352, 353, sec. 393. When obtained by design the means of obtaining the evidence is not legally excused, but in the interest of justice it is ignored upon the

theory that the wrongful invasion of premises is a matter for which ample remedies are provided. It is not the search and seizure but the unreasonable search and seizure which is condemned. United States v. Bell, D.C., 48 F.Supp. 986. See, also, Wigmore on Evidence, 3rd Ed., Vol. VIII, sec. 2183 et seq.

It is true that various jurisdictions are not entirely in harmony with the above stated principles that redress for wrongful possession is not the exclusion of pertinent evidence, so we turn to California decisions which must be accepted as the guide post directing the rule to follow. In 8 Cal.Jur., p. 78, sec. 178, it is set forth: "* * * that it is no objection to papers or other subjects of evidence which are pertinent to the issue that they were illegally taken from the possession of the party against whom they are offered or were otherwise unlawfully obtained. This rule is based upon the doctrine that when evidence is offered, the court will consider only its competency and not a collateral issue as to the method by which it was obtained. See People v. Mayen, 188 Cal. 237, 205 P. 435, 24 A.L.R. 1383; People v. Le Doux, 155 Cal. 535, 102 P. 517; People v. Kelley, 22 Cal.2d 169, 137 P.2d 1; People v. Gonzales, 20 Cal.2d 165, 124 P.2d 44; People v. Eiseman, 78 Cal.App. 223, 248 P. 716; People v. Beilfuss, 59 Cal.App.2d 83, 138 P.2d 332; In re Ajuria, 188 Cal. 799, 207 P. 516; People v. Hrjak, 85 Cal.App. 301, 259 P. 353; People v. Cook, 148 Cal. 334, 83 P. 43. In People v. Gonzales, supra, it was held one may have civil and criminal remedies against the illegal act of taking property but the state is not precluded from using evidence so obtained. At page 169 of 20 Cal.2d, at page 46 of 124 P.2d, the court said: "* * * the accepted rule in this state, as in many others, permits the introduction of improperly obtained evidence on the ground that the illegality of the search and seizure does not affect the admissibility of the evidence." If the state may use such evidence to prove guilt there does not appear any logical reason why the accused may not in such manner prove innocence or raise a reasonable doubt as to guilt.

[10] We have considered subd. 1 of section 1881 as applied to the facts herein and have concluded that all of the letters were admissible when limited to a consideration of that particular section but not otherwise. "We are not convinced that said section was intended in any case to shield a party to an action and deprive the adversary of the benefit of the testimony of such party." In re Strand, 123 Cal.App. 170, 172, 11 P.2d 89, 90. "If it be conceded that the letter was illegally obtained this would not operate to exclude it from evidence on the ground that it was a privileged communication, or that the evidence was self-incriminating. Though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. 1 Greenleaf on Evidence (16th Ed.) § 254a." People v. Swaile, 12 Cal.App. 192, 196, 107 P. 134, 137, approved in People v. Baender, 68 Cal.App. 49, 228 P. 536. The People, in a criminal proceeding against one spouse, may prove declaration of the other spouse if otherwise admissible. In other words, by code provision one spouse may be an incompetent witness against the other, but the statements of one spouse made to some one else may be proven by competent testimony. People v. Chadwick, 4 Cal.App. 63, 87 P. 384, 389; First Nat. Bank of Porterville v. DeMoulin, 56 Cal.App. 313, 205 P. 92; People v. Cook, 148 Cal. 334, 83 P. 43. In People v. Mitchell, 61 Cal.App. 569, 573, 215 P. 117, 119, the court said: "While defendant's wife was not a witness on the trial, counsel for defendant contends that the letter was inadmissible under the provisions of section 1322 of the Penal Code, which provides, in effect, that the wife is not a competent witness against the husband in a criminal action. The evidence shows that this particular letter was found on the floor of a cabin shortly after defendant's wife had removed therefrom. If it may be assumed that defendant's wife could not have testified as to the contents of the letter, it does not follow that no one else who read the letter might not do so. It is analogous to the situation of testimony by a witness who overheard a conversation between husband and wife." Lloyd v. Pennie, D.C., 50 F. 4; People v. Morhar, 78 Cal.App. 380, 248 P. 975.

It appears from the last quotation that, irrespective of a confidential relationship existing between Jane and Ernest, Jane's mother, Mrs. Peak, who found the letters in various parts of the house, could have testified as to their contents. In Commonwealth v. Everson, 123 Ky. 330, 96 S.W. 460, 124 Am.St.Rep. 365, it was held that neither the husband nor the wife could testify to a confidential conversation but that an eavesdropping housekeeper might do so. In People v. Baender, supra, a wife, the recipient of a letter from her husband, did not testify, but her attorney appeared as a witness and the letter in question was so introduced in evidence. The letter under the particular circumstances in the case was admissible, waiver or no waiver. People v. Mitchell, supra; People v. Morhar, supra.

[11] One of the letters from Jane to Ernest introduced herein contains the following: "* * * if your wise when you come back you will ask dad to continue helping you because he knows all the answers to keep us out of trouble. * * * Alice didn't even say Happy Birthday so if that's the way it is and she is only nice to me to get things from you in your next letter I wish you would ask her to get another job because if I stay home they couldn't run the business and your dad hasn't been in for a week so unless I can have people around me that like me I am not going to work. Well, that's enough of self pity but I know just what will happen when you come back; the family will be all around you and tell you all things they did, and you will hold the same resentment toward dad you have always had." The other letters, introduced and not introduced as they appear in the record, are not additional evidence of a different character, Code Civ.Proc. sec. 1939, but merely evidence of the same character to the same point or, in a word, cumulative, Code Civ. Proc. sec. 1938. Under the circumstances the rejection of some of the letters was not error.

[12] The additional letters, written previously and subsequently but all within a period of approximately six weeks, merely reiterate a direct disapproval of Alice, a criticism of other relatives of Ernest and an approval of Jane's "Dad." It does not appear that the rejection of the additional evidence in any respect was prejudicial to the interests of the appellant. The general rule is that if a party is not prejudiced thereby the court in its discretion may limit the number of witnesses or the number of documents to prove a particular link in a chain of evidence. 26 R.C.L., p. 1033, sec. 37. The court may exercise a reasonable control over the sufficiency of evidence upon a particular point. Code Civ.Proc., sec. 2044; In re Estate of Wineteer, 176 Cal. 28, 167 P. 516; Sheridan v. Sheridan, 15 Cal.App.2d 200, 59 P.2d 175; In re Estate of Haupt, 200 Cal. 147, 252 P. 597; People v. Garbutt, 197 Cal. 200, 239 P. 1080, 112 A.L.R. 1165; Walter v. England, 133 Cal.App. 676, 689, 24 P.2d 930; People v. Tou Jue, 66 Cal.App. 235, 225 P. 759.

[13] It is suggested that defendant shot to protect himself and his family. Instructions were given on self-defense and defense of habitation. A number of conclusions could have been reached by the jury. It is true there is testimony by the appellant that the Epidendios approached the premises in a loud and tumultous manner, and there is evidence of previous quarrels during which Ernest left his own home to avoid trouble. There is evidence to warrant the conclusion that after the first appearance of the daughter on the premises on the day in question appellant invited a continuation of the dispute for the purpose of claiming the shot was in self-defense. There is evidence that Peak was in fear of harm to himself and his wife. There is evidence from which the jury could have concluded beyond a reasonable doubt that he was not acting to protect himself and his family. The jury evidently reached the latter conclusion.

The court instructed that there is "a distinction in relationship between the owner or proprietor and a guest on the one hand, and that of landlord and tenant on the other. As a matter of law a tenant has an interest in the real estate and, among other things, he is entitled to the exclusive possession of the leased property. On the other hand, a guest has no interest in the real estate, of which a residence is a part. He is a mere licensee. He has merely the use of the premises, or a portion of the premises, without the actual or exclusive possession which remains in the owner.

"If you believe from the evidence beyond a reasonable doubt and to a moral certainty that the defendant was not a tenant of Ernest Epidendio and that he was not entitled to the exclusive use and occupancy of the premises owned by said Ernest Epidendio at 12 Sycamore Street, in the City of Larkspur, County of Marin, State of California, but that said defendant was using said premises as a licensee of said Ernest Epidendio, then the defendant did not have the right to exclude said Ernest Epidendio and Jane Epidendio, his wife, therefrom, nor did he have the right to use any force or violence to prevent them, or either of them, from entering said premises together, and any assault with a deadly weapon by the defendant upon said Ernest Epidendio and Jane Epidendio, while they, or either of them, were entering or attempting to enter the said premises together, would not be justified."

The first paragraph is a correct statement of the law although the relationship established by the oral hiring or renting of room space depends upon the contract, construed in the light of the intention of the parties, which may be gained from statements made by them and the circumstances surrounding the execution of the contract.

The second paragraph must be read in connection with other instructions and then applied to the evidence. When that is done appellant's criticism that the jury was told to find him guilty no matter what the circumstances were under which the Epidendios sought to enter the premises, even if they were attempting to enter for an unlawful purpose or in an unlawful manner, or to inflict great injury upon defendant etc., is not well founded. When the instructions are read as a whole, the law in this respect seems to have been fairly stated and if error occurred the appellant seems to have been favored.

[14] Though not so claimed by appellant, it has been suggested that the instruction is a formula instruction, and that a specific rule applies that would otherwise not be applicable. "It is doubtless the rule that, where a so-called 'formula' instruction is given, directing a verdict in the event the jury finds certain facts to be true, it must embrace all the elements essential to a recovery, and that the omission therefrom of any of such elements amounts to error, the prejudicial effect of which is not overcome by the inclusion of the omitted elements in other instructions." Edgar v. Citraro, 112 Cal.App. 163, 167, 297 P. 645, 647.

[15] The instruction above is divided into two parts; the first paragraph simply states the law, the second is not in fact a formula instruction. It does not assume to be a complete statement of the law upon which the jury may base a verdict, ignoring all other instructions. Harvey v. Aceves, 115 Cal.App. 333, 1 P.2d 1043. It does not, standing alone as set forth in the instruction, state a premise which, if found to be true, would warrant the jury finding the appellant guilty. It simply states certain facts found to be true upon which a finding of assault with a deadly weapon "would not be justified." There may be other circumstances justifying the use of a deadly weapon that are set forth in other instructions.

[16] It is contended by appellant that the instruction ignores and sets aside the doctrine of self defense. In other words, that it should contain the elements of self-defense. It is often impossible to frame an instruction containing all the essentials so that laymen may intelligently follow the law and apply it to facts. Instructions at the request of appellant were given to the jury under the provisions of Penal Code, section 197; also the following were given: "The conditions under which the right of self-defense may be asserted are: First, that the party against whom the threat of serious bodily injury exists was not himself at fault or the first aggressor; and Second, that the shooting was necessary to prevent the infliction upon himself or his wife or child of a great bodily injury by the other person. Where one is without fault and is placed under circumstances sufficient to excite the fears of a reasonable person that another designs to commit some great bodily injury upon him, or his wife or child, and to afford ground for the reasonable belief that there is imminent danger of the accomplishment of this design, such person may, acting under these fears alone, shoot or slay the assailant and be justified in so doing by the appearances." "If the circumstances were such as to justify a reasonable person in believing the danger of injury to himself or to his wife or to his child would be imminent he may act upon these appearances alone and be justified in so doing." The jury was instructed upon every phase of self defense suggested by the appellant.

[17] Appellant suggests that a definition of licensee is not contained in one of the instructions. If it was intended that such instruction was, or if it might be reasonably construed to be, a formula instruction, and no other instruction contained a definition of licensee the point might be worthy of some further consideration. It is not a formula instruction and we fail to find any instruction on the definition of guest or licensee submitted by appellant that was not given. "If they harmonize as a whole and fairly and accurately state the law, a reversal may not be had because of verbal inaccuracies, or because a separate instruction does not contain all of the

elements which are to be gathered from the instructions as a whole. Douglas v. Southern Pac. Co., 203 Cal. 390, 396, 264 P. 237; De La Torre v. Johnson, 203 Cal. 374, 377, 264 P. 485." Westover v. City of Los Angeles, 20 Cal.2d 635, 637, 128 P.2d 350, 351.

There is evidence to show that appellant and his family were guests of the Epidendios. Assuming, however, that they had a right as tenants to live in the house, the right was a common one with the son-in-law and daughter. Under either circumstance appellant was not justified in preventing the Epidendios from obtaining their personal belongings unless in the entry or attempt to enter an unwarranted assault by the Epidendios or their agents occurred. The evidence does not show such conduct on the part of the Epidendios. They had a right to enter and they made no assault upon Peak or his wife.

[18, 19] It is contended that the court erred in embodying in the instructions Penal Code, section 1127c, covering the subject of flight. Flight, standing alone, is not sufficient to establish guilt, but flight immediately after the commission of an offense or after one is accused of a crime is a circumstance that may be considered and is a matter for the jury to determine. Appellant disappeared the day the grand jury returned the indictment against him, remained away for approximately one week and then returned and surrendered. Whether he knew that the indictment would be or had been filed, his intention in leaving and his intention in returning are all matters to be determined by the jury upon the facts as presented. We are not prepared to say from the record presented that the giving of such an instruction in this case was without evidentiary support.

[20, 21] Appellant testified that when he looked out of the window on the morning in question he saw "Shorty" Miller with an iron bar in his hand. There is no testimony that the bar was used or that a threat to use it was made. Miller was called in rebuttal and admitted his presence on the porch but denied that he had an iron bar or any weapon in his hand or possession. He also stated on cross-examination that the Epidendios lived with him. He was asked the following: "[1] Tell me everything you did from the time you got there until you left. * * * [2] Who else was on the porch with you? * * * [3] What were you doing? What did you go there for? * * * [4] Had they lived up there with you before?" The record shows that the second and fourth questions were answered by the witness. The first question is rather broad and might call for a lengthy dissertation on irrelevant and immaterial matters. Certainly the trial judge did not abuse his discretion. The first part of the third question had been answered, and the answer to the latter part—what did you go there for—appears numerous times. The jury was certainly not led astray by the court's ruling on that question.

The entire transcript discloses that the appellant was tried ably and fairly by court and counsel and that the jury could not conscientiously have returned any other verdict.

The judgments and orders denying motions for new trial on counts one and two of the indictment are affirmed.

KNIGHT, J., concurs.

PETERS, Presiding Justice (dissenting). I dissent.

An examination of the record discloses that during the course of this trial at least three serious errors were committed. In my opinion, when these errors are considered in the light of the closeness of the case on the evidence, they were prejudicial, and warrant a reversal.

The first of these errors relates to some six letters passing between Jane and Ernest Epidendio, the two complaining witnesses, while Ernest was in the army. The trial court sustained objections to the admission of these letters on the sole ground that they were privileged communications between husband and wife, even though the evidence disclosed that the letters had fallen into the hands of Mrs. Peak. The majority opinion holds that "all of the letters were admissible when limited to a consideration of that particular section [§ 1881, subd. 1, Code Civ.Proc.] but not otherwise." It should be here pointed out, that in the trial court the only objections to these letters were that they were privileged, and that they tended to impeach certain witnesses only as to collateral issues. The trial court overruled this second objection, but excluded the letters solely upon the ground that they were privileged. We are all agreed that the letters were not privileged, and that in this respect the trial court was in error. The majority opinion, however, holds that it was not error for the trial court to exclude these letters because they were "merely evidence of the same character to the same point or, in a word, cumulative. Code of Civ.Proc. sec. 1938. Under the circumstances the rejection of some of the letters was not error." The majority opinion then relies on the well settled rule that a trial court "in its discretion may limit the number of witnesses or the number of documents to prove a particular link in a chain of evidence." The obvious fallacy in this reasoning is that the trial court, in whom the discretion vests, has never exercised that discretion in this case. Here the trial judge obviously believed the letters were pertinent, but erroneously believed they were privileged. The majority opinion seeks to substitute the discretion of an appellate court for that of the trial judge.

In an attempt to show that the improper rejection of these letters was not prejudicial, the majority opinion quotes a part of one paragraph from one letter that was admitted, and then concludes that the rejected letters were "merely" cumulative evidence to the same effect. This, in my opinion, is not a fair characterization of these letters. When read as a group, the excluded letters disclose that during Ernest's absence while in the army, the store was kept open largely because of the initiative and hard work of appellant. They further disclose that there was bitter feeling between the Epidendios and the Peaks; that the divorce between Jane and Ernest had been caused by the unreasonable demands of the Epidendios upon their son; that the sister of Ernest had quarrelled with Jane over the management of the store, and had accused Jane of wasting Ernest's money; that Jane had been forced to fire this girl; that the Epidendios were jealous because Jane's father was helping to operate the store and because Jane had not turned the very profitable business over to them when Ernest went into the army. One letter told Ernest that if he was going to let his family order him around, as he had in the past, that they had better close up the store and move away.

These letters were most important. They disclose that while Ernest was in the army, both Jane and Ernest were deeply appreciative of appellant's efforts on their behalf, that the relationship between Jane and Ernest and appellant was then most harmonious, and that appellant had done an outstanding job for them. Ernest had testified on the trial that appellant had done nothing out of the ordinary while Ernest was in the army, and Jane had testified that the business would not have closed even though appellant had not assisted her. Jane testified that neither her brother-in-law nor sister-in-law, while Ernest was in the army, attempted to create trouble between Ernest and her. The letters directly impeach this testimony. Of even greater importance, the jury could have inferred from these letters, had they been admitted, that the Epidendio family must have provoked a feeling of antagonism between appellant and Ernest and Jane after Ernest's return, and the letters directly show what the motive of the Epidendio family was. It is true that some of these facts appear in the quoted letter. But all of them do not appear in that letter. These letters proved the background of the controversy between the two families by the very words of the two prosecuting witnesses. To refer to such testimony as "merely" cumulative, as does the majority opinion, is to close one's eyes to the realities of the situation. Had the trial judge attempted to exercise his discretion and excluded these letters on the ground that they were merely cumulative, which he did not, we would have been compelled to hold that he abused his discretion. In my opinion, this error was most prejudicial.

To understand the seriousness of this, and the other errors to which reference will hereafter be made, some reference must be made to the evidence. This is so, because to ascertain whether a partcular error is or is not prejudicial the entire record must be considered, including the evidence favorable to the defense. While an appellate court has no power to weigh the evidence, under § 4½ of Art. VI of the Constitution, in determining whether an error is prejudicial, the appellate court must make an examination "of the entire cause, including the evidence" in order to ascertain whether "the error complained of has resulted in a miscarriage of justice." I have no doubt that the evidence recited in the majority opinion supports the judgment. But if error has been committed, as I believe it has, then the court is under a duty not only to consider the prosecution's evidence, but to consider the evidence as a whole, in order to ascertain the seriousness of the error. It is obvious that if the evidence is overwhelming in favor of the prosecution, or even if the weight of the evidence strongly favors the prosecution, a particular error may properly be held to be non-prejudicial. But if the case is a close one, with the evidence about evenly divided, it is equally obvious that the identical error may then be found to be prejudicial.

It will be noted that the majority opinion does not expressly hold that the evidence is overwhelming, or that it even preponderates in favor of the prosecution. However, towards the end of the opinion, it is stated "that the jury could not conscientiously have returned any other verdict." Such statement, in my opinion, is totally unwarranted by the record. It is not supported by any analysis of appellant's testimony. An examination of the record, far from showing that no other verdict could "conscientiously" have been returned, demonstrates to a certainty that the case was a very close one on the facts. Stated another way, there was ample, substantial evidence which, if believed by the jury, would have compelled a "conscientious" jury to acquit the appellant.

The evidence produced by the prosecution, and recited in part in the majority opinion, supports the implied findings of the jury that appellant was an irascible man and a troublemaker, who, without lawful cause, committed an unjustifiable and most serious assault with a deadly weapon on his daughter and her husband. On the other hand, there is some evidence that bad feeling existed between the Epidendio family and that of Peak, and that such feeling was the fault of the Epidendios. The whole basis of the defense was that Peak knew of this ill feeling, and that when seven men and his daughter, in a loud and boisterous manner, attempted to secure access to the house, he was in fear of injury to his wife or to himself; that he fired only after Willie Epidendio had kicked in the door and after threats had been made against his life. There is substantial evidence to support this defense. It is an admitted fact that on the morning of November 14th, seven men and Jane Epidendio arrived at 12 Sycamore Avenue in two trucks. The prosecution claimed, and offered evidence to prove, that they came only to remove the furniture and personal effects belonging to Jane and Ernest. The evidence shows that the only furniture Jane and Ernest had in the house was a living room set, two bedroom sets, a breakfast room set, and some kitchen furniture. The balance of the furniture belonged to appellant and his wife. Jane and Ernest admitted that they had made no arrangements for the storage of the furniture, and that it could not have been taken to the place in which they were then living. Incidentally, after the shooting, and up to the time of trial, the furniture had not been moved, and Jane and Ernest had not moved into the house, although the Peaks had moved out. There was evidence that when the crowd first arrived on the porch Jane yelled that they had come to move the furniture and the Peaks out of the house and that "she had been told she had a perfect legal right to use any force whatever to come in the house" to accomplish these results. Under such circumstances, the appearance of seven grown men to move this small amount of furniture, particularly in view of the threats made and the past relationship of the parties, might well have led a reasonable man to believe that this large group was there for some other purpose than merely to move the furniture.

There was substantial evidence not only of appellant, his wife, and their son, but also of a neighbor, Mrs. Campbell, that the seven men approached the house in a loud and tumultuous manner, swearing and making threats to injure Mr. Peak. According to this evidence, the men threatened to break in and "hang" or "kill" appellant. It is certainly a reasonable inference that appellant must have been fearful of injury because, at his request, his wife telephoned the sheriff and asked for help, and, when he refused to act because the house was located within an incorporated town, she telephoned the chief of police, but he refused to come to their assistance. The evidence produced by the prosecution shows that Jane brought a gun to the scene. Appellant testified that he saw one of the crowd with a gun, and another with an iron bar.

The defense also produced evidence of threats made by Jane against her mother and father, and there was evidence that only a few days before the shooting Jane had choked her mother and threatened to kill her.

There was a direct conflict over whether the appellant and his wife paid rent for the premises. All admit that before appellant and his wife moved to 12 Sycamore Avenue, Jane and Ernest paid them $35 a month to care for their child. The grandparents had cared for the child from his birth. Appellant and his wife testified that the agreement was that if they came to stay at 12 Sycamore Avenue, the $35 per month payment should cease and that the $35 per month for the care of the child should be considered rent. Jane testified she continued to pay her parents $35 a month after they came to live with her, and that they paid no rent. There was no record of such payments kept by Jane.

There was a direct conflict as to whether Jane had paid appellant for his services at the store. Jane testified she first paid him $35 per week, and later $50 per week for such services. Peak denied receiving any payments. Jane testified that she made the payments in cash, and admitted that no record was kept in the store books of such payments. She testified that the reason the transaction was so handled was because if her father was an employee he would have to get a Social Security card, that he had none, and did not want to get one. Appellant, however, produced his Social Security card which he had had for at least two years.

Jane testified that many quarrels occurred between Ernest and her father, and that her father swore at and threatened Ernest on many occasions. Ernest testified that he had never heard appellant swear at him, nor had they quarrelled.

As to the actual shooting, appellant testified that he was fearful that the men intended to harm him and his wife. He testified, and his story is corroborated by his wife and son, and partially by Mrs. Campbell, that he did not get the shotgun until he saw someone in the group outside with a pistol and another one with an iron bar; that the crowd called him vile names and dared him to come out; that they threatened to beat him up, to hang him, and to kill him; that just before the shooting, Willie Epidendio was standing beside the front door pounding on the door; that Willie yelled "I am going—you God damned son-of-a-bitch—to kill you"; that with that he kicked in the glass of the lower panel of the door; that a curtain was drawn over the door so that all that could be seen were Willie's legs; that when Willie kicked in the glass, appellant turned the shotgun away from Willie and fired onto the porch; that he did not want to hit Willie and aimed at the porch to scare him; that he did not know Jane and Ernest were then coming up on the porch; that they walked into the line of fire; that he had not intended to hit anyone.

This evidence is not recited for the purpose of indicating that it is stronger evidence than that produced by the prosecution. The credibility of the witnesses was, of course, for the jury. But the above evidence is recited for the purpose of showing that there was substantial evidence in support of the defense, that the case was a very close one on the facts, and that the statement appearing in the majority opinion quoted above is not borne out by the record. Under such circumstances, any substantial error takes on added significance. If error is committed, and if reasonable minds may reasonably differ over whether it is prejudicial, the benefit of the doubt should be accorded the accused, and the case reversed.

There was another serious error committed at the trial in connection with the unreasonable and improper limitation placed by the trial court on the cross-examination of the witness Miller. Miller was one of the group outside the house. The prosecution did not produce him as a witness in presenting its main case. Appellant testified that he saw Miller on the porch with an iron bar in his hand, and that this was one of the reasons he was afraid to let the group into the house. The prosecution thereupon called Miller as a rebuttal witness. He was asked if, on the morning of November 14, 1943, he was at the premises at 12 Sycamore Avenue in Larkspur. He answered that he had been, and in response to another question stated that he had been on the front porch of the premises that day. He then testified that at no time that morning did he have an iron bar or any other kind of weapon in his hand or possession.

On cross-examination he testified that he was on the porch of the house for about fifteen minutes, and then left. He was then asked: "Tell me everything you did from the time you got there until you left." He was not permitted to answer this question, the trial court sustaining an objection that this was beyond the scope of the direct examination. A like objection was sustained to the questions: "What were you doing? What did you go there for?"

These questions were vital to the defense. The entire defense was predicated on the theory that appellant was fearful of his life, and one of the reasons given was that

Miller had come up on the porch with an iron bar in his hand. The prosecution elected on Miller's direct examination to ask him questions that placed the witness on the porch on the day in question. That opened up the question as to everything he did there on that day. Under § 2048 of the Code of Civil Procedure appellant had the right on cross examination, to examine the witness "as to any facts stated in his direct examination or connected therewith." As was held in People v. Flores, 15 Cal.App. 2d 385, 401, 59 P.2d 517, 526: "A full cross-examination is not a matter of privilege; it is a matter of 'absolute right.'" See, also, § 1854, Code of Civ.Proc., and People v. Teshara, 141 Cal. 633, 636, 75 P. 338; People v. Mammilato, 168 Cal. 207, 213, 142 P. 58; People v. Roach, 139 Cal. App. 384, 385, 33 P.2d 895. It certainly was pertinent to inquire about everything Miller did during his stay on the porch, and to ascertain why he had come. It was appellant's word against that of the witness on the vital question as to whether the witness had an iron bar in his hand. Certainly the defense should have been accorded the fullest opportunity to check the witness' activities while on the porch so that the jury could have the opportunity of determining who was telling the truth.

The majority opinion holds that the sustaining of the objection to the first question above quoted was not error for the reason that the "question is rather broad and might call for a lengthy dissertation on irrelevant and immaterial matters." No objection was made to the form of the question. The objection was sustained on the sole ground that it went beyond the scope of the direct examination. Nothing that Miller could have done from his arrival on the porch to his departure therefrom could be irrelevant or immaterial on the vital issue under discussion. As to the sustaining of the objection to the question "What did you go there for?" the majority opinion states "the answer * * * appears numerous times." If by that statement it is meant to imply that the answer appears "numerous times" in the testimony of Miller, it is a misinterpretation of the record. Miller at no time testified as to why he had gone to the Peak home that morning. If the statement in the majority opinion means that other witnesses testified that all of the group went to the house to move the furniture, it is a correct statement of the record, but it has no relevancy at all to the point under discussion. Just because several witnesses have testified to their purpose in doing an act, that does not warrant the court in prohibiting an inquiry into the purpose of a witness who is under examination when that purpose is relevant to the issue under discussion. Miller's purpose was of great importance. If he went there to assault appellant, the fact that the others were there to move the furniture would be immaterial. Under the circumstances, the limitation on the cross examination was unwarranted, was not within any lawful discretion of the trial court, and when considered with the other errors, warrants a reversal.

The trial court, in my opinion, also committed prejudicial error in the instruction quoted on p. 13 of the majority opinion. By that instruction the court told the jury that if they should find that appellant was a licensee, then he had no right "to exclude" Jane and Ernest from the premises, "nor did he have the right to use any force or violence to prevent them, or either of them, from entering said premises together, and *any assault* with a deadly weapon by the defendant upon said Ernest Epidendio and Jane Epidendio, while they, or either of them, were entering or attempting to enter the said premises together, *would not be justified.*" (Italics added.) That is not the law. By that instruction the jury were told that if they found that the Peaks were licensees and not tenants entitled to the exclusive use of the premises, then, under no circumstances could appellant use any force or violence to prevent Jane and Ernest from entering, regardless of how that right was sought to be exercised, and regardless of the purpose of the entry, and that, under such circumstances, *any assault* committed by appellant "would not be justified." The basic issue presented to the jury was whether the shooting, which was admitted, was justified. By this instruction the jury were told that if they found certain facts to be true, then the assault was not justified. Inasmuch as this was the only issue before the jury, there can be no escape from the conclusion that such an instruction amounted to a direction to the jury to find the defendant guilty if they found he was a licensee. The instruction is obviously incomplete in that it disregards completely the manner in which the right of entry, assuming it to exist, was attempted to be exercised, disregards the purpose of the entry, and completely disregards the entire defense of self defense. It would have been simple enough to have placed the proper limitations in this instruction so as to present a proper picture of the law to the jury. It is no answer to say that the jury was properly instructed on self defense. The challenged instruction was given immediately after the instructions on self defense. As I read the instructions, the one under consideration reads as if it were a limitation on the self defense instructions. To say the least, the jury may reasonably have believed that self defense was available only if appellant was a tenant, not if he were a licensee. This error was obviously prejudicial.

In view of these several errors it is my opinion that the judgment and orders appealed from should be reversed, and a new trial ordered.

Rehearing denied; PETERS, J., dissenting.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

In re HEARD'S ESTATE.

REGENTS OF UNIVERSITY OF CALIFORNIA et al. v. HEARD.

L. A. 18744.

Supreme Court of California.

Dec. 1, 1944.

Rehearing Denied Dec. 28, 1944.

1. Wills 🔑439, 440, 470

A will must be construed according to testator's intentions as gathered from language of entire will.

2. Wills 🔑448

Intestacy must be avoided where and to extent testator's expressed intention makes such possible. Probate Code §§ 100, 101, 103, 105.

3. Wills 🔑463

If a word has no meaning, or is absurd, or repugnant to clear intention manifested in other parts of will, it may be regarded as surplusage, or restricted in its application.

4. Wills 🔑506(1)

The words the "heirs of", as used in provision of will devising remainder of testamentary trust to heirs of lawful issue of testatrix' son who at time of testatrix' death had no children, would be disregarded or regarded as synonymous with "lawful", where such words were repugnant to clear intention manifested in other parts of will, and unless words were either disregarded or construed as "lawful issue" the provision was void as unduly suspending the power of alienation.

See Words and Phrases, Permanent Edition, for all other definitions of "Heirs of" and "Lawful".

5. Wills 🔑478

Under provision in will devising remainder of testamentary trust to certain organizations if there should be no lawful issue of testatrix' son living at termination of trust, there is natural implication that if there be such lawful issue living at that time the property is to go to that issue.

6. Wills 🔑473

Provision in will devising remainder of testamentary trust to heirs of lawful issue of testatrix' son who at time of testatrix' death had no children, even if void as violative of rule against perpetuities, was separable, and subsequent provisions devising property to certain organizations if there were no lawful issue of testatrix' son living at termination of trust should be construed as making a complete disposition of the remainder.

7. Wills 🔑473

Where there are valid and invalid clauses in a will, the question whether valid clauses can stand depends upon whether invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing main scheme of testatrix.

In Bank.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Proceeding in the matter of the estate of Emma C. Heard, deceased. John W. Heard, Jr., filed a petition against the Regents of the University of California and others for construction of the will and the determination as to persons entitled to distribution. From an order in favor of the plaintiff, the defendants appeal.

Reversed with directions.

Prior opinion, Cal.App., 146 P.2d 725.

A. H. Conard and Calkins, Hall, Linforth & Conard, all of San Francisco, and Harry M. Conron, Borton, Petrini, Conron & Borton and Calvin H. Conron, Jr., all of Bakersfield, for appellants.

Harvey, Johnston & Baker, of Bakersfield, for respondent.

PER CURIAM.

A petition for hearing in this case was granted to the end that further consideration be given to the contentions of the respondent. On such consideration we adopt as the opinion of this court the opinion of the District Court of Appeal, Fourth Appellate District by Presiding Justice Barnard with certain modifications.

"Emma C. Heard, a widow, died on November 23, 1939, leaving an estate valued at about $200,000. Her only close relatives were a brother and a son, John W. Heard, Jr. At that time this son was 42 years old, his wife was 36 years old, and they had no children.

"Mrs. Heard left a will and a codicil, which were admitted to probate. There is nothing in the codicil which is material here. Of the seven sections of the will, the only controversy is with regard to the provisions of section IV. In section III, she made several small bequests which are not questioned, including one of five dollars 'and no more' to her brother. In section IV, which is here in question, she gave the bulk of her estate to the Bank of America in trust for the purposes therein named. After defining the powers and duties of the trustee and providing for its compensation section IV contains fifteen numbered paragraphs relating to what shall be done with the net income from the trust estate, to the termination of the trust and to the disposition of the remainder. Briefly summarized, the first eleven paragraphs provide for the following payments from the income: $200 a month to her son, John W. Heard, Jr., as long as he lives; $50 a month to a Mrs. Cummings as long as she lives; $25 a month to a Mr. Rice as long as he lives; $50 a month to a servant as long as she lives; $25 a month for the care of her dog as long as it lives; and the rest of the net income to her son, if living, otherwise to his lawful issue, if any, and otherwise to the lawful issue of Mrs. Cummings. It was also provided that if the net income was insufficient to cover all of these monthly payments it should first be used to pay the monthly allowance of $200 to her son or in case of his death to his lawful issue, and the balance prorated among the other beneficiaries; and that the trustee might at any time use the principal of the trust for the care and support of her son or of his lawful issue, if in its discretion this appeared necessary.

"Paragraph 15 contains a spendthrift clause relating to each beneficiary under the trust. Paragraphs 12, 13, and 14 read as follows:

" '12. This trust shall terminate upon the death of the last survivor of all of the persons named or designated as follows:

" '(a) Such of the children of said May Durham Cummings as may be living at the time of my demise.

" '(b) Said G. Stanley Rice.

" '(c) Said Eulalia Bethel, if she be in my employ at the time of my demise, otherwise her death shall not be taken into consideration.

" '(d) My said son, John W. Heard, Jr.

" '(e) The lawful issue, if any of my said son John W. Heard, Jr., who may be living at the time of my demise.

" '13. Upon the termination of said trust as hereinabove provided under Paragraph 12 hereof, the whole of my said estate then remaining in the hands of my said trustee shall be forthwith and outright paid over and delivered to the heirs of the lawful issue of my son, John W. Heard, Jr.

" '14. If, at the termination of said trust as hereinabove provided, there should not then be living any lawful issue of my said son John W. Heard, Jr. then the whole of the residue of my estate shall be forthwith paid over and distributed as follows:' (Here follow provisions that $5000 shall go to the Grand Lodge of Masons of this state, $5000 to Bakersfield Lodge 224 of Masons, and the residue of the Estate to the University of California.)

"In due course, the son, John W. Heard, Jr., filed a petition under section 1080 of the Probate Code for a construction of this will and a determination as to the persons entitled to distribution. Answers and statements of their rights were filed by the trustee, the University of California and the lodge organizations. After a trial of the issues thus presented the court made findings and conclusions of law to the effect that, while the remainder of the will is valid and effective, all of the provisions of section IV are invalid and inoperative since they 'violate the rule against perpetuities * * * and violate the statutes of' this state; that the testatrix died intestate as to that portion of her estate which she attempted to dispose of through the provisions of section IV; and that all of that portion of her estate should be distributed to her son John W. Heard, Jr. as her sole heir at law. An order was entered accordingly and this appeal followed.

"The respondent's contention, which was accepted by the trial court, is that paragraphs 13 and 14 are void upon their face because they express the possibility that there will be living issue of the respondent at the time of his death; that the term 'issue' includes descendants of any degree; that if any issue of the respondent survived him paragraph 13 could not become operative to effect distribution until all issue of the respondent had died, making possible the identification of the heirs of such issue; and that the will clearly discloses that the main intent and purpose of the testatrix was to provide for the maternal heirs of any issue of the respondent, or that the provisions of paragraph

14 should apply in the event there never was such issue. It is further argued that the attempt to carry out this paramount intention of the testatrix is abortive since paragraphs 13 and 14 are void; that paragraph 13 cannot be separated from the remainder of section IV without destroying the main intention of the testatrix to give the residue to the maternal and other heirs of the issue if such heirs existed; that for this reason all of section IV and all of the trust provisions are void; and that it follows that the testatrix died intestate in so far as any property affected by section IV is concerned. It will be noted that while the respondent contends that both paragraphs 13 and 14 are void the objections raised are addressed only to paragraph 13 and that what is claimed to be the main intention of the testatrix, to which everything else must give way, is drawn from paragraph 13 rather than from an examination of the entire will. * * *

[1, 2] "Under our statutes and decisions a will must be construed according to the intention of the testator as gathered from the language used in the entire will, effect must be given to the expressed intention so far as possible and intestacy must be avoided where and to the extent the expressed intention makes this possible." Probate Code, §§ 100, 101, 103, 105; Estate of Puett, 1 Cal.2d 131, 133, 33 P.2d 825; see Eaton v. Brown, 193 U.S. 411, 413, 24 S.Ct. 487, 48 L.Ed. 730; Rest.: Property: Future Interests, parts 3 and 4, § 241, comment (a) and comments on subsec. (2), § 242, comments (a), (b) and (c); Wigmore, Evidence (2d ed.) §§ 2458-2478.

"Examining this will in its entirety it clearly appears, with respect to that portion of her estate which she attempted to dispose of through section IV, that the testatrix had the firm intention to provide for the respondent and for certain others, during their lifetime, and that the principal of the fund should not go directly to the respondent. The trust is to terminate absolutely on the death of the last survivor of certain lives in being. It also rather clearly appears that the testatrix intended to make provision for the lawful issue of her son if there should be any. She refers to such lawful issue at least eleven times in the will. In section III, in giving certain personal property to the respondent, she provides that it shall go to his lawful issue if he is not living at the time of her death. In section IV, in giving certain advisory powers in connection with the management of the trust to the respondent, she gives the same powers after his death to such of his lawful issue as may survive him. In each of the provisions for the payment of the portion of the income from the trust, or at the discretion of the trustee a portion of the principal, to the respondent she includes a similar provision for payment to his lawful issue in case any survives him. In the event of the respondent's death without lawful issue, the income which would otherwise go to him is to go to Mrs. Cummings. The lawful issue of the respondent is also referred to in paragraphs 12, 13 and 14. The only reference to 'the heirs of' the lawful issue of the respondent is the one in section 13, which gives rise to this controversy.

"Insofar as disclosed by the language used in the entire will, the main intention of the testatrix appears to be to provide for the respondent and for his lawful issue, if any there be. The expressed intent seems to be to provide an income for her son during his life and thereafter to provide for rather than to disinherit any possible grandchildren." In the light of her testamentary plan it is inconceivable that the testatrix used the phrase "the heirs of" with the intention of cutting off her son's issue so that the heirs of such issue, and not the issue themselves would receive the distribution of the trust estate. "That language is so inconsistent with her disclosed intent and with her general testamentary plan, as uniformly evidenced by the other parts of her will, as to suggest that it was used inadvertently; it has the effect of disinheriting any grandchildren, the natural objects of her bounty and for whom she makes provision in all other parts of section IV; and, finally, it does not accomplish a valid disposition even to such heirs.

"The language used in paragraph 13 expresses something which is different from the general intention which seems to be expressed by other language repeatedly used in other parts of the will. Obviously, a mistake was made in drafting either paragraph 13 or paragraph 14. Paragraph 14 gives the remainder to the organizations named in the event no lawful issue of the respondent are living at the termination of the trust, while under the same situation paragraph 13 would give this remainder to the heirs of any lawful issue. Paragraph 13 is inconsistent for this reason as well as for the reasons above noted."

[3, 4] If we disregard the words "the heirs of" in paragraph 13 or regard them as synonymous with the words "lawful issue" in that paragraph, the will would be complete, the trust would be good, and the disposition of the remainder would be clear. On the other hand, if we do not disregard the words "the heirs of" or regard them as synonymous with "lawful issue" that paragraph is void as unduly suspending the power of alienation. "If a word has no meaning, or is absurd, or repugnant to the clear intention manifested in other parts, it may be regarded as surplusage, or restricted in its application." In re Estate of Wood, 36 Cal. 75, 81; In re Estate of Goetz, 13 Cal.App. 292, 109 P. 492; In re Estate of Spalding, 84 Cal. App. 371, 258 P. 154; see 26 Cal.Jur. § 202, p. 887. In our opinion the words "the heirs of" are repugnant to the clear intention manifested in other parts of the will and should be disregarded or regarded as synonymous with "lawful issue." This interpretation carries out the dominant scheme and purpose of the testatrix as expressed in her will and not only avoids conflicts between portions of the will but protects the main intentions of the testatrix from being nullified by words that were obviously used by mistake.

Even if the words "the heirs of" could not be disregarded or regarded as synonymous with "lawful issue" it would not follow that all of section IV would be void simply because paragraph 13 was void as unduly suspending the power of alienation.

[5] "If paragraph 13" were "eliminated from the will, paragraph 14, which still remains, provides that if there should not be any lawful issue of the respondent living at the time fixed for the termination of the trust the entire residue of the estate shall forthwith go to the organization named therein. The thing that would prevent such a result would be the fact that lawful issue of the respondent were then living. There is a natural implication from this provision that if there be such lawful issue living at that time the property is to go to that issue. In re Estate of Blake, 157 Cal. 448, 108 P. 287; In re Estate of Atkinson, 110 Cal.App. 499, 294 P. 425; In re Estate of Franck, 190 Cal. 28, 210 P. 417. * * * Such an implication is especially strong here since the provisions for the termination of the trust and the immediate delivery and payment of the trust estate to someone are so definite, and since it corresponds exactly with the intention so clearly disclosed by all of the will except that part of paragraph 13 which provides for something the testatrix either did not intend to or could not do. * * *"

[6, 7] In our opinion, there is no doubt that paragraph 13 would be entirely separable from the other provisions of section IV, and that these other provisions could and should be given effect as a part of the will of the deceased. In re Estate of Troy, 214 Cal. 53, 3 P.2d 930, 933. "In that case, in applying the general rules for determining the question of severability, one of which is 'where there are valid and invalid clauses in a will, the question whether the valid clauses can stand depends upon whether or not the invalid ones are so interwoven with them that they cannot be eliminated without interfering with and changing the main scheme of the testator,' the court held that an invalid clause, the elimination of which would result in intestacy, was nevertheless severable since, as the court said: 'Our conclusion does not result in a disposition of the estate so different from what the testator contemplated nor so unreasonable that it must be presumed that the testator would not have made the valid provisions had he been aware of the invalidity of the others; it does not work injustice among the beneficiaries, nor defeat the dominant scheme and purpose of the testator in the disposition of his property; nor does it cause any important practical change in the testator's general scheme or result in any possibility that the property will go to others than those he intended; but, on the contrary, those whom the testator intended should benefit and whom he cherished will take by the plan which he devised.'" See, also, In re Estate of Micheletti, 24 Cal.2d 904, 151 P.2d 833.

"The remaining provisions of section IV of the will here in question * * * carry out the intentions of the testatrix and they are not so inseparably woven with the provisions of paragraph 13 that they" would have to "be declared void, leading to a result * * * that the testatrix most clearly intended to avoid and prevent."

For the reasons given, the order appealed from is reversed with directions to the probate court to enter its order upholding the provisions of section IV of this will as construed herein, and providing for distribution of the residue of the estate at the proper time to the trustee named in section IV of the will, and with such other provisions for the ultimate distribution of the residue or the remainder thereof as are proper and appropriate and not inconsistent with the views expressed herein.

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67 Cal.App.2d 116

JOHNSON et al. v. FRESNO COUNTY.

Civ. 3152.

District Court of Appeal, Fourth District, California.

Nov. 30, 1944.

Hearing Denied Jan. 25, 1945.

1. Highways ⇨192

Open ditch across highway, while unguarded by warning sign, constituted a "dangerous condition" for which county would be liable under Public Liability Act, if county board or officer or person having authority to remedy such condition within a reasonable time after receiving knowledge or notice thereof failed to remedy it or take action reasonably necessary to protect the public. St.1923, p. 675, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Dangerous Condition".

2. Highways ⇨211

Evidence that for the purpose of replacing bridge for the repair of which an appropriation was included in budget adopted by county board of supervisors, bridge was removed under orders of road foreman having authority to keep roads in his territory open and in safe condition was sufficient to charge board of supervisors with notice of dangerous condition created by removal of bridge. St.1923, p. 675, § 2.

3. Highways ⇨193

Where a condition inherently dangerous to traveling public is created under authority of governing board of a county or municipality, no further notice of such condition need be established in order to fix liability for consequent injuries to persons using highway in a prudent manner. St. 1923, p. 675, § 2.

4. Highways ⇨193, 194

Removal of bridge leaving open ditch across highway and not the burning out of warning flares created condition inherently dangerous to traveling public, and was sufficient to place upon county chargeable with actual and constructive notice of removal of bridge the continuing duty of taking reasonably necessary action to protect the public which duty was not fulfilled by placing lighted flares and then permitting them to burn out. St.1923, p. 675, § 2.

Appeal from Superior Court, Fresno County; Arthur C. Shepard, Judge.

Action by Floyd Johnson and Myrtle Johnson, his wife, against the County of Fresno for personal injuries sustained by plaintiffs when automobile in which they were riding plunged into an open ditch across a public highway. From a judgment entered upon a verdict in favor of plaintiffs, and an order denying motion for judgment notwithstanding the verdict, defendant appeals.

Judgment and order affirmed.

James M. Thuesen, Dist. Atty., Harold V. Thompson, and Robert M. Wash, Deputy Dist. Attys., all of Fresno, for appellant.

L. M. Linneman, of Dos Palos, and Rae B. Carter, of Fresno, for respondents.

MARKS, Justice.

This is an appeal from a judgment and from an order denying a motion for judgment notwithstanding the verdict in an action to recover for damages received when the Ford pick-up in which plaintiffs were riding plunged into an open ditch across a public highway of Fresno County.

The sole question presented on appeal is the correctness of an instruction to the jury given by the trial court at the request of plaintiffs, and the refusal to give an instruction requested by defendant. These instructions involved the question of knowledge or notice on the part of officers or agents of defendant of the dangerous and defective condition of the highway and the sufficiency of the warning of danger given by defendant.

Fairfax and Temple Avenues are public highways of the County of Fresno. Fairfax Avenue runs north and south and is intersected at right angles by Temple Avenue. A ditch or canal runs east and west a few feet north of the north line of Temple Avenue and crosses Fairfax Avenue. It had been covered by a bridge.

A few days prior to the happening of the accident on the night of Sunday, July 26, 1942, this bridge was removed by the employees of defendant to permit the installation of a new bridge. This left an open excavation across Fairfax Avenue between six and ten feet wide, and between five and six feet deep.

To warn the traveling public of the danger caused by this open ditch a sign about four feet wide was placed in the center of Fairfax Avenue between eight and ten feet south of the excavation. It had on its face, "Bridge Out. Road Closed." The ordinary type of flares had been placed on Fairfax Avenue both north and south of the excavation by Henry Sorg, defendant's bridge foreman, at about 5 o'clock p. m. on Saturday, July 25, 1942. These flares had burned out some time before the happening of the accident on the following Sunday night so that there was no warning of the excavation, other than the sign, when the automobile in which plaintiffs were riding was driven into it.

At about midnight plaintiffs were riding north on Fairfax Avenue in a Ford owned and driven by Zeke Gosdin. As it approached Temple Avenue its lights were burning and it was traveling about 30 miles an hour. The night was dark but clear and dry. The Ford traveled over some dirt on the south bank of the excavation and plunged into it injuring Floyd Johnson seriously and Myrtle Johnson slightly.

Section 2 of the Public Liability Act, Statutes 1923, p. 675, under which this action is brought, provides in part as follows: "Counties, * * * shall be liable for injuries to persons and property resulting from the dangerous or defective condition of public streets, highways, * * * and property in all cases where the governing of managing board of such county, * * * officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, highway, * * * or property and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

[1] It cannot be questioned that while unguarded with warning signs the open excavation created a dangerous condition on Fairfax Avenue so no further attention need be given to this phase of the case.

Plaintiffs argue that the removal of the bridge over the canal was done under authority of the board of supervisors; that the inherently dangerous condition, having been planned by and created under authority of the governing body of the County of Fresno, was within the knowledge of its members so that no further notice of the dangerous condition in the highway need have been given defendant to make it liable for resulting damages.

Defendant argues that notice of the dangerous condition arising from construction authorized by the governing body could only arise "where there is a patent or intrinsic engineering or planning defect in the work ordered, which makes it inevitably a hazard to the public." If we understand its position correctly the county argues that the removal of the bridge, with the excavation properly guarded by warning signs and lighted flares, did not create a dangerous condition; that a warning sign and lighted flares were placed in proper positions to warn travelers; that "knowledge that the flares were out on the part of some person designated in the statute, and failure to remedy said condition within a reasonable time, is a prerequisite to liability" of the county.

The evidence is undisputed to the effect that the board of supervisors had adopted a budget in which there was an appropriation for repair of this bridge; that the bridge was located in supervisorial district number one; that Maurice S. Meeker was the supervisor representing that district and as such had general supervision of keeping roads and bridges within the district in repair as far as permitted by appropriations made.

Mr. Meeker testified that he had three road foremen to care for the roads and bridges within his district; that C. F. Bedell was the road foreman who had charge of the territory in which the intersection of Fairfax and Temple Avenues is situated.

On the question of the authority given Bedell in his position as road foreman we find the following in Mr. Meeker's testimony:

"Q. I see. Then, do you delegate to your road foreman the authority to determine just what should be done there, is that your practice? A. The foreman in a district is more familiar—

"Q. Yes. A. With what is necessary to be done, and he naturally has to do that thing in order to put the culvert or bridge, as it may be. * * *

"Q. You leave it up to the road foreman to determine what shall be done with the various roads and bridges then, do you? A. Well, within the budget limitations and designations.

"Q. Yes. That is what I mean. In other words, if your budget designated this bridge at Fairfax and Temple Avenues as being the bridge upon which something should be done, where an appropriation is made, you leave it up to the road foreman to determine what is to be done? A. If there isn't a problem that requires a lot of conference and consideration and discussing, yes.

"Q. Well, now, in this particular case, you did just leave it up to him to go ahead and determine what was to be done? A. I don't recall that we had any conversation about it.

"Q. Well, you don't recall that you departed from your usual practice there, do you, Mr. Meeker? A. No."

Mr. Bedell testified that it was his duty to keep bridges in the district in condition for safe travel over them. He testified as follows:

"Q. Now, from whom did you receive the direction to remove the bridge? A. Nobody gave me directions to remove the bridge.

"Q. Did you talk with Mr. Meeker with reference to the removal of it? A. No, I didn't.

"Q. You just took it upon yourself to remove the bridge? A. I did.

"Q. I see. In other words, you saw that the bridge needed removing and you removed it? A. I did.

"Q. I see. Mr. Bedell, did you have general instructions from Mr. Meeker with reference to the removal of bridges where their condition was such as to warrant removal in your opinion? A. I don't recall whether I had instructions or not. Naturally my job was to see that the roads are kept safe and open.

"Q. And you have the authority of determining those things yourself? A. I believe I do.

"Q. Now, at the time you removed this bridge, in your opinion its condition was such as to warrant its removal, is that right? A. It was.

"Q. Now, all of your instructions in that regard came from Mr. Meeker, is that correct? A. I don't recall any particular instructions to that effect. It was naturally the thing to do holding the job that I did there. I naturally had to keep the bridges open and the road open.

"Q. But you had general authority from Mr. Meeker? A. I had authority to keep the roads open, and to keep them in safe condition, yes."

Mr. Bedell further testified that Henry Sorg was bridge foreman under him; that he ordered Sorg to remove the bridge in question; that he instructed Sorg to place warning signs and lighted flares during the progress of the work and keep the flares burning during the hours of darkness. Sorg testified that the men under him removed the bridge in question; that at about 5 o'clock p. m. on Saturday, July 25th, he placed lighted flares on both sides of the excavation; that he did not return again to see that the flares continued to burn.

It is undisputed that all of the flares were out at the time of the accident. The evidence justifies the inference that the oil in all of them had been consumed.

[2] There is no intimation in the record that Mr. Meeker or any other member of the board of supervisors of Fresno County had actual notice that the bridge had been removed or that a dangerous excavation had been left open across Fairfax Avenue or that the flares placed on each side of the excavation had burned out. However, we believe the evidence sufficient to charge them with notice of what had been done there and the condition created by the removal of the bridge.

[3] It is a rule generally applied in cases of this kind, that where a condition which is inherently dangerous to the traveling public is created under the authority of the governing board of a county or a municipality no further notice of that condition need be established in order to fix liability for consequent injuries to persons using the highway in a careful and prudent manner. See Wise v. City of Los Angeles, 9 Cal.App.2d 364, 49 P.2d 1122, 50 P.2d 1079; Sandstoe v. Atchison, T. & S. F. R. Co., 28 Cal.App.2d 215, 82 P.2d 216; Kaufman v. Tomich, 208 Cal. 19, 280 P. 130; Mulder v. City of Los Angeles, 110 Cal.App. 663, 294 P. 485; Black v. Southern Pacific Co., 124 Cal.App. 321, 12 P.2d 981.

Defendant seeks to bring the case without the foregoing rule by urging that the large ditch across Fairfax Avenue did not create an inherently dangerous condition in the road when protected by the warning sign and lighted flares, but that the condition became dangerous when the flares were extinguished. From this it is argued that as no responsible officer or employee of Fresno County had any notice or knowledge that the flares had burned out the action cannot be maintained under the provisions of the Public Liability Act.

[4] The ditch across the highway created an inherently dangerous condition and it was only because of this condition that the placing of the warning sign and the lighted flares became necessary. As the defendant may be charged with both actual and constructive notice of the dangerous condition created by the open excavation the statute places upon it the duty of taking "such action as may be reasonably necessary to protect the public against such dangerous or defective condition." This duty to give such protection, after notice of the condition, is a continuing one and is not fulfilled by placing lighted flares and then blandly permitting them to burn out so that at night there is no efficient warning of danger to the traveling public. Under such circumstances the defendant cannot escape liability.

The instruction proposed by defendant which the trial court refused to give contained the following:

"* * * before the plaintiff may be entitled to your verdict, you must find from a preponderance of the evidence: * * *

"Third: That before the accident in question, such board, officer or person had had a reasonable time, after receiving such notice, to remedy the condition or to take such action as was reasonably necessary to protect the public against it, and had failed to do either.

"The word 'person' as used in this instruction is limited in its meaning to an officer or member of the Board of Supervisors, which must not be construed to include employees generally, the county being not liable for the negligence of a mere employee."

The quoted portion of the instruction is not a correct statement of the law. The Public Liability Act imposes liability when there is notice given to "the governing or managing board of such county * * * or person having authority to remedy such condition * * *." The evidence already quoted shows rather clearly that Bedell had such general authority. Within that authority he ordered the bridge removed and a new one constructed in its place. He knew when the bridge was removed and the inherently dangerous condition created thereby. This brings this case within the holding in Boyce v. San Diego High School District, 215 Cal. 293, 10 P.2d 62, 63, where it is said: "The evidence shows that there had been an accident of the same type about two years previously, and that this accident was known to persons having authority to remedy the condition. John E. Thombs, the custodian of the school buildings and grounds, testified that he heard of the accident, and that he reported it to the principal of the school and also notified the superintendent of construction to put a rail around the pit. Thombs testified also that Connell, the superintendent of construction, had full charge of repair work. Bertolucci also said that he heard of the accident, and Claude Woolman, a member of the school board, testified that Bertolucci, as chief electrician, had the power to remedy any defective condition in the electrical system. In this state of the record, the verdict and judgment below must be upheld. It is apparent that there was actual knowledge on the part of persons having authority to install safety appliances."

The challenged instruction given by the trial court correctly set forth the law concerning notice to defendant as we have outlined it. The instruction requested by defendant did not correctly set forth the rules of law applicable here and there was no error in refusing to give it.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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67 Cal.App.2d 8

NICOLDS v. STORCH et al.

Civ. 7077.

Sac. 5659.

District Court of Appeal, Third District, California.

Nov. 25, 1944.

Rehearing Denied Dec. 18, 1944.

Hearing Denied Jan. 22, 1945.

1. Trusts 🔑61(3)

A trust may be extinguished by cestui que trust's parol surrender of his beneficial interest, where trustee so acts in reliance on such surrender as to make it inequitable for cestui to assert his interest.

2. Frauds, statute of 🔑139(1)

Performance of oral agreement within statute of frauds takes it out of such statute. Code Civ.Proc. § 1971.

3. Trusts 🔑61(3)

Where there has been some performance of oral trust contract by trustee or his position has changed as result thereof, cestui que trust's surrender of his beneficial interest is effective irrespective of statutory requirements. Code Civ.Proc. § 1971.

4. Frauds, statute of 🔑139(1)

A fully executed parol contract cannot be affected by statute of frauds, nor assailed by parties thereto or third persons because it is not in writing, though full performance thereof is by one of parties only. Code Civ.Proc. § 1971.

5. Frauds, statute of 🔑144

The facts of particular case may give rise to equitable estoppel against party seeking to set up statute of frauds and foreclose him from relying thereon, and operation of such equitable doctrine is not limited to any particular class of contracts within statute, if essential elements of estoppel are present. Code Civ.Proc. § 1971.

6. Trusts 🔑61(3)

In suit to establish partners' ownership of property in defendant's possession, evidence sustained finding of plaintiff's valid oral surrender, cancellation, and rescission of resulting trust in which defendant held property for partners' benefit. Code Civ.Proc. § 1971.

7. Trial 🔑396(1)

The trial court did not err in refusing to make plaintiff's proposed evidentiary findings as to matters not set forth in complaint.

8. Trial 🔑395(5)

A court need not make findings on other than ultimate facts and material issues.

9. Appeal and error 🔑1071(6)

A party may not complain on appeal of trial court's failure to make fact findings which must necessarily have been adverse to such party.

10. Appeal and error 🔑1071(6)

Where trial court makes findings on issues which determine cause, other issues become immaterial, and failure to find thereon does not constitute prejudicial error.

11. Appeal and error 🔑1071(6)

Error cannot be predicated on trial court's failure to make requested findings, unless there is sufficient evidence in record to sustain finding in favor of complaining party and such finding would countervail or destroy effect of other findings.

12. Trusts 🔑372(3)

In suit to establish partners' ownership of property in possession of defendant as record owner, trial court's fact findings were sufficient to establish estoppel of plaintiff to claim further interest in property as beneficiary of resulting trust and sustain judgment for defendant.

13. Equity 🔑65(1)

In suit to establish partners' ownership of property in possession of defendant as record owner thereof, where evidence showed that plaintiff completely rid himself of all responsibility for property, and filed action only after prospect for good prices of fruit raised thereon appeared, plaintiff was in no position to assert that defendants, claiming estoppel of plaintiff to assert interest in property, did not come into court with clean hands.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by J. R. Nicolds against Gustave Storch, Peter Storch and others to establish plaintiff's and first named defendant's ownership, as copartners, of property standing in name and possession of defendant Peter Storch. Judgment for defendants, and plaintiff appeals.

Affirmed.

Whitehurst & Logan, of Newman, for appellant.

Edward T. Taylor and John E. Griffin, both of Modesto, for respondents.

ADAMS, Presiding Justice.

Plaintiff sued defendants, seeking to establish in himself and defendant Gustave Storch, as copartners, ownership of certain real and personal property standing in the name and in the possession of defendant Peter Storch. His complaint alleged the creation of the partnership between him and Gustave Storch in February, 1936, to conduct the business of producing and marketing fruit and the carrying on of such business; that during the existence of said partnership the partners desired to purchase certain described property, hereinafter referred to as the peach orchard, together with certain farming implements, for the sum of $9200; that not having sufficient funds to make said purchase it was verbally agreed between them and defendant Peter Storch that the latter would lend the two partners $9200 for such purpose, and that the property should be conveyed to Peter Storch as security for the money so loaned, and that Peter Storch should hold the same in trust for the copartners until they should repay said $9200; that Peter Storch should borrow for the benefit of the copartnership a portion of the purchase price and advance the balance from his own funds, and that the copartnership should pay interest, taxes on the property, and all costs of upkeep, and should occupy same as partnership property; that pursuant to said agreement Peter Storch purchased the property by borrowing $5400 from a bank, securing said loan by a deed of trust upon the land, and by paying the balance from the proceeds of his unsecured promissory note and his own funds; that plaintiff and Gustave Storch then entered into possession of the property and operated same as partnership property except as to a portion thereof that was sold by consent of all parties. The complaint then alleged that Gustave Storch became involved in matrimonial difficulties which resulted in the institution of a divorce action by his wife, in which action a restraining order was issued enjoining the disposition or encumbrance of any property, either community or separate, in the possession or under the control of said Gustave Storch; that after the filing of said divorce action plaintiff and Gustave Storch agreed to dissolve their partnership and did dissolve it on November 20, 1940, but that in such dissolution no disposition was made of the peach orchard, but that the same was, by the consent of all parties, left in the possession of Peter Storch pending the outcome of the action for divorce; that said action resulted in an interlocutory decree entered May 1, 1941, which set aside to Gustave Storch all interest in said real property and any farming equipment within the jurisdiction of the court.

It was further alleged that there remained unpaid to Peter Storch the sum of $7668.47, together with interest from March 1, 1941. The property held by Peter Storch was described and included a crop of peaches alleged to be the property of the copartnership. Plaintiff also alleged that Peter Storch had laid out certain moneys for the operation of the property since he had taken possession of same on the dissolution of the partnership; and plaintiff offered, and alleged that he was ready, able and willing, upon ascertaining the amount due Peter Storch, to pay his just share of same, or to pay the whole upon being awarded a lien on the premises. He prayed that it be decreed that he and Gustave Storch were the owners of said partnership property subject only to the payment of the indebtedness to Peter Storch, and that an accounting be had.

Defendants answered, and among other defenses alleged that plaintiff was guilty of laches, that he was estopped by his delay in seeking to enforce his rights, that the agreement alleged in the complaint was oral and therefore unenforceable by reason of the statute of frauds, and, also, that plaintiff, prior to the commencement of his action, had "orally surrendered, cancelled, abandoned, extinguished and rescinded the resulting trust alleged in the complaint * * * and discharged and released said Peter Storch from the performance thereof with the intention permanently to surrender, cancel, abandon, extinguish and rescind the resulting trust alleged in the complaint"; that plaintiff had surrendered and abandoned possession of the premises in November, 1940, at the time of the dissolution of the partnership and had never resumed possession or occupancy thereof; that Peter Storch had entered into possession of the property immediately after plaintiff's oral surrender, abandonment and rescission of the resulting trust and that plaintiff had severed all connections with the operation of the property. Defendants further alleged that they had expended large sums of money since said surrender, in operating same and in growing the crop of peaches thereon and had done so in reliance upon the surrender and abandonment by plaintiff. It was further alleged that at the time of the dissolution of the partnership one of the assets thereof was a lease to an apricot orchard which had been transferred to plaintiff as part of the consideration of his surrender and extinguishment of the resulting trust.

After a trial of the action the court made findings to the effect that it was verbally agreed between plaintiff, Gustave Storch and Peter Storch that the latter would lend the two partners $9200 for the purchase of the peach orchard and equipment, that the property should be conveyed to Peter Storch as security for the money lent, and that the latter should hold the same in trust for said copartners, as property of the copartnership until they should repay said sum; that pursuant to said agreement the purchase was made, and plaintiff and Gustave Storch entered into possession of the property and operated it as partnership property; that the partnership was dissolved on November 20, 1940; that it was not agreed at that or any time that upon the purchase price being repaid to Peter Storch the partnership might become entitled to a conveyance from him; that disposition was made in such dissolution for the disposal of said property, and that it was not left in the possession of Peter Storch pending the outcome of the divorce action; and that in November, 1940, plaintiff orally surrendered, cancelled, abandoned, extinguished and rescinded the resulting trust alleged in the complaint to defendant Peter Storch and discharged and released him from the performance thereof with the intention permanently to surrender, cancel, abandon, extinguish and rescind the trust; that defendant Peter Storch consented to and accepted and agreed to accept the same and the same was done by mutual consent of plaintiff and defendant Peter Storch; that thereupon plaintiff completely surrendered and abandoned possession of said premises and the whole thereof, in the month of November, 1940, at the time of the dissolution of the partnership, to defendant Peter Storch, and plaintiff, prior to the commencement of this action, never resumed any possession or occupancy of said premises.

Also that immediately after the dissolution in November, 1940, defendant Peter Storch entered into possession of the property and took complete possession and control of same; that prior to the dissolution plaintiff, since the purchase of said property, had been in the actual possession of said ranch and supervised, farmed, managed, operated and maintained said ranch and property, and immediately after said oral surrender, cancellation, abandonment, extinguishment and rescission of said resulting trust, plaintiff severed all connections with it and had nothing further to do with the supervising, farming, managing, operating or maintaining of said ranch and property. It further found that at the time of the dissolution the crop of peaches on the land had been harvested and that there would be no further income therefrom until the late summer of 1941, and that it was necessary that certain work and labor be performed on said peach orchard during the winter and spring following the dissolution, and that Peter Storch spent large sums in the purchase of necessary equipment, and for work and labor, expending some $4000 for such purposes, and also performed work upon said property himself; that plaintiff was an experienced operator himself and knew the cost and expense of operating such property and that said expenditure would have to be made, that he had full knowledge of same while the work was being done by Peter Storch, but that he did not assist in any work thereon, and never contributed or offered to contribute toward the expenses of such operations; that Peter Storch assumed the risk of losing some $7500, the cost of operating the orchard, if peaches did not sell at a fair price in 1941; that the property was highly speculative in that peach crops fluctuate in value, having sold as low as $5 per ton; that the price in 1941 would not be generally known until May, 1941, but that those in the trade had some information earlier that in all probability peaches would yield a much higher price in 1941 than in previous years; that the acts of Peter Storch were done by him pursuant to the cancellation, etc., of said trust and in reliance thereon, and such acts would not have been done, nor moneys expended nor the risks involved taken, had he not relied thereon; and that said oral agreement to surrender, etc., was fully executed.

There were further findings that a part of the consideration for the cancellation, etc., of the trust and the dissolution of the partnership was the transfer of the lease of the apricot orchard to plaintiff, who immediately assumed sole ownership of said lease and the operation of the orchard; that plaintiff was guilty of laches, that he was estopped by his delay in seeking to enforce his rights, and that he abandoned any interest which he might have had in the property with the intention permanently to relinquish any and all rights therein.

The evidence shows that prior to the dissolution of the partnership Gustave Storch assigned and transferred to Peter Storch all his interest in the partnership property. Also that plaintiff himself prepared a statement showing the assets and liabilities of the partnership and the assets remaining to be divided between the parties on dissolution and did not mention the peach orchard as among the assets, nor the balance of the purchase price due Peter Storch as one of the liabilities. The dissolution agreement of November 20, 1940, which was in writing, recited that the parties desired and intended to dissolve the partnership, to wind up its affairs and to agree upon the distribution of the partnership assets; that "This agreement is intended to and shall completely adjust and settle all claims which either party hereto now has or may have acquired from the beginning of the world to the date hereof, one against the other, and particularly all claims, rights, or duties that may or might arise out of or by reason of the execution of said agreement of partnership, or any matters or transactions entered into as the result thereof. Each party admits full satisfaction of all of such claims, and demands, and acknowledges good and valuable consideration for the execution of this agreement."

In an inventory attached to the dissolution agreement no mention was made of the peach orchard, nor was the amount of the loan due Peter Storch set forth, though certain amounts of interest due Peter Storch, and the bank from which Peter Storch had borrowed, were included as accounts payable. Also there was evidence that after the dissolution plaintiff demanded and received a refund of premiums prepaid upon insurance upon the property, that he ordered that no more materials used on it be charged to him and that he cancelled a cannery contract, and that Peter Storch had to sign a new one.

On this appeal it is contended by plaintiff Nicolds that the judgment of the trial court should be reversed, *first,* because that court found that plaintiff *orally* surrendered, cancelled, abandoned, extinguished and rescinded the resulting trust, it being urged that under the statute of frauds, Code Civ.Proc. § 1971, such surrender, cancellation, etc., could only be effected by a writing; *second,* that the trustee could not "buy up" other claims against him, and then insist that they, as well as moneys owed the trustee by other parties, be paid as a condition of conveying title; *third,* that plaintiff as beneficiary under the trust could not be estopped to dispute a surrender of his interest to the trustee where the latter was fully aware of the true facts at all times; and, *fourth,* the court erred in refusing to make findings upon matters of evidence introduced by plaintiff as affirmative defenses to defendants' affirmative defenses. No contention is made that the evidence is insufficient to sustain the findings of the trial court.

There seems to be a division of opinion of courts as to whether, even where statutes contain provisions similar to section 1971 of the Code of Civil Procedure, relied upon by appellant, an equity founded on parol proof may be discharged by parol. It is said in an article in 42 Harvard Law Review, 849, 854, that if the creation and continuance of a trust may be shown without any written declaration of trust, no higher degree of evidence should be required to show its extinguishment. And (p. 864) that where a resulting trust arises wholly by parol, as in the case of a purchase-money resulting trust, it is held by the weight of authority that no writing is necessary for its extinguishment.

In a note in 106 A.L.R. 1315, it is also said that while there is some conflict in the cases the majority of courts hold to the principle that an oral contract to surrender, rescind, or abandon the beneficial interest arising under a resulting trust is not rendered ineffective or unenforceable by the statute of frauds. Cases in which this view was taken are there cited. Also see the later case of Barber v. Coleman, Tex.Civ.App., 173 S.W.2d 660.

Restatement of Trusts, sec. 460, provides: "Where a transfer of an interest in land is made to one person and the purchase price is paid by another, the resulting trust which arises in favor of the payor can be extinguished by an oral conveyance or surrender of his interest by the beneficiary of the resulting trust to the trustee." and comment thereon reads: "The resulting trust in this situation arises from the fact of the payment of the purchase price and without any writing. As has been stated the inference that a resulting trust arises from the payment of the purchase price can be rebutted without a writing (see sec. 441, Comment *b*). Similarly, it can be extinguished without a writing." In the California annotations to this volume it is said regarding section 460, supra, that no case in point was found, but that Millard v. Hathaway, 27 Cal. 119, contains dicta that a release by the payor of his interest under a resulting trust must be proved in writing.

Appellant relies upon Millard v. Hathaway, and some other cases cited in 106 A. L.R. 1316, 1317. Respondent relies upon cases cited to the contrary in the same note, and also upon Carter v. Hopkins, 79 Cal. 82, 21 P. 549, and Knouse v. Shubert, 48 Cal.App.2d 685, 121 P.2d 74. In Carter v. Hopkins, money had been advanced by one Bouldin, plaintiff's intestate, to purchase a lot in San Francisco, title to which was taken in Hopkins' name. In the action, brought by Carter to establish a resulting trust, there was testimony, educed by plaintiff, that there had been a settlement between Bouldin and Hopkins in which the latter had conveyed to Bouldin certain property in San Bernardino County in payment of all advances made by Bouldin, though there was no conveyance by Bouldin of his interest in the trust property. A nonsuit granted at the close of plaintiff's evidence was sustained. On appeal Millard v. Hathaway was cited and relied upon but the court said [79 Cal. 82, 21 P. 551]: "Conceding that a resulting trust was established as to the lot in the city and county of San Francisco, the court is of opinion that this trust was extinguished by the conveyance by Hopkins to Bouldin of the land in the county of San Bernardino, and that the statute of frauds does not require a conveyance by Bouldin to Hopkins of his equitable interest in the San Francisco lot."

In Knouse v. Shubert, supra, where the purchase price of property in controversy was paid by appellant, and title was held by defendant, the court said that while this transaction raised the presumption of a resulting trust in favor of appellant, it added, 48 Cal.App.2d at page 689, 121 P.2d at page 76: "However, such presumption is rebuttable and 'oral declarations of the payor's intention to make a gift to the transferee are admissible to show that the payor intended that the transferee should have the beneficial interest in the property, even though the property transferred was an interest in land and the Statute of Frauds is in force. Such declarations are admissible, whether made before or at the time of or subsequent to the transfer. As the resulting trust arises from parol evidence so it may be rebutted by parol evidence.' Restatement of the Law—Trusts, section 441, Comment b, p. 1348."

No other California cases bearing upon the problem are cited by the parties to this action, nor has our research revealed any. However, we do not find it necessary to determine this question in this case, since there are other well established principles upon which the judgment of the trial court must be affirmed. As hereinbefore stated, that court found that at the time of the dissolution of the partnership between plaintiff and Gustave Storch, plaintiff surrendered, cancelled, abandoned, extinguished and rescinded the resulting trust to Peter Storch, and discharged and released him from the performance thereof; that Peter Storch accepted such surrender, and that thereupon plaintiff surrendered and abandoned possession of the premises and never resumed such possession, and thereafter had nothing to do with the supervising, farming, managing, operating or maintaining of same; that Peter Storch took complete control and possession of the property and operated it himself, that he performed necessary work and labor thereon, and spent large sums of money in the purchase of necessary equipment and for labor thereon, in order to prepare same for a crop of peaches the coming year; that plaintiff was an experienced operator and knew the cost and expense of operating same, had full knowledge of what work was being done by Peter Storch, but never contributed to or offered to contribute toward such work or expense; and that the acts of Peter Storch were done pursuant to the cancellation, etc., of the trust and in reliance thereon, and he would not have done such acts nor expended moneys nor taken the risks involved in operating the property except in reliance thereon; *and that said oral agreement to surrender, etc., was fully executed;* that plaintiff stood by with full knowledge and permitted Peter Storch to change his position and do the aforesaid acts in reliance upon plaintiff's surrender and rescission. Also there was a finding that as a part of the consideration for plaintiff's surrender of his interest in the peach orchard, ownership of the lease and the operation of the apricot orchard were transferred to plaintiff; that plaintiff was guilty of laches, and that he was estopped to claim any further interest in the peach orchard.

[1-3] These findings bring plaintiff within the rule that a trust may be extinguished by a parol surrender by the cestui que trust in any case in which the trustee so acts in reliance upon the surrender as to make it inequitable for the cestui to assert his interest, and the rule that performance of an oral agreement within the statute of frauds takes the case out of the statute. It is said in the note in 106 A.L.R., p. 1318, that whatever may be the nature of the trust relation all courts agree that where there has been some performance by the trustee in accordance with the oral contract, or where his position has been changed as a result of it, the surrender is effective irrespective of the requirements of the statute. Cited in support of this principle are Carter v. Hopkins, supra; Dayton v. Newman, 19 Pa. 194; Gorrell v. Alspaugh, 120 N.C. 362, 27 S.E. 85; Wells v. Crumpler, 182 N.C. 350, 109 S.E. 49; Magen v. Neiman, 301 Pa. 164, 151 A. 796. Also see 42 Harv.L.Rev. 851, 865.

[4] It is said in 12 Cal.Jur., pp. 926, 927, that a fully executed parol contract cannot be affected by the statute of frauds, and cannot be assailed either by the parties or by third persons on the ground that it is not in writing; that the rule is the same where full performance is by one of the parties only; and that the rule is sometimes placed on the ground of estoppel.

While it is not specifically so stated in Carter v. Hopkins, supra, it is inferable that the decision was based on equitable estoppel, since Bouldin accepted the San Bernardino property which Hopkins averred was given in settlement, among other things, for Bouldin's interest in the San Francisco property.

[5] The doctrine of equitable estoppel was applied in Wilson v. Bailey, 8 Cal.2d 416, 421–423, 65 P.2d 770, where the court said that it is well settled that the facts of a particular case may give rise to an equitable estoppel against a party seeking to set up the statute of frauds, and foreclose him from relying thereon; and that there is no reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always that the essential elements of estoppel are present.

In Moulton v. Harris, 94 Cal. 420, 421, 29 P. 706, it was held that where a vendee, in reliance upon an oral contract to convey, takes possession of property and makes improvements thereon, this is sufficient part performance to take the contract out of the statute.

In Vierra v. Pereira, 12 Cal.2d 629, 632, 86 P.2d 816, where defendants entered into an oral contract of lease for a term of three years and the lessee entered into possession and made expenditures in irrigating, leveling and planting the land, and fully performed the contract, it was held that defendants' conduct estopped them to make the defense of the statute of frauds. Also see Coonan v. Loewenthal, 129 Cal. 197, 200, 61 P. 940; Graves v. Arizona Central Bank, 205 Cal. 715, 718, 272 P. 1063; Husheon v. Kelley, 162 Cal. 656, 662, 124 P. 231; Bekins v. Smith, 37 Cal.App. 222, 224, 225, 174 P. 96; Martin v. Pritchard, 52 Cal.App. 720, 724, 199 P. 846; Rundell v. McDonald, 62 Cal.App. 721, 724, 217 P. 1082; Schaefer v. United Bank & Trust Co., 104 Cal.App. 635, 646, 286 P. 723; Atkinson v. Boynton, 97 Cal.App. 759, 762, 276 P. 356; Atkinson v. Boynton, 111 Cal. App. 128, 130, 295 P. 352.

[6] In view of the legal principles above set forth and the findings of the trial court we conclude that the first abovementioned contention of plaintiff cannot be sustained, and that there was a valid surrender, cancellation, abandonment and extinguishment of the resulting trust. This conclusion renders it unnecessary to pass upon appellant's second and third contentions on appeal.

[7-11] As to the fourth one, that the trial court erred in refusing to make certain findings proposed by plaintiff, which cover six printed pages in the transcript, they pertain largely to what plaintiff contends were his reasons for the dissolution of the partnership, are evidentiary, and not matters set forth in plaintiff's complaint. It is well established that it is unnecessary for a court to make findings upon other than ultimate facts (Culver v. Miller, 54 Cal.App. 545, 549, 202 P. 338), nor upon other than material issues; also a party may not complain of a failure to find upon an issue where a finding, if made, must necessarily have been adverse to him; and if findings are made upon issues which determine a cause, other issues become immaterial and a failure to find thereon does not constitute prejudicial error. 24 Cal. Jur. 942–949. Furthermore, unless there is evidence in the record sufficient to sustain a finding in favor of a complaining party, and such finding would, if made, countervail or destroy the effect of other findings, no error can be predicated upon the failure of the trial court to make such requested findings. 24 Cal.Jur. 941.

[12] Appellant makes no contention that the findings made are insufficient to sustain the judgment except that he does argue that a simple finding that a party is estopped is insufficient. We do not think that it can be said in this case that the findings are subject to this criticism. We have set forth at some length findings made by the court which are sufficient to constitute an estoppel against plaintiff, and we are satisfied that the findings made cover all of the material issues in the case, and sustain the judgment in favor of defendants.

[13] There is also some contention by appellant that defendants did not come into court "with clean hands," and were, therefore, not entitled to consideration by a court of equity. Apparently the trial court was satisfied in this respect, and since the evidence is amply sufficient to show that plaintiff at the time of the dissolution of the partnership completely rid himself of all responsibility for the peach orchard, turned possession of same over to Peter Storch, and, with full knowledge that much work and large expenditures upon it would be required during the coming months did not make or offer to make any contribution thereto, and only filed this action in May, 1941, after prospects for a good price for peaches in 1941 appeared, he is in no position to assert that defendants' hands were not clean, since the cleanliness of his own hands may be said to be subject to question.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

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67 Cal.App.2d 175

BALDWIN v. BALDWIN.

Civ. 12753.

District Court of Appeal, First District,
Division 1, California.

Dec. 4, 1944.

1. Appeal and error 🔑770(1)

Where respondent filed no brief within time prescribed and no sufficient excuse was made, appeal could be submitted on record, and statement of facts in appellant's brief accepted as true. Rules on Appeal, rule 17(b).

2. Appeal and error 🔑770(1)

Where respondent filed no brief within time prescribed, submission for decision on appellant's brief was discretionary, word "may" in rule being used in a permissive sense. Rules on Appeal, rules 17 (b), 40(d).

3. Appeal and error 🔑773(1)

The general rule in many jurisdictions is that on failure of respondent to file a brief on appeal, court may reverse without considering merits, or may consider merits and affirm or reverse judgment.

4. Appeal and error 🔑773(5)

Where respondent files no brief on appeal, appellant's brief should be examined to see whether errors complained of would probably entitle appellant to a reversal, and, if necessary, appellate court should examine record to ascertain, if possible, whether such reversal would result in miscarriage of justice. Const. art. 6, § 4½; Rules on Appeal, rules 17(b), 40(d).

5. Appeal and error 🔑770(1)

Where respondent filed no brief within time prescribed, the complete record on appeal, including pleadings, affidavits received and filed, testimony, statements of counsel, and rulings of court, should be considered, particularly in view of appellant's admission that his brief contained an inadvertent statement of fact. Rules on Appeal, rules 17(b), 40(d).

6. Appeal and error 🔑770(1)

Where respondent filed no brief, certain portions of appellant's brief respecting one of affidavits would not be considered where it appeared and was admitted that a statement quoted therein as appearing in respondent's affidavit was not of record on appeal.

7. Appeal and error 🔑955

Where evidence is conflicting, proof of an actual business partnership, that the business is insolvent, and that assets are being wasted or misappropriated, are matters entirely for trial court, as respects appointment of receiver.

8. Appeal and error 🔑1011(1)

The facts found by trial court, though in conflict with other evidence stated in an affidavit or otherwise favorable to prevailing party, are binding on reviewing court.

9. Appeal and error 🔑955

An appellate court is never justified in substituting its discretion for that of trial court sitting nisi prius with reference to appointment of receiver, and appellate court's power is limited to determination whether there has been such abuse of discretion as to have resulted in miscarriage of justice. Const. art. 6, § 4½.

10. Partnership 🔑325(3)

In action involving accounting of partnership business, evidence as to relations and transactions between parties, though contradicted, was sufficient to sustain order appointing receiver.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Action by Floyd Baldwin against Lillian Baldwin, also known as Lillian Black, for judgment for money had and received and on an account stated, wherein defendant cross-complained seeking an accounting for partnership business and filed a motion for the appointment of a receiver. From an order appointing a receiver, plaintiff appeals.

Affirmed.

Henry J. Kleefisch, of San Francisco, for appellant.

Ben K. Lerer, of San Francisco, and E. H. Cosgriff, of Burlingame, for respondent.

WARD, Justice.

This is an appeal from an order appointing a receiver. Plaintiff in his complaint sought judgment for money had and received and on an account stated. Defendant answered and cross-complained, alleging a partnership in the business of "Floyd Baldwin, Painting and Decorating." She demanded an accounting and filed a motion for the appointment of a receiver. Plaintiff answered defendant's cross-complaint. Affidavits were filed by the parties in opposition to and in support of the application for the appointment of a receiver respectively. The matter was submitted upon the pleadings, the affidavits and the testimony of the parties. The trial court entered an order appointing a receiver, and it is from this order that the plaintiff and cross-defendant has taken this appeal.

The clerk's and the reporter's transcripts having been filed, followed in due time by appellant's brief, and the respondent having presented no answering brief, the matter has accordingly been submitted under rule 17(b) of the Rules on Appeal. 22 Cal. 2d 14.

[1-4] Where a respondent has filed no brief within the time prescribed, and no sufficient showing of excuse is made, the appeal may be submitted on the record under rule 17(b) (Zeigler v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118; Marchese v. Marchese, 61 Cal.App.2d 307, 142 P.2d 936), and the statement of facts in appellant's brief accepted as true. The submission for decision upon appellant's brief is discretionary. Ramacciotti v. Galiano, 59 Cal.App.2d 8, 137 P.2d 722. The word "may" is used in a permissive sense. Rule 40(d). The general rule in many jurisdictions is that on the failure of respondent to file a brief on appeal, the court may reverse without considering the merits, or may consider the merits and affirm or reverse the judgment. 3 Am.Jur., sec. 781, p. 338; 4 C.J.S., Appeal and Error, § 1339, pp. 1929, 1930. The rule that should be followed is that of examining the brief of appellant to see whether the error or er-

rors complained of would probably entitle such party to a reversal, and, if necessary, examine the record to ascertain, if possible, whether such reversal would result in a miscarriage of justice. Calif. Const. Art. VI, sec. 4½; Lutz v. Merchants' Nat. Bank, 179 Cal. 401, 177 P. 158; Duisenberg-Wichman & Co. v. Johnson, 120 Cal.App. 227, 7 P.2d 1081.

[5] We believe, particularly in view of appellant's admission that his brief contains an inadvertent misstatement of fact, that the record on appeal containing the pleadings, affidavits received and filed, testimony, statements of counsel and the rulings of the court, in fact the complete record, should be considered.

[6] Appellant contends that the affidavit and testimony in support of the motion for the appointment of a receiver were insufficient for that purpose, and that there is no evidence of any assets that would be subject to receivership. Certain portions of appellant's brief in reference to one of the affidavits will not be considered inasmuch as it appears and is admitted that a statement quoted therein as appearing in respondent's affidavit is not of record on appeal.

[7-9] When it appears that evidence thereon is conflicting, proof of an actual business partnership, that the business is insolvent and that assets are being wasted or misappropriated, are matters entirely in the hands of the trial court. The evidence may be in the form of allegations in a complaint or other pleading, by affidavit or by testimony. 45 Am.Jur., pp. 90, 91, secs. 103, 105. The facts found, though in conflict with other evidence stated in an affidavit or otherwise favorable to the prevailing party, are binding on a reviewing court. In Misita v. Distillers Corp., Ltd., 54 Cal.App.2d 244, 250, 128 P.2d 888, 892, the court said: "An appellate court is never justified in substituting its discretion for that of the court sitting nisi prius. Its power is limited to the determination whether there has been such an abuse of discretion that it has resulted in a miscarriage of justice." See, also, Goes v. Perry, 18 Cal.2d 373, 115 P.2d 441; Moore v. Oberg, 61 Cal.App.2d 216, 142 P.2d 443; Breedlove v. J. W. & E. M. Breedlove Excavating Co., 56 Cal.App.2d 141, 132 P.2d 239.

[10] It is not necessary to give a detailed account of the personal and business relations of the parties from 1938 until the filing of this action. It is sufficient to say that respondent testified she loaned appellant the money with which to go into business; that she was his business partner; that she assisted him in the manual performance of their undertakings; that she did the banking and paid the bills from funds of the business deposited jointly in her name and that of appellant; that the assets of the business amounted to approximately $10,000 and that appellant had threatened to ruin the business rather than account to her. This evidence, though contradicted, is sufficient to deter a reviewing court from interfering with the order appointing a receiver. Under all of the circumstances of the case we are not convinced that the "court's discretion has been abused." Sunset Farms, Inc., v. Superior Court, 9 Cal.App.2d 389, 405, 50 P.2d 106, 113; Elson v. Nyhan, 45 Cal.App.2d 1, 113 P.2d 474.

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

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67 Cal.App.2d 27

SAGER et al. v. O'CONNELL.

Civ. 12702.

District Court of Appeal, First District, Division 2, California.

Nov. 27, 1944.

1. Adjoining landowners 🔑6
Nuisance 🔑10

Where plaintiffs' city property had been excavated and a retaining wall erected on plaintiffs' property, adjoining owner, after wall had deteriorated, was not liable for one-half cost of repair, damages for debris falling onto plaintiffs' property, nor maintaining a nuisance, nor obligated to build another wall, or remove the debris. Civ.Code, § 832.

2. Adjoining landowners 🔑6

Where plaintiffs' city property had been excavated, plaintiffs were obligated to maintain a retaining wall previously erected on plaintiffs' property, and were liable for damages sustained by adjoining owner when wall deteriorated. Civ.Code, § 832.

3. Adjoining landowners 🔑3

In action against adjoining landowner for failure to maintain a retaining wall and cross-action for loss of lateral support, where cost of repairing injury by removing debris, and otherwise restoring premises to their original condition, amounts to less than value of property prior to injury, such cost is proper measure of damages, and where cost of restoration will exceed such value, property's value is measure of damages. Civ.Code, § 832.

4. Adjoining landowners 🔑6

Evidence of cost of rebuilding retaining wall on plaintiffs' property which had been excavated below street level did not support a judgment for damages for defendant adjoining landowner, in absence of evidence of value of defendant's property or of damages suffered, particularly where judgment included cost of removing debris from plaintiffs' property and restoring plaintiffs' wall. Civ.Code, § 832.

5. Adjoining landowners 🔑3

One who withdraws natural lateral support of another's land, or support which has been substituted for the natural support, is liable for subsidence of other's land in absence of a superseding cause or other reason for relief. Civ.Code, § 832.

6. Adjoining landowners 🔑3

To obtain judgment for loss of lateral support, adjoining owner must be guilty of some act of negligence. Civ.Code, § 832.

7. Adjoining landowners 🔑3

The fact that an adjoining landowner was not registered owner does not relieve him of liability for loss of lateral support, where he is negligent. Civ.Code, § 832.

8. Adjoining landowners 🔑3

The fact that a prior adjoining owner was negligent in permitting a retaining wall to decay will not excuse a subsequent owner from liability for loss of support from the continued negligence. Civ.Code, § 832.

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by E. N. Sager and another against Daniel R. O'Connell for abatement of a nuisance, damages therefrom, removal of dirt and debris, and in the alternative one-half cost of repair of a retaining wall or an order that defendant rebuild wall, wherein by stipulation unnamed plaintiff was added as party plaintiff and cross-defendant, defendant reserving right to object to pleadings thereafter filed, and defendant cross-complained for an order to compel cross-defendants to construct a new wall or in the alternative for alleged cost of wall. From a judgment for defendant on the cross-complaint, plaintiffs appeal.

Judgment reversed.

Marvin E. Lewis and James W. Harvey, both of San Francisco, for appellants.

Simeon E. Sheffey and Eric A. Falconer, both of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiffs and cross-defendants appeal from a judgment awarded respondent on the cross-complaint.

The original complaint for abatement of a nuisance and the recovery of damages therefrom was brought in the name of the individual appellant, E. N. Sager. It alleged that the plaintiff owned designated property on Ellis Street in the City and County of San Francisco, and that the defendant was the adjoining owner, upon whose premises a wooden wall or bulkhead had been erected. It further alleged that the defendant had permitted the bulkhead to become decayed and that as a consequence dirt and debris had fallen from the higher property of defendant onto the property of plaintiff, creating the damages complained of.

Upon the trial of the action, the title of plaintiff's property was put in dispute and by stipulation the Sager Enterprise & Construction Company, a corporation, was added as party plaintiff and cross-defendant, the respondent reserving all rights to object to the pleadings to be filed thereafter.

Pursuant to this stipulation, at the conclusion of the trial, appellants then filed an amended complaint for abatement of nuisance, praying that if the bulkhead be determined to be a division fence, respondent be ordered to contribute one-half of the cost of repair, but if it be determined to be respondent's fence, he be enjoined from maintaining a nuisance and ordered to build another fence, and for the removal of dirt and debris now on appellants' property as a result of its having fallen through the fence, and for the recovery of damages.

Respondent answered and cross-complained, contending throughout that his property was at its natural level and that appellants' adjoining property had been excavated by a previous owner; that the bulkhead was located upon appellants' property and had been erected by appellants' predecessor in title for the purpose of providing lateral support to which respondent's land was entitled. He further alleged that appellants had permitted the bulkhead to become decayed and that as a consequence dirt from respondent's property had fallen into the excavation on appellants' property; that if appellants failed to erect a substantial bulkhead, he would have to do so and that the cost of erecting the same would be $5,000. The entire prayer of both the original cross-complaint and the document entitled "Amended Cross-Complaint," which in reality appears to be a supplemental cross-complaint, reads: "That Cross Defendants herein named be required and ordered to construct a new wall or bulkhead in lieu of the old, rotten and decayed bulkhead now on the land of Cross Defendants herein named, and in the alternative, that if said new wooden wall or bulkhead is not constructed within a time fixed by order of this Court that Cross-Complainant have judgment against Cross Defendants herein named in the sum of Five Thousand Dollars ($5000.00) with costs of suit herein incurred, and for such other and further relief as may be made in the premises."

Upon the trial of the action respondent was awarded a judgment on his cross-complaint in the sum of $2,035. That sum is predicated upon the following finding of fact: "That by reason of the failure of cross-defendants to furnish to the land of cross-complainant the lateral support to which it was and is now entitled to receive from cross-defendants' land, and by reason of the subsidence and falling in of cross-complainant's land, cross-complainant has been damaged in the sum of Two Thousand and Thirty-Five Dollars ($2,035.00)."

[1] Appellants claim a number of errors. We find that many of the findings of the court objected to are supported by the evidence, although a conflict in the evidence did exist. The evidence does support the conclusion that appellants' property had been excavated below the street level. The finding that the wall was not a division fence, but a bulkhead originally erected on appellants' property for the purpose of providing lateral support for respondent's property, is also supported by the evidence. It follows therefore that appellants have not proved the gravamen of their complaint and cannot recover thereon.

[2] However, the award of damages to respondent is not sustained by the evidence. For this reason it is unnecessary to determine if the item of damages for the loss of the right of lateral support (as distinguished from damages resulting from the deposit of debris) was embraced within the issues of the cross-complaint. The only witness who testified on this subject directed his testimony to the cost of replacing the retaining wall in its present location, but the trial court found that that wall was built on appellants', not on respondent's, property. In addition it included in the figure of $2,035, the cost of removing dirt and debris from appellants' property and restoring appellants' wall. No segregation in these items was made. Appellants had contended that the wall was built on the property line, but the trial court found to the contrary, and thus we have a case where the appellants are obligated to maintain the wall for the lateral support of respondent's land, and the collateral issue of the damages sustained by respondent.

[3] The proper measure of damages in this state is that laid down in Green v. General Petroleum Corp., 205 Cal. 328, 336, 270 P. 952, 956, 60 A.L.R. 475: "The rule to be applied in this case is: If the cost of repairing the injury by removing the débris deposited by the appellant, and otherwise restoring the premises to their original condition, amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value, then the value of the property is the proper measure. Salstrom v. Orleans, etc., Mining Co., 153 Cal. 551, 558, 96 P. 292." Kell v. Jansen, 53 Cal.App.2d 498, 127 P.2d 1033; Wharam v. Investment Underwriters, 58 Cal.App.2d 346, 350, 136 P.2d 363.

[4] No evidence whatever was introduced as to the value of respondent's prop-

erty and no evidence was offered of the damages suffered. The cost of rebuilding a retaining wall on appellants' property cannot be held to be equivalent to the cost of restoring respondent's property to its original condition by mere speculation and without some evidence, and the finding of damages is therefore not supported by the evidence.

While the findings of fact contain a finding that respondent's property is entitled to lateral support, that statement is not contained in either the conclusions of law or the judgment. Since the enforcement of this right is the main issue raised by the cross-complaint, it would appear proper that a determination be made thereon. The trial court found that respondent's land is in its natural condition and if this is sustained by evidence at the new trial it would be a basis for the claim that his land is entitled to lateral support.

The California rule of lateral support is found in Civil Code, § 832: "Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction or improvement, under the following conditions * * *." This section has been discussed in considerable detail in Wharam v. Investment Underwriters, supra, where the court states (page 349 of 58 Cal.App. 2d, page 364 of 136 P.2d): "There is nothing in section 832 * * * which permits or excuses negligent trespass upon adjoining property. All that said section does is to permit a land owner to excavate, freed from the absolute common law right of lateral support in his neighbor, provided certain conditions in the Code section are complied with, and always provided that negligence of the excavator is not the proximate cause of damage to the property of the adjoining land owner. For no man may use his own property so negligently as to cause damage to or destruction of his neighbor's property. See section 832, Civil Code; Pacific Gas & Electric Co. v. Scott, 10 Cal.2d 581, at page 585, 75 P.2d 1054, at page 1056, and cases cited."

[5] However, the case at bar involves a problem not covered by sec. 832, supra, or other cases in California. In this case the excavation was made with due care and adequate precaution was taken to sustain respondent's property. The sole fault of appellants', if any exists, lies in negligently permitting the lateral support to weaken. Section 817 of the Restatement of Torts is applicable: "* * * a person who withdraws the naturally necessary lateral support of land in another's possession, *or support which has been substituted for the naturally necessary support,* is liable for a subsidence of such land of the other as was naturally dependent upon the support withdrawn, in the absence of a superseding cause or other reason for relieving him." (Italics ours.) See Gorton v. Schofield, 311 Mass. 352, 41 N.E.2d 12, 139 A.L.R. 1262; Foster v. Brown, 48 Ont.L.R. 1, 10 B.R.C. 918.

[6-8] Appellants also question whether judgment could be rendered against both appellants. In this connection we point out that it is essential to recover judgment against an owner that he be shown to be guilty of some act of negligence in connection with the lateral support of respondent's property. The mere fact that appellant E. N. Sager was not the registered owner of the property is not sufficient to relieve him of liability if, in fact, he owned the property and was negligent. The fact that a prior owner was negligent in permitting the bulkhead to decay will not excuse a subsequent owner from a continuing negligence.

Assuming the trial court finds all of the elements to exist which will grant respondent's property the right of lateral support, we see no reason in equity why the burden of providing such support should be transferred from appellants' to respondent's land. But here the case made by respondent upon which the judgment rests is that, unless appellants construct a substantial bulkhead, it will be necessary for respondent to do so. The cost of such construction is pleaded in the cross-complaint. But respondent cannot have a judgment for money to construct the bulkhead and then require appellants to construct it at their own expense.

The judgment is reversed.

SPENCE, J., and GOODELL, Justice pro tem., concur.

PACIFIC INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14582, 14583.

District Court of Appeal, Second District, Division 1, California.

Nov. 27, 1944.

Rehearing Denied Dec. 15, 1944.

Hearing Granted Jan. 26, 1945.

1. Workmen's compensation 🔑610

An injury "arises out of the employment" when there is apparent to the rational mind upon consideration of all the circumstances a causal connection between the conditions under which work is required to be performed and the resulting injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Arises Out of the Employment".

2. Workmen's compensation 🔑610

If exposure of employee to particular danger differs substantially from the normal risk to which all are subject, it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment.

3. Workmen's compensation 🔑608

It was not intended by the compensation act that an employer who comes within its provisions shall be the insurer of each employee at all times during the period of the employment, but employer is liable for compensation only when the injury occurs to the employee while performing some act for the employer in the course of his employment, or is doing something incidental thereto.

4. Workmen's compensation 🔑609

In order to recover for injury as arising out of employment, there must be a causal connection between the employment and the injury which had its origin in a risk connected with the employment and flowed from that source as a rational and natural consequence.

5. Workmen's compensation 🔑652

Compensation is recoverable for injuries sustained in performance of acts necessary to the comfort, convenience and welfare of the employee while in discharge of his work only where such acts bear a reasonable relation to the employment.

6. Workmen's compensation 🔑610

An injury sustained while voluntarily doing something outside of the employment is not an injury suffered "in the course of the employment".

See Words and Phrases, Permanent Edition, for all other definitions of "In the Course of the Employment".

7. Workmen's compensation 🔑621, 652

Minor employees who were drowned while on employer's premises and on way to collect wages, the drowning apparently occurring when wading in reservoir owned by employer and at which employees were permitted to wash themselves, but not at place where such employees customarily washed, did not sustain injury arising out of and occurring in the course of their employment, so as to justify an award of compensation for death.

Petition by the Pacific Indemnity Company seeking the review and annulment of awards made by the Industrial Accident Commission for the death of Tomas Vallez and another.

Awards annulled.

Herlihy & Herlihy, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, Attys. for Industrial Accident Commission, both of San Francisco, for respondents.

DORAN, Justice.

By these proceedings petitioner seeks the review and annulment of awards made by the Industrial Accident Commission for the death of Tomas Vallez, age 12, and of his brother Adolfo Vallez, age 15, who both sustained death by drowning on the premises of the employer, while the two boys were purportedly on their way to the employer's office to get their pay for picking grapes. The evidence in the record upon review establishes that Tomas and Adolfo Vallez resided with their parents. These two boys, and other members of their family, were employed by petitioner's assured as grape pickers on a piece work basis. On Saturday, September 5, 1942, the two boys had picked grapes for their employer in the morning. It appears from the testimony in the record that all the grape pickers quit work that day at noon. At that time Tomas and Adolfo went home.

About 12:30 or 1:00 in the afternoon of that day Tomas and Adolfo left their home with two other boys. There is evidence in the record that the boys were going to the office of their employer at that time in order to collect their wages. It also appears that the reason the boys went home after quitting work was to pick up certain cards recording the amount of grapes picked on previous days, for the purpose of getting their wages for such grape picking. One of the boys who accompanied Tomas and Adolfo testified at the hearing that the boys stopped at an irrigation reservoir on the employer's premises, in order to wash before going to the office for their pay. Tomas and Adolfo were drowned in this reservoir sometime between 12:30 and 3:00 PM of the day in question. The evidence shows that the boys were clothed when drowned; and there is no evidence to establish that they had gone swimming in the reservoir. There is testimony to the effect that the Vallez boys washed their feet in the reservoir, that the smaller of the two fell in the reservoir and that the larger boy went in after his brother. It appears that the Vallez boys had told their sister Margaret, at the time the boys left their home on the afternoon in question, that they were going to take a shower at "Maas Bros. Showers." They also told Margaret that they were going to get their pay; however, the boys did not state whether they were going to take a shower before or after they got their pay. Margaret testified that when she got her pay on Saturday she usually got her pay before noon or at noon "because the bookkeeper goes I think at one." There is testimony that grape pickers washed their faces and hands in the reservoir, and that people also went swimming there. But it is not established that the reservoir was maintained by the employer for that purpose. It appears from the record that there were facilities for washing at the Vallez home. The Vallez home was not upon the premises of the employer. In going from the Vallez house to the employer's office the boys would pass by the reservoir if they went by way of "the sand road." Upon the evidence presented at the hearing the commission found that the two Vallez boys sustained injury arising out of and occurring in the course of their employment, proximately resulting in their death on the same day.

[1, 2] It has been held that the injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. If the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. The danger must be peculiar to the particular place in which the employee was required to work. The accident does not have to be actually foreseen or expected. "It is sufficient that after the event it appears to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence." If the exposure of the employee to a particular danger differs substantially from the normal risk to which all are subject, "if the employment necessarily accentuates and increases the danger to a higher degree than that to which persons generally are subjected, then it may fairly be held that there was such special exposure to such danger as warrants a conclusion that the accident arose out of the employment." Kimbol v. Industrial Accident Commission, 173 Cal. 351, 354, 355, 160 P. 150, 151, L.R.A.1917B, 595, Ann.Cas.1917E, 312.

With regard to the reservoir and the use made thereof by grape pickers, the following appears in the transcript of the testimony taken at the hearing, the testimony being that of Margaret Vallez:

"Q. Then would they get any particular amount of dirt on them in picking those grapes? A. A lot of dirt.

"Q. What kind of dirt, sand? A. Sand and dust from the grapes.

"Q. Just the sand, no soil and dust on the grapes? A. That's the sand in the box.

"Q. But no mud or nothing like that? A. No.

"Q. Now you have seen this reservoir, haven't you? A. Yes.

"Q. When you say washing in there do you mean swimming or just washing? A. No, there was a little, like a little box, just a little piece of cement box, and there is where the water goes out of the reservoir, there is a pipe there and everybody kneels down and washes their hands and face and head whenever they want.

"Q. That is right along the highway, isn't it? A. Close to the reservoir.

"Q. You mean you drove along that road and the reservoir is right next to the road? A. Yes.

"Q. And if you want to stop there and wash your hands or face it is just a matter of walking over there and doing it? A. Yes.

"Q. They also use that for a swimming pool, don't they? A. Yes.

"Q. People go in there and go swimming? A. Yes.

"Q. And a diving board? A. Yes.

"Q. When you say you have seen a number of people there at one time, do you mean they were in swimming? A. The truck stops there and picks the people there, all the people from the ranch that camp there, and some other men from places, came from our house, some came from Cucamonga, we all get together there and go in the truck.

"Q. Sort of a meeting place? A. Yes, we meet there at 7 o'clock, we all get in the truck and then we start to work, we meet there every morning, then the truck leaves us there in the afternoon at 5 o'clock.

"Q. The people that live in the houses at the camp wash there? A. They wash there.

"Q. Their clothes? A. Not clothes, their hands and face they wash there.

"Q. That is about the only water around there, isn't it? A. I don't think they have any.

"Q. I mean for household use? A. Yes, they have drinking water.

"Q. And no fence? A. No.

"Q. Anybody that is driving along the road could stop and wash if they wanted to? A. Yes."

Respondent Industrial Accident Commission argues that: "Aside from the direct testimony that the grape pickers became grimy and dirty during the employment, it is a matter of common knowledge that the continuous handling of grapes or other fruit in the field would result in the accumulation of stickiness and dust from the handling of the fresh fruit in the field. It also requires no affirmative testimony that an employer would not be welcoming into his office employees for the purpose of settling with them for their work, when they were soiled from their day's work. The employers here had furnished facilities for the employees to clean themselves at the site where the day's work began and ended, to-wit, at the camp adjacent to the reservoir. From the employer's standpoint he contemplated they would be used and from the employees' standpoint, they had the right to use these facilities as an incident of the employment."

In the absence of affirmative testimony on the subject, it cannot be assumed that an employer of field workers would not welcome employees into the ranch office to receive their pay unless the employees had first washed. As already stated, the evidence does not establish that the reservoir was maintained by the employer to furnish the employees facilities for washing themselves; though it may be inferred from the evidence that the employees were permitted to wash in the reservoir. It may also be inferred that the reservoir was likewise available for the same purpose to anyone who might be passing by.

The only testimony in the record as to the hours during which the employer's office was open on Saturday indicates that the office closed about 1:00 or 1:30 in the afternoon. The time when the drowning of the Vallez boys occurred is not established, except that Chano Silva, who was with the boys at the time of the accident, testified that they arrived at the reservoir about 12:40 PM. The constable, who heard a radio call regarding the drowning, while the constable was riding in the sheriff's car, testified as follows: "We received this call, I would say somewhere around between 2:30 and 3:00 o'clock in the afternoon, or possibly a little later than that, I don't know just exactly the time, and we were in the vicinity of Upland at that time and we went directly to the reservoir on Base Line; when we got there they had removed one body from the reservoir, which was the older boy I believe, and we contacted some men there and they were diving into the reservoir trying to find this other boy."

[3, 4] Assuming, however, that when the boys stopped to wash at the reservoir, they were on the way to the office of their employer, to receive their pay, there is still a question whether the use of the reservoir by the boys, under the circumstances presented, constituted an incident of their employment. "It is, of course, a fundamental doctrine that it was not intended by the compensation act that an employer who comes within its provisions shall be the insurer of his employee at all times during the period of the employment, but is liable for compensation only when the injury occurs to the employee while performing some act for the employer in the course of his employment, or is doing something that is incidental thereto. There must be some connection between the injury and the employment other than the mere fact that the employment brought the injured party to the place of injury. There must be a causal connection between the employment and the injury which had its origin in a risk connected with the employment, and flowed from that source as a rational and natural consequence. California Casualty Indemnity Exch. v. Industrial Acc. Comm. [190 Cal. 433], 213 P. 257. But whether a given accident is so related or incident to the business in which the employee is engaged must depend upon its own particular circumstances. No exact formula can be laid down which will automatically solve every case. Cudahy Packing Co. v. Parramore [263 U.S. 418], 44 S.Ct. 153, 68 L.Ed. [366, 30 A.L.R. 532]; [General Accident, Fire & Life] Assurance Corp. v. Industrial Acc. Comm., 186 Cal. 653, 656, 200 P. 419." Larson v. Industrial Acc. Comm., 193 Cal. 406, 224 P. 744, 745. In this connection, it is important to note that, according to the testimony of Margaret Vallez, the employees washed their faces, hands and heads at the outlet of the reservoir, where there was a "cement box" and a pipe; but at the time of the drowning, the boys appear to have been washing their feet in the reservoir itself, or to have been wading along the edge. Therefore, even if it be assumed, though it is not here decided, that washing at the reservoir outlet was an incident of the employment, there is still a question whether the use the Vallez boys were making of the reservoir at the time of the fatal accident was incidental to their employment.

The opinion in State Comp. Ins. Fund v. Industrial Acc. Comm., 194 Cal. 28, 227 P. 168, cites and quotes from Hackley, etc., Co. v. Industrial Acc. Comm., 165 Wis. 586, 162 N.W. 921, 922, L.R.A.1918A, 277, which latter case takes the view that an employee going in the usual manner for his pay to a place designated by the employer is performing a service within his employment, and cites cases sustaining this view, one of which is Lowery v. Sheffield Coal Co., 1 B.W.C.C. 1, wherein a collier, on his way to collect his wages, was walking along a footpath provided by his employer for its employees; and while on that path the collier was knocked down by a locomotive at a point where the path ran along a railway line which passed through the employer's premises. The collier was held entitled to compensation for his injury. In the Hackley case, above referred to, an employee was injured while riding on a train which it was necessary for the employee to take in order to get to the employer's office to collect his pay. In that case the court stated: "The duty to pay and the right to receive the compensation were integral parts of the contract of employment. * * * So in going to get his pay he was but fulfilling a duty imposed upon him by the employer and using the means of conveyance which the employer furnished his employés for such purpose." In State Comp. Ins. Fund v. Industrial Acc. Comm., supra, a hotel maid was injured while leaving the hotel premises on her day off. The elements of her employment contract provided that she live upon the hotel premises. The maid in that case was held entitled to compensation, the court stating (194 Cal. at page 35, 227 P. at page 170): "It would seem, upon principle, that her legal situation was precisely the same as if upon a day when she was not actually working for her employer—when she had a 'day off,' or for some other reason was not working—she had gone to his premises by the entrance designated by the employer to collect the portion of her wages to be paid in cash, and had been injured in the same place and manner as she was injured."

[5] In these last cases, above referred to, there is a direct connection between the injury and an act which was necessary for the employee to perform in order to carry out or fulfill some condition or circumstance of his employment. The collier had to go by the path provided in order to get his pay. His presence upon this path at the time directly resulted in his being knocked down by the locomotive. The employee in the Hackley case was injured while travelling along a route and in a conveyance it was necessary for him to take in order to get his pay. The maid, of necessity, must have left the hotel premises by the entrance or passageway provided, and was injured as a direct result of leaving in that manner. But in the case here presented, the injury did not arise as

a direct result of the employees going to the office to receive their pay. There was an intervening cause, namely, stopping to wash at the reservoir. If any rule may be invoked to uphold the award here in question it is that rule which allows compensation for injuries sustained in the performance of acts necessary to the comfort, convenience and welfare of the employee while in the discharge of his work. But such acts must bear a reasonable relation to the employment. See: Western Pac. R. Co. v. Industrial Acc. Comm., 193 Cal. 413, 224 P. 754, wherein it was held not a departure from employment for a messenger on a rainy night to go home and get his slicker in order to proceed with his duties in the rain; and Leffert v. Industrial Acc. Comm., 219 Cal. 710, 28 P.2d 911, 913, a case where an employee was killed while going to look for his overcoat. The employee was a salesman about to start out on his work in the early morning. In the case last cited, the court said: "As we look at these facts, Leffert was, when injured, engaged in doing something he might reasonably have been expected to do while in the performance of his duty. * * * The saving of his overcoat was also reasonably incidental to the performance of his duties as a salesman. * * * In view of the fact that Leffert drove an open car and that the salesmen started on their rounds at an early hour in the morning, the carrying of an overcoat seems an ordinary and necessary precaution. The absence of a showing that Leffert needed the coat on that particular day is immaterial. He was allowed to leave it at the office, and the conditions of his work required its use from time to time. That he sought to recover it for future use did not take him out of the course of his employment."

While, upon the evidence presented, it might appear reasonable to anticipate that grape pickers would stop to wash themselves at the reservoir, even though the reservoir was not maintained for that purpose, it also appears that there was a relatively safe method of washing at the reservoir outlet, which, according to the evidence, was the method resorted to by the other employees. Upon the record presented it cannot reasonably be said that the employer contemplated a use of the reservoir by employees, such as that resorted to by the Vallez boys, which placed them in a dangerous position and resulted in their drowning. The risk undertaken by the boys, in washing their feet or wading at the edge of the reservoir, was not such a risk, under the circumstances presented, as could be said to have flowed from the nature of the employment as a rational and natural consequence.

[6] The principle involved herein is illustrated in Northwestern P. R. Co. v. Industrial Acc. Comm., 174 Cal. 297, at page 306, 163 P. 1000, at page 1003, L.R.A. 1918A, 286, as follows: "An employé engaged in and about machinery, where a part of his duty is to keep that machinery clean and in running order, while in the performance of that duty may carelessly become entangled in moving cogs, and recover. A traveling man, using a railway train with ordinary precautions and injured by a collision would be granted a recovery. But if that same traveling man, seeking to catch a train to go to another station, still under his employment, should attempt to board a moving train, this being no part of his instructions and no part of his duty, he has added to his vocation perils not contemplated in the contract of employment, and for injuries sustained to him by reason of this added risk the employer is not liable." Such instances serve to illustrate the general rule that an injury sustained while voluntarily doing something outside of the employment is not an injury suffered in the course of the employment. The act of the Vallez boys, in using the reservoir in the manner revealed by the evidence, falls within such general rule; and the circumstances presented do not furnish the basis for an exception. (For example, see: Zolkover v. Industrial Acc. Comm., 13 Cal.2d 584, 91 P.2d 106, wherein an employee, assaulted by an escaping thief, gave chase to the thief and was again assaulted outside the premises. In that case the court concluded that the sequence of events occurring without opportunity for reflection formed a part of the res gestae and constituted one continuous assault. The principle there applied is wholly inapplicable here.)

[7] It follows that the employees in question did not sustain injury arising out of and occurring in the course of their employment, and the commission was without power to grant an award of compensation in the case. The awards are, and each of them is annulled.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 20

Ex parte COOK.

Cr. 1888.

District Court of Appeal, Third District, California.

Nov. 25, 1944.

1. Criminal law ⚷1001

The discretion to be exercised by a court in revoking probation or a suspended sentence under statute is not capricious or arbitrary, or a mental discretion to be exercised ex gratia, but an impartial legal discretion guided by fixed principles to be exercised in conformity with spirit of law to subserve ends of substantial justice. Pen.Code, § 1203.2.

2. Criminal law ⚷1001

The procedure for revocation of probation is informal and statute does not contemplate trial by jury or a formal hearing, but defendant should be granted an opportunity to be heard before a suspended sentence or probation is revoked, particularly where issue is purely a question of fact. Pen.Code, § 1203.2.

3. Statutes ⚷194

Where words "or otherwise" are used in statute as a general phrase following enumeration of particular things, quoted words are usually interpreted in a restricted sense as referring to things or matters of same kind as those specifically enumerated.

See Words and Phrases, Permanent Edition, for all other definitions of "Or Otherwise".

4. Criminal law ⚷1001

Under statute providing that court in its "discretion" may issue a warrant for probationer's re-arrest and revoke probation if court believes from officer's report "or otherwise" that probationer is violating his probation, words "or otherwise" are a relative term, do not remove restrictions placed upon court under words "in its discretion", and refer to a showing comparable to officer's report or that justice requires court's intervention, or that court reasonably believes facts disclosed by such sources, predicated upon sufficient facts. Pen.Code, § 1203.2.

5. Criminal law ⚷1001
Habeas corpus ⚷19

Where, at conclusion of hearing on alleged violations of health and safety code, after an arresting officer not sworn as a witness informed police court that defendant was intoxicated when arrested, court without giving defendant opportunity to be heard immediately revoked a suspended sentence for intoxication conditioned on good behavior, revocation was improper and defendant was entitled to be discharged on habeas corpus. Pen.Code, § 1203.2; St.1939, p. 483.

6. Criminal law ⚷1001

Under statute, to revoke a suspended sentence, sufficient evidence must be adduced from which court may conclude that probationer has violated his probation or is an unfit person to be allowed his liberty, notwithstanding no particular source, manner or degree of proof is required and the matter may be presented in an informal fashion. Pen.Code, § 1203.2.

Proceeding in the matter of the application of Eddie Cook for a writ of habeas corpus.

Writ granted and petitioner discharged.

Harold Wyatt, of Stockton, for petitioner.

J. C. Tope, City Atty., and H. C. Stanley, Asst. City Atty., both of Stockton, for respondent.

PEEK, Justice.

The defendant's petition for a writ of habeas corpus is the outgrowth of an order of the police court of the city of Stockton, revoking a suspension of sentence previously entered by that court. The original judgment, a copy of which is attached to the petition herein, discloses that on May 29, 1944, the defendant was convicted of intoxication and sentenced to a term of 150 days, which sentence was suspended on good behavior for two years. Thereafter on the 21st day of August, 1944, the suspension was revoked and defendant was remanded to the custody of the sheriff.

Defendant is the operator of a hotel in the city of Stockton. On August 19, during the time the suspended sentence was in force and effect, he was arrested in his own home on a warrant issued pursuant to a complaint (which was subsequently dismissed) charging him with two violations of the Health and Safety Code, St.1939, p. 483. On August 21, he appeared in court to answer said charges and entered a plea of not guilty. At the conclusion of the hearing one of the arresting officers who had not been sworn as a witness arose and stated to the court that the defendant was drunk when arrested. The judge immediately replied: "Revoke the order of suspension." The defendant was neither questioned concerning such charge nor was he given an opportunity to reply thereto, but was forthwith remanded to the sheriff pursuant to the order of revocation. Petitioner testified in this court, in support of his petition, that he was not represented by counsel at the time his suspended sentence was revoked; that he was given no opportunity of replying to the charge made against him by the arresting officer; that the matter was disposed of so quickly and during the usual morning confusion in a police court that the defendant did not know the effect of such order until subsequent matters were being considered by the court.

In support of his petition defendant cites no California case but relies upon the annotation appearing in 54 A.L.R. at page 1471, and the cases therein cited, where it is said: "In nearly every jurisdiction wherein the question has been raised, it has been held that a convicted defendant released under a suspended sentence, is entitled to notice and a hearing on the issue whether he has broken the conditions of suspension of sentence, before the suspension may be revoked." (Citing cases.)

The respondent in its return to the application for the writ argues, as it also did in the hearing before this court, upon the authority of In re Giannini, 1912, 18 Cal. App. 166, 122 P. 831, that the discretionary power of the court to revoke a suspension of sentence may be exercised for any cause which to the court is good and sufficient.

It is to be noted that in the Giannini case the chief contention was that the power of the court to suspend sentence or to revoke probation and execute the original sentence cannot extend beyond the period of the sentence, and as more than 90 days [the original sentence] had elapsed between the date of the sentence and the issuance of the commitment, the court no longer possessed the power to direct the commitment of the defendant. No question relating to notice or hearing of the matter, or the source, manner or degree of proof necessary to sustain the revocation was before the court. It is therefore readily seen that the case so relied upon by the city attorney is not in point with the question herein presented.

Respondent further contends that Section 1203.2 of the Penal Code, added by Statutes of 1935, page 1709, gives to a court the power to revoke a suspension in the manner set forth in defendant's petition herein. The section cited is as follows: "At the time during the probationary period of the person released on probation in accordance with the provisions of these sections, any probation or peace officer may without warrant, or other process, at any time until the final disposition of the case, re-arrest any person so placed on probation * * *, and bring him before the court, or the court may in its discretion issue a warrant for the re-arrest of any such person and may thereupon revoke and terminate such probation, if the interests of justice so require, and if the court in its judgment, shall have reason to believe from the report of the probation officer, or otherwise, that the person so placed upon probation is violating any of the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates or a vicious life. * * *"

Counsel for respondent likewise have cited no case (nor has our search disclosed any) decided in this state directly in point with the issue here presented. However, it is our opinion that the rule enunciated by this court in the case of In re Young, 1932, 121 Cal.App. 711, 10 P.2d 154, 155, is controlling. The facts in that case are quite similar to those presented herein. A defendant was sentenced to imprisonment in the county jail, which sentence was suspended and he was released upon probation. Shortly thereafter he was re-arrested and taken before a Justice of the Peace who, after an informal hearing, revoked his probation. The defendant then petitioned this court for a writ of habeas corpus, asserting that a revocation of a suspended sentence without the privilege of trial violated the constitutional prohibition against depriving one of his liberty without due process of law. It was held that under subdivision 2 of section 1203, a defendant is not entitled to a jury trial or other formal hearing upon a revocation, and that any informality in the procedure followed by a Justice's Court was waived by the defendant's failure to object thereto "when he was taken before the court for the purpose of revoking his probation."

By stipulation it was admitted by counsel herein that the defendant was neither before the court in response to an order to show cause why his suspended sentence should not be revoked, nor was he at the time of the suspension before the court by reason of any violation of the terms of his probation. The revocation of the suspension was purely a summary response to the voluntary statement of a police officer that the defendant was drunk at the time of his arrest for the alleged violation of certain provisions of the Health and Safety Code.

However, respondent argues that even though it be true that no notice of hearing was given defendant nor was there any hearing upon the question of grounds for the revocation of his suspended sentence, the order of revocation was a valid order and proper under the circumstances. In this regard it is contended that any restriction which might be placed upon acts of the court under section 1203.2 by use of the words "in its discretion" is removed by the subsequent use of the phrase "or otherwise".

The ultimate effect of such a contention is to argue that the discretion to be exercised by a court in revoking a suspended sentence becomes immaterial by the use of the additional words "or otherwise". With such contention we cannot agree.

The procedure for revocation of probation is wisely made informal. The statute neither contemplates trial by jury or a formal hearing upon such issue. Likewise it does not contemplate that the unfitness of a defendant to enjoy the liberty of a suspended sentence must be established beyond a reasonable doubt. In re Young, supra. However, this court in that case did not say that because of such informality suspension of sentence might be revoked without any hearing whatsoever.

[1] It long has been the rule in this state that when discretionary power is conferred upon the courts "the discretion intended * * * is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in the manner to subserve and not to impede or defeat the ends of substantial justice." Bailey v. Taaffe, 29 Cal. 422, 423, 424. The rule so stated has been applied with clarity to the discretion to be exercised by a court in the granting or denying of probation under Section 1203. People v. Jones, 1927, 87 Cal.App. 482, 262 P. 361. If the rule is applicable to the discretion to be exercised by a court in passing upon an application for probation it logically follows that such rule is likewise applicable to the discretion exercised by a court in revoking probation or a suspended sentence already granted. If this were not so a "discretion, guided and controlled in its exercise by fixed legal principles * * * in conformity with the spirit of the law * * * to subserve * * * the ends of substantial justice", would be meaningless. In other words, under respondent's contention it would be possible to substitute for such discretion, whim, caprice, mistake, rumor, or even downright malice. It cannot be said that such was the intention of the legislature.

Our disposition of the issue so raised finds conclusive support in the case of People v. Sanders, 1923, 64 Cal.App. 1, 220 P. 24, where the court, in passing on an appeal from an order of the Superior Court granting a motion to revoke the defendant's probation, said: "* * * there were proven sufficient facts by unimpeachable evidence to warrant the exercise of the discretion of the court in revoking the probation." Further amplification of this statement is found in the additional observation of the court that "the record contains sufficient admissible evidence to warrant the action taken." See also People v. Lippner, 1933, 219 Cal. 395, 26 P.2d 457.

[2] On principle it would seem to be only proper and just that under the provisions of Section 1203.2 notice and an opportunity to be heard should be granted a defendant before a suspended sentence or probation could be revoked. Particularly is this true when such an issue is purely a question of fact. The order of suspension herein specifically provided that the sentence was "suspended on good behavior two (2) years." Whether or not petitioner's behavior was bad obviously involves a question of fact.

[3] Nor do the words "or otherwise" as used in Section 1203.2 lend support to

respondent's argument. Said section requires, as a basis for revocation of probation, that any probation or peace officer may, without warrant or other process, at any time prior to the final disposition of the case, re-arrest the probationer and bring him before the court, or the court may in its discretion, issue a warrant for his re-arrest and thereupon revoke and terminate the probation if the interests of justice so require and if the court in its judgment shall have reason to believe from the report of the probation officer "or otherwise" that the person so placed upon probation is violating any of the conditions of his probation. As used in such a statute the words "or otherwise" become a relative term. When so used as a general phrase following the enumeration of particular things, such words are usually interpreted in a restricted sense as referring to things or matters of the same kind [ejusdem generis] as those specifically enumerated.

[4] Therefore as used in said section the phrase "or otherwise" must refer to a showing comparable to or of equal solemnity with a report of a probation officer or a showing that the ends of justice require the intervention of the court or that the court in its judgment has reason to believe the facts disclosed by such sources. Again the plain inference of the wording of the section is not that the belief of the court may be predicated upon some ethereal supposition but that it is a reasonable belief predicated upon a sufficient factual presentation. People v. Sanders, supra.

[5] In the present case the fundamental requirements are missing. No showing was made by a probation officer; no warrant for the re-arrest was issued; no order to show cause was issued nor was there any showing that the interests of justice required a revocation. In other words no fact whatsoever was before the court upon which it could exercise its discretion. Under such circumstances to take from a defendant his right to liberty, which was granted him by the suspension, without an opportunity to be heard is repugnant to fundamental principles of law and justice.

[6] As we have previously stated, although no particular source, manner or degree of proof is required by the statute, still a judge or justice having jurisdiction of such a cause might have some factual basis upon which to predicate the exercise of his discretion. And even though the matter be presented in an informal fashion, nevertheless sufficient evidence must be adduced from which the court may conclude that the probationer has violated the terms of his probation or is an unfit person to be allowed his liberty.

For the foregoing reasons the writ is granted and the petitioner discharged.

THOMPSON, J., and ADAMS, P. J., concur.

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66 Cal.App.2d 986

GREIF et al. v. DULLEA, Chief of Police, et al.

CANCILLA et al. v. SAME.

Civ. 12719.

District Court of Appeal, First District, Division 1, California.

Nov. 24, 1944.

Rehearing Denied Dec. 23, 1944.

Hearing Denied Jan. 22, 1945.

1. Appeal and error 🔑138
Judgment 🔑382

One whose interests are injuriously affected by a judgment in a proceeding to which he is not a party may make himself a party by moving to set aside such judgment, and, if his motion is denied, may, on appeal from that order, have proceeding of which he complains reviewed, not only for excess of jurisdiction, but for error.

2. Appeal and error 🔑138

Where a taxicab company was not made a party to consolidated proceedings for writs of mandamus and certiorari to compel chief of police and members of police commission to cancel permits issued to taxicab company to operate taxicabs in San Francisco, the taxicab company could resort to an appeal from an order refusing to vacate judgment entered in consolidated proceedings. Code Civ.Proc. § 938; § 963, subd. 2.

3. Appeal and error 🔑1

The right of appeal should be recognized unless statute provides otherwise, and it should not be denied upon technical grounds if appellant is acting in good faith.

4. Parties 🔑78, 82

A necessary party to an action may be eliminated if under certain circumstances his presence cannot be obtained and his interest will not thereby be impaired. Code Civ.Proc. § 389.

5. Automobiles 🔑84
Judgment 🔑707
Mandamus 🔑151(1)

A taxicab company which held permit from Police Department of San Francisco to operate 500 cabs was an "indispensable party" to a consolidated proceeding for writs of mandamus and certiorari to compel members of Police Department to cancel 125 of the permits, and, where cab company was not joined in proceedings as a party, it was not bound by judgment entered therein. Code Civ.Proc. §§ 389, 1107.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Party".

6. Judgment 🔑666, 675(1)

A person who is not a party but controls an action, individually or in co-operation with others, is bound by adjudications of litigated matters as if he were a party and, if other party has notice of his participation, the other party is equally bound, but in order that rule should apply it is necessary that one in whose favor or against whom rules of res judicata operate be able to determine whether an appeal should be taken.

7. Appeal and error 🔑138
Judgment 🔑382

Where taxicab company which held permits from Police Department to operate 500 cabs though not made a party in consolidated proceedings for writs of mandamus and certiorari to compel members of Police Department to cancel 125 of the permits, conducted defense but after adverse judgment was entered company was refused permission by representatives of Police Department and Board of Permit Appeals to appeal on their behalf, company could make itself a party to the proceedings by moving to set aside judgment therein, and, upon motion being denied, could appeal from that order, and have the proceeding reviewed for error. Code Civ.Proc. §§ 389, 938, 1107; § 963, subd. 2.

8. Municipal corporations 🔑621

Board of Permit Appeals of San Francisco may take notice of existence and contents of permit and license ordinances as part of its function to review acts of departments authorized to issue, grant or deny licenses or permits. St. 1931, p. 3001, § 39.

9. Evidence 🔑32

Although a superior court may not take judicial notice of ordinances unless pleaded and proven, and an appellate court is ordinarily confined to record on appeal, an appellate court may take judicial notice of an ordinance of which an inferior tribunal of original jurisdiction may properly take notice.

10. Mandamus 🔑72

Mandate is not available to control the exercise of official discretion or judgment, or alter or review action taken in the proper exercise of such discretion or judgment.

11. Automobiles 🔑84

The Board of Permit Appeals of San Francisco was duly authorized under charter to hear appeal from order of Chief of Police purporting to restore to taxicab company 125 permits to operate cabs which had been canceled on cab company's application and to use its discretion in determining order to be entered therein. St. 1931, p. 3001, § 39.

12. Abandonment 🔑3

Abandonment cannot be established if there is any intention to repossess or reclaim.

13. Automobiles 🔑104

Even if permits to operate 500 taxicabs in San Francisco issued to cab company should be deemed a franchise, whether there was a cancellation by abandonment of 125 of the permits as a result of cab company requesting Board of Police Commissioners to temporarily cancel such permits was required to be determined by intent, and the circumstances of lapse of time and mistake of law would be considered in determining intent.

14. Automobiles 🔑104

Where taxicab company which held permits to operate 500 taxicabs in San Francisco requested a temporary cancellation of 125 of the permits because of mistake of law on part of officials in exacting license taxes according to number of permits outstanding instead of according to number being used, cab company's action in requesting temporary cancellation of permits did not establish cancellation of the permits by abandonment. St.1931, pp. 2989, 2991, 2998, §§ 20, 22, 35.

15. Municipal corporations ⇨621

The San Francisco Board of Permit Appeals is a local board and comes within the classification of a board with discretionary powers, and judicial or quasi judicial power may be conferred on such board. St.1931, p. 3001, § 39.

16. Officers ⇨103

Where fact-finding powers have been conferred on local boards their determination will not be set aside unless an abuse of discretion is pleaded and proved, that is, unless it is alleged and proved that the board acted arbitrarily, capriciously or fraudulently.

17. Certiorari ⇨21, 64(1)
Mandamus ⇨63, 172

Either mandamus or certiorari may be used to review the determination of local administrative boards invested with quasi judicial power, and whichever method of review is adopted the scope of review is identical.

18. Municipal corporations ⇨62

The Legislature by general law or by special charter provision may vest judicial power in commissions and boards established in any incorporated city or city and county. Const. art. 6, § 1.

19. Certiorari ⇨64(1), 65
Mandamus ⇨168(3), 172

In a certiorari or mandamus proceeding to review determination of a local administrative board possessing judicial or quasi judicial power, superior court is not permitted to accept evidence in addition to record of local board, and the court may not pass upon truth or falsity of the facts.

20. Mandamus ⇨72

Though court may compel a public administrative agency vested with discretionary power to act, ordinarily mandamus will not compel such agency to act in any particular manner so as to substitute court's discretion for discretion invested in administrative agency.

21. Automobiles ⇨84

The San Francisco Board of Permit Appeals did not abuse its discretion in approving action of Chief of Police in declaring that permit granted to taxicab company to operate 500 cabs was in full force after a purported temporary suspension of permit to extent of 125 cabs upon cab company's own request. St.1931, pp. 2989, 2991, 2998, 3001, §§ 20, 22, 35, 39.

22. Automobiles ⇨84
Certiorari ⇨70(5)
Mandamus ⇨172, 187(9)

Whether taxicab company's license to operate 125 cabs under a permit authorizing operation of 500 cabs had been canceled as result of cab company's request to Board of Police Commissioners to temporarily suspend permits for 125 cabs was a mixed question of law and fact to be determined by Board of Permit Appeals, and superior court's trying the issue de novo in consolidated mandamus and certiorari proceedings to review board's determination constituted prejudicial error. St.1931, p. 3001, § 39.

◆

Appeal from Superior Court, City and County of San Francisco; Robert McWilliams, Judge.

Proceeding by Anthony Cancilla and others, as members of Chauffeurs' Union, Local 265, A.F. of L., and another, against Charles W. Dullea, as Chief of Police of City and County of San Francisco, and others, for a writ of mandamus directed solely to the defendant Chief of Police, praying for an order to cancel 125 permits to operate taxicabs in the City and County of San Francisco, issued to the Yellow and Checker Cab Company, consolidated with a proceeding by Charles A. Greif and others individually and as directors of the Associated Owners of Luxor Cabs, against Charles W. Dullea, as Chief of Police of the City and County of San Francisco, and others, for a writ of mandamus and a writ of certiorari directed to the defendant Chief of Police. From judgments entered, the Yellow and Checker Cab Company appeals.

Reversed.

Lloyd S. Ackerman, of San Francisco (Philip S. Mathews, of San Francisco, of counsel), for appellant.

Clayton W. Horn, of San Francisco, for respondents.

WARD, Justice.

An appeal by the Yellow and Checker Cab Co. in a certiorari and mandamus proceeding from the denial of its motion to vacate the judgment or judgments entered in certain cases consolidated for trial.

The motion was based upon the ground that the above named company, although it was not a party of record in the proceedings before the trial court, was the real party in interest; that the findings of fact are not supported by the evidence and that the conclusions of law are erroneous.

The main question involved is whether the above appellant has the right to operate in the City and County of San Francisco approximately 500 taxicabs or only about 375. On appeal it is urged, in addition, that the trial court failed to review the action of an appeal board created under the provisions of a local charter, but tried the cause de novo, thus ignoring the function and authority of the local board.

In advance of an investigation of all other legal and factual problems the question of the right of the Yellow and Checker Cab Co. to take this appeal should be determined. Briefly, and only for the determination of this point, the following facts appear: In 1935 appellant cab company requested the Board of Police Commissioners to "cancel" temporarily its right to operate 125 of its taxicabs. The board made an order purporting to *revoke* that right. In 1941 the company requested the chief of police to restore such right on the ground that the Board of Police Commissioners did not have the power to suspend indefinitely and could not revoke a permit, license or certificate without notice and hearing. The chief of police recognized the right of appellant to operate 500 taxicabs and under the provisions of ordinance 5132 NS, sec. 54 (Municipal Code, Part III, Art. 2, sec. 128, p. 691), notified the tax collector that five hundred instead of three hundred seventy-five was the number of taxicabs appellant was entitled to operate. Upon receipt of this notification the tax collector addressed himself to the city attorney for an opinion as to whether the company was liable for the tax on 500 or 375 vehicles. The city attorney advised collection of the tax on the lesser number for the past year, and on the greater thereafter. This was done and the company given the right to accommodate an increased number of passengers by the use of 125 additional taxicabs.

Anthony Cancilla and others, members of the Chauffeurs' Union, Local 265, A.F. of L., and Charles A. Greif and others, individually and as directors of a competing taxicab company, whom we shall refer to hereafter as petitioners, appealed to the Board of Permit Appeals, a body created to hear appeals by any department or person claiming his personal property or interests, or those of the general public, have been adversely affected as the result of the granting or revoking of permits or licenses by a department or its representative. San Francisco Charter, sec. 39, Stats. 1931, p. 3001. The Board of Permit Appeals approved the action of the chief of police. The chauffeurs' union and one taxicab operator filed a petition in the superior court for a writ of mandamus directed solely to the chief of police, praying for an order to cancel the 125 "permits" on the ground that they were issued illegally. On the same day petitioner Charles A. Greif filed a petition for a writ of mandamus and a writ of certiorari to be directed to the police commission and the chief of police. Alternative writs were issued as prayed. Answers and returns were filed by the respective parties. A stipulation of facts was entered into, signed by all of the attorneys of record and the attorneys for the appellant, though as stated the latter was not a party of record. In addition to this stipulation, testimony and documentary evidence were received. The attorney for the appellant prepared the pleadings and stipulation, conducted the trial, argued legal questions and, as appears from the record, seems to have been given full control in the conduct of the case. At the conclusion of the trial, judgment was rendered in favor of the chauffeurs' union and the competing company, and against the parties named as respondents in the superior court proceedings. This, of course, did not include the appellant.

The Board of Permit Appeals, which had been made respondent in the superior court proceedings shortly before submission for decision, the police commission and the chief of police declined to appeal. The appellant herein had waged the battle on its own behalf and on behalf of the chief of police and others, and was suddenly left without right to challenge the correctness of the trial court's decision.

In this position the appellant presented a motion to vacate the judgment, upon the ground that an indispensable party had not been joined. The motion was denied and the Yellow cab company appealed.

[1] In Elliott v. Superior Court, 144 Cal. 501, 507, 509, 77 P. 1109, 1111, 103 Am.St.Rep. 102, the court said: "But it

has been settled as a rule of practice by a long series of decisions that only a *party to the record* can appeal, and other rules of practice equally well settled have remedied any inconvenience that might have resulted from this construction of section 938; so that there is no reason now to depart from it, if there ever was." "There is in fact another plain, speedy, and adequate remedy allowed by our practice to one whose rights or interests are injuriously affected by the judgment or by any appealable order of a court given or made in an action or proceeding to which he is not a party. He may make himself a party by moving to set aside such judgment or order, and, if his motion is denied, may, on appeal from that order, have the proceeding of which he complains reviewed not only for excess of jurisdiction, but for error. People v. Grant, 45 Cal. 97; Green v. Hebbard, 95 Cal. 39, 30 P. 202; Pignaz v. Burnett, 119 Cal. 157, 51 P. 48; Credits Commutation Co. v. Superior Court, 140 Cal. 82, 73 P. 1009." See, also, Eggert v. Pacific States S. & L. Co., 20 Cal.2d 199, 124 P.2d 815; Faias v. Superior Court, 133 Cal.App. 525, 24 P.2d 567. Thus, on appeal from the court's order denying the Yellow cab company's motion to vacate, if it appears that the motion should have been granted, an appellate court may not only decide the question of the propriety of the order, but may review for error the proceedings before the superior court and the local board.

[2, 3] The competing company and the union do not object to the consideration of the entire appeal, if the appellant is entitled to appeal. It is their position that the appellant is not an indispensable party; that by conducting the trial before the superior court the company had its day in court, and that by moving to set aside the judgment not only for lack of jurisdiction but on the ground that the conclusions of law and findings of fact were erroneous, the company entered a voluntary appearance and thereby waived the failure to join the company as a party in the superior court. The last contention relies principally upon the facts and the law as set forth in Shelley v. Casa De Oro, Ltd., 133 Cal.App. 720, 24 P.2d 900. In that case the motion to vacate and set aside the judgment was made (133 Cal.App. at pages 721, 722, 24 P.2d at page 901) "upon the ground that no summons had been served upon it, that no appearance had been made by it or by anyone authorized by it to appear, and that the purported appearance by the attorney referred to was entirely without its authorization and without its knowledge or consent." At page 723 of 133 Cal.App., at page 901 of 24 P.2d, the court said: "It seems to be settled in this state that the inclusion in the motion of any ground inconsistent with the sole claim that the judgment is entirely void for want of jurisdiction of the person is sufficient to convert the attempted special appearance into a general appearance." In the present case the motion was enlarged to contain incidentally an attack upon the findings, but the basis of the motion was lack of jurisdiction. If a judgment should not have been entered at all, it may be set aside under proper circumstances (Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662), for instance, if the party was an indispensable party, as distinguished from a merely necessary party. Parties having no interest in an action are not aggrieved parties, and hence may not appeal under the provisions of Code of Civil Procedure, sec. 938. A party in interest, but not of record, who accepts complete control in the conduct of a case, but suddenly is confronted with his lack of legal capacity to take an appeal, is an aggrieved party. The appeal herein was from a special order made after final judgment. Code Civ.Proc. sec. 963, subd. 2. The company was not a party to the proceedings in the superior court, except as indicated heretofore, and may resort to an appeal from the order refusing to vacate the judgment. Luckenbach v. Laer, 190 Cal. 395, 212 P. 918; Title Ins. & Trust Co. v. California, etc., Co., 159 Cal. 484, 114 P. 838. The right of appeal should be recognized unless the statute provides otherwise, and it should not be denied upon technical grounds if the appellant is acting in good faith. Sharick v. Galloway, 12 Cal.App.2d 733, 55 P.2d 1196; Pratt v. Robert S. Odell & Co., 49 Cal.App.2d 550, 122 P.2d 684.

[4] As we view the question of the right of appeal, the important consideration is whether the appellant was an indispensable party. "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in

* * *." Code Civ.Proc. sec. 389. The terms "necessary party" and "indispensable party" have often been used synonymously. Usually, a necessary party is made a defendant in an action though his interest may be separate from that of others. A necessary party may be eliminated if under certain circumstances his presence can not be obtained and his interest will not thereby be impaired, but if the plaintiff or petitioner prays for the cancellation of a legal right in a certificate, permit or license issued in the name of and being the property of a third person, such person is an indispensable party to the action. In Bank of California v. Superior Court, 16 Cal.2d 516, 522, 106 P.2d 879, 883, it was said: "Where, also, the plaintiff seeks some other type of affirmative relief which, if granted, would injure or affect the interests of a third person not joined that third person is an indispensable party." See, also, Hartman Ranch Co. v. Associated Oil Co., 10 Cal.2d 232, 73 P.2d 1163; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A., N.S., 275; McPherson v. Parker, 30 Cal. 455, 89 Am.Dec. 129; Ambassador Petroleum Co. v. Superior Court, 208 Cal. 667, 284 P. 445; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236; Ash v. Superior Court, 33 Cal.App. 800, 166 P. 841; Los Angeles County v. Superior Court, 17 Cal.2d 707, 112 P.2d 10; First Nat., etc., Bank v. Superior Court, 19 Cal.2d 409, 121 P.2d 729; Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 116 P.2d 458.

[5] In the present case the action of the Board of Police Commissioners in "cancelling" the "permits" purports to be the annulment of license rights of the company to operate taxicabs. The communication from the chief of police to the tax collector designating 125 additional taxicabs as taxable also referred to property of the Yellow cab company. The petitions of the chauffeurs' union and the competing company to the Board of Permit Appeals specifically mentioned that concern. It was plain therefrom that the license rights and the property involved was that claimed by the Yellow cab company. The union's and the competitor's petitions filed in the superior court, whether for a writ of certiorari or mandamus, alleged that the Yellow cab company and a subsidiary company "held permits from the Police Department of the City and County of San Francisco to operate five hundred (500) cabs." This figure included the 125 in dispute in this proceeding.

Irrespective of whether the Yellow cab company had a valid right to operate the 125 taxicabs and was obligated to pay taxes thereupon, the company was entitled to appear as a party in the superior court proceeding and defend its legal right. The petitioners in the superior court prayed that the validation of the licenses or permits be annulled, voided and set aside, and that the licenses or permits be cancelled. This was indeed asking for a decree, which, if granted, would injure a third party not joined as a party. Code Civ.Proc. sec. 1107. See Bank of California v. Superior Court, supra. It seems unnecessary to consider this point further. In view of its inability to appeal from the judgment, the Yellow cab company must be declared to be an indispensable party to the proceeding. An indispensable party is not bound by a judgment in an action in which he was not joined. Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892; Restatement of the Law, Judgments, sec. 93; 1 Greenleaf on Evidence, 16th Ed., sec. 523; 30 Am.Jur., Judgments, secs. 219–246.

[6] The union and the competing company further contend that the conduct of the case by the appellant Yellow cab company constituted that company's day in court, and it thereby waived any objection to jurisdiction. It may be admitted for the purpose of considering the contention that from the date of the trial to the date of the judgment the appellant had its "day in court." In Harris v. Barker, 80 Utah 21, 12 P.2d 577, the petitioner in a mandamus proceeding failed to join the real party in interest. The party appeared and participated in the proceeding to the same extent as if a party of record. It was held that under such circumstances the proceedings should not be set aside merely because one who had actually participated in the trial had not been made a party in form. See, also, Louisville & N. R. Co. v. Schmidt, 177 U.S. 230, 20 S.Ct. 620, 44 L. Ed. 747. This is the generally accepted rule and is formulated in Restatement of the Law, Judgments, sec. 84, pp. 390, 398 as follows: "A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the

other party is equally bound. * * * In order that the rule stated in this Section should apply it is necessary that the one in whose favor or against whom the rules of res judicata operate participate in the control of the action and if judgment is adverse, *be able to determine whether or not an appeal should be taken.*"

[7] As previously noted herein, the Yellow cab company was refused permission by the representative of the chief of police, the Police Commission and the Board of Permit Appeals to appeal on its behalf. In a word, the Yellow cab company was no longer able to protect its rights by the process of appeal. Accordingly the rule set forth in Elliott v. Superior Court, supra, and other cited cases is applicable to the present appellant injuriously affected by the judgment. Its right of appeal extends to error throughout the superior court proceedings. As stipulated on oral argument, all of the claims of the respective parties will be considered on this appeal.

It is admitted in petitioners' brief that on February 16, 1931 appellant cab company was the "owner and holder of 500 permits for the operation of taxicabs." The record shows that from 1931 until 1935 it paid license taxes for 500 cabs although it operated only 375. In the latter part of 1935 a subsidiary of appellant addressed a communication to the Board of Police Commissioners, stating that the subsidiary held permits to operate 195 taxicabs; that it did not require that number and therefore requested the board "to cancel 125 permits." It asked, however, that in the event "additional facilities" should be required in the future the "permits" be reinstated. The above letter accompanied a communication to the board written on the letterhead of the appellant and signed by W. Lansing Rothschild, the president of the company. The letter reads in part:

"With reference to the attached letter of our wholly owned subsidiary, dated December 12th, you will observe we are voluntarily surrendering 125 taxicab operation permits of the Yellow Cab system.

"We are extremely reluctant to believe that our business will not undergo a complete and satisfactory recovery, and in connection therewith we respectfully request that your Board consider this cancellation as of a temporary nature, more or less as an indefinite suspension of these permits, as it is our belief that ultimately we will again enjoy sufficient operation to require their restoration to ourselves."

A few days later the Board of Police Commissioners passed the following resolution: "Resolved, that the following number of certificates of Public Convenience & Necessity and permits as Operators of Public Vehicles, be and they are hereby cancelled at the request of the permittee. * * * Red Top Cab Co., 125 permits." On the following day there was endorsed on the reverse side of the letter of the subsidiary company to the Board of Police Commissioners, filed as an exhibit, the following: "Red Top Cab Co. 125 Permits Cancelled. Granted by the * * * Chief of Police Wm. J. Quinn." The two letters requested a "cancellation as of a temporary nature" only—a "suspension"—subject to "reinstatement" and, as interpreted later by Chief Dullea, this was "granted" by Chief Quinn.

In July of 1941 the opinion in Flynn v. City and County of San Francisco, 18 Cal. 2d 210, 115 P.2d 3, was filed. That case, involving San Francisco ordinance No. 5132 NS, the identical license ordinance involved herein, held that the ordinance violated the state Constitution (art. XIII, sec. 1) and that it was double taxation of property, which is not permitted within the terms of Political Code, section 3607. Shortly therefter the city attorney herein determined that a license to operate taxicabs applied to those in operation and not to those not being operated. This interpretation was made pursuant to the decision in the Flynn case. Thereupon appellant company filed a petition to correct the records, and a second petition to restore 125 permits "temporarily suspended." The present Chief of Police, Dullea, decided in favor of appellant. The union and the competing company petitioned the Board of Permit Appeals to hear and determine the propriety of the action of the chief of police. To avoid repetition of this question, the propriety or validity of the action of the chief of police will be determined after consideration of the same facts and circumstances as presented to the Board of Permit Appeals. However, it seems advisable to determine first the question of jurisdiction of the Board of Permit Appeals to hear the petitioners' appeals.

Petitioners contend that the Board of Permit Appeals is merely an administrative board without quasi judicial functions. Section 39, supra, of the charter provides:

"Any applicant for a permit or license who is denied such permit or license by the department authorized to issue same, or whose license or permit is ordered revoked by any department, or any person who deems that his interests or property or that the general public interest will be adversely affected as the result of operations authorized by or under any permit or license granted or issued by any department, may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused."

The Board of Permit Appeals originates from the vote of the people of the county, followed by approval of the local charter by the state. It does not possess the identical character of jurisdiction of a municipal or justices court. It has jurisdiction to hear appeals and confine the hearing to the evidence submitted by the respective parties, or it may make "such further investigation as the board may deem necessary." Section 39 of the charter. It may be a hybrid tribunal (see Tipp v. District of Columbia, 69 App.D.C. 400, 102 F.2d 264), but its jurisdiction over designated matters is broad. It may hear appeals upon the record; it may try the cause de novo or it may make its own investigation and its own independent order based thereon. It should be noted that in the present appeal it did not make an independent order.

[8, 9] The Board of Permit Appeals of the City and County of San Francisco may take notice of the existence and contents of permit and license ordinances as part of its function to review the acts of departments authorized to issue, grant or deny licenses or permits. Ex parte Davis, 115 Cal. 445, 47 P. 258; Ex parte Hansen, 158 Cal. 494, 111 P. 528. Although a superior court may not take judicial notice of ordinances unless pleaded and proven, and an appellate court is ordinarily confined to the record on appeal (10 Cal.Jur., sec. 31, pp. 705–707), yet an appellate court may take judicial notice of an ordinance of which an inferior tribunal of original jurisdiction may properly take notice. Varcoe v. Lee, 180 Cal. 338, 181 P. 223; Tipp v. District of Columbia, supra. In the present case the parties stipulated that this court should consider all ordinances referred to in the superior court or before the Board of Permit Appeals.

[10] The status of the San Francisco Board of Permit Appeals has been established. In Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 144 P.2d 4, an original proceeding in mandamus to compel the board to cancel its action in overruling the issuance of certain permits and to reinstate the permits and affirm the action of another board, the court held (23 Cal.2d at page 310, 144 P.2d at page 8): "* * * that the remedy of mandate is not available to control the exercise of official discretion or judgment, or to alter or review action taken in the proper exercise of such discretion or judgment." The opinion (23 Cal.2d at page 311, 144 P.2d at page 9) states: "This comprehensive language affecting the issuance of *all* permits sought under authority of the relevant San Francisco Charter and ordinance provisions in plain terms vests the granting power with a 'sound discretion' generally." The opinion then considered the plan of appeal from departmental agencies. At page 313 of 23 Cal.2d, at page 10 of 144 P.2d, it was further said: "Section 39 of the San Francisco charter creates the Board of Permit Appeals as the reviewing agency here concerned and defines its powers, duties and jurisdiction." It was then held that the claim that the Board of Permit Appeals was confined to a determination of whether there had been a compliance with municipal ordinances regulating permit procedure was untenable.

[11] Under the authority of the Lindell case it must be held that, consistent with the purpose of the charter, the Board of Permit Appeals was duly authorized to hear the appeal and to use its discretion in determining the judgment or order of the board.

We therefore return to a consideration of the facts as presented by documents and testimony. Before the board these consisted of the communications and statements heretofore mentioned, numerous ordinances, certain sections of the municipal code, charter provisions, testimony by the president of the Board of Police Commissioners, the chief of police, the deputy chief clerk in the tax collector's office and the business representative of the Chauffeurs' Union, 265, A.F. of L. All of the witnesses were called by the petitioners. Attention is not called to any claimed untruth or contradictory or inconsistent statements made by any of them. Neither is it claimed that the police commission nor the chief of police nor the municipality received any unjust enrichment by the surrender of the rights to operate the 125 taxicabs or the restoration thereof. The position of the petitioners is that in 1935 there was a voluntary surrender and cancellation of 125 permits which was accepted by the police commissioners, together with a cancellation by the then chief of police; in a word, that having surrendered the designated rights the chief of police erred in any action resulting in restoration. It will hereinafter appear that if the action of the chief of police, approved by the Board of Permit Appeals, constituted in fact the issuance of new rights in the form of a permit or permits or licenses, under the provisions of ordinance 11.01111 (Municipal Code, p. 498, section 1075 et seq.) it would be necessary to obtain from the Board of Police Commissioners a declaration that necessity and public convenience demanded the operation of the 125 taxicabs. If from all the facts and circumstances the Board of Permit Appeals was justified in determining that the action of Chief Dullea was not equivalent to the issuance of new rights but merely the recognition of old rights which in fact had never been *revoked*, then the provision of ordinance 11.01111 in reference to a resolution of public convenience and necessity is not applicable to the situation presented.

The use of the word "permit" in the record and in the briefs may appear to be confusing. Petitioners seem to use the word as authority to operate *one* taxicab. The police department sometimes uses the word in the same sense. There were not 125 separate permits. The fact is appellant had one permit to operate 500 taxicabs. So we proceed for the present to the period during which Chief Dullea directed the Police Department, including the issuance of permits, to operate passenger vehicles for hire.

Upon receipt of the communication from appellant in 1941, Chief Dullea conferred with a lieutenant attached to the Traffic Department, the deputy chief of police and a member of the Police Commission. He then wrote his determination of the question somewhat in the form of rough court findings and made them part of the files of the department. He determined that the permit issued in June 1932, after a hearing, by the then chief of police and the Board of Police Commissioners was in fact a single permit to operate 500 taxicabs by several companies bearing different names; that since the issuance of the permit the parent company had regularly licensed motor vehicles for hire in number reasonably necessary to meet the public demand; that from the record the former chief "apparently consented to the request of the company for an indefinite or temporary suspension," whereas the Police Commission had attempted to withdraw from the operation of such permit without notice, hearing or trial, 125 taxicabs; that the company now desires to operate the full number (500) of vehicles covered by said permit. The chief concluded that there was no law authorizing the action of the department in 1935, and declared the permit to operate 500 taxicabs to be in full force and effect. Thereafter he notified the tax collector that the subject of penalties and delinquencies was one for consideration by the tax collector but that the appellant cab company was entitled to operate 503 taxicabs. The extra three do not play any part in the present proceeding.

As previously stated, petitioners appealed to the Board of Permit Appeals. In turn the board upheld the chief. As previously stated, the Police Commission in 1935 was without legal authority to cancel or revoke any permits. This power belonged to the chief. There remains for consideration on this question the action of the chief in that year in purporting to "cancel" the "permits" or, as petitioners sometimes refer to them, the franchise. It may be admitted that a "permit" is somewhat of the nature of a franchise, but we think that is not the case here. In no place called to our attention in the charter or in the ordinance is this license or permit referred to as a franchise. We are not called upon to pass upon the question whether the right to operate a vehicle in *all* parts of the City and County of San Francisco without restriction as to roadway or street, may be correctly designated as a franchise. There is nothing in the record indicating that any legislative body, supervisors or municipal charter has conferred upon the

Police Commission power to grant a franchise. The powers of the Police Commission are outlined in section 35 of the San Francisco charter. That section does not contemplate the issuance of a franchise, but a permit, such permit to be issued by the chief of police—not the Police Commission. However this may be, the more important question is whether the permit was cancelled.

The idea generally conveyed by the term "cancellation," as applied to a privilege or authorization evidenced by a writing, is that the authorization or privilege has been withdrawn or terminated. The word "cancel" has sometimes been used instead of repeal, annul, rescind, terminate, surrender, waive or abandon. Words and Phrases, Perm. Ed., vol. 6, p. 33 et seq.; Pearson v. Brown, 27 Cal.App. 125, 148 P. 956. A request to cancel or destroy a thing is of no avail unless there is something that can be in fact cancelled or destroyed. In this instance the reading of the context of the letters in question is persuasive that the idea in mind was not abandonment, but suspension with subsequent restoration. The use of the word "cancel" was ill advised and unfortunate in that it has afforded ostensible ground for this litigation.

[12] Petitioners contend that there was in fact cancellation. If so, there must have been abandonment. There can be no abandonment if there is any intention to repossess or reclaim. Richardson v. McNulty, 24 Cal. 339; Del Giorgio v. Powers, 27 Cal.App.2d 668, 81 P.2d 1006; Humboldt v. Van Duzer, 48 Cal.App. 640, 192 P. 192. In the present case the intent of appellant is manifest from the words used in the communication to the Board of Police Commissioners as follows: " * * * we respectfully request that your Board consider this cancellation as of a temporary nature, more or less as an indefinite suspension of these permits." In the other letter it is plainly set forth that should the company require additional facilities in the future they desired their rights restored. The record shows that in 1935 the company did not need the 125 taxicabs on account of the depression; it also indicates that in 1941 within a week after the Japanese attack on Pearl Harbor, San Francisco needed more taxicabs. The weakness of petitioners' position rests upon the theory that the permit issued in 1941 by Chief Dullea was new and not a mere revival. If true, it would have been necessary that the Police Commission issue declarations of public convenience and necessity (ordinance 11.01111) covering such action, which was not done. Dullea did not issue new permits but declared and notified the tax collector that "the permit held by the company for 500 taxicabs has been, ever since June 13, 1932, when it was issued, and still is, in full force and effect." Under the circumstances a certificate of public necessity and convenience was not necessary. There is substantial factual evidence to sustain this conclusion by the Board of Permit Appeals. We will now give more minute consideration to the legal effect of ordinances, etc., as justifying the action of Chief Dullea.

For many years the Yellow cab company, under changing rules, by ordinance held a permit for the operation of 500 taxicabs, and at times it operated that number. No ordinance called to our attention annulled this privilege. On the contrary, all new ordinances reserved such right to the company. In August 1931 ordinance 9045 NS was adopted, which provided that before a license or permit should be issued to the operator of a vehicle for transportation of passengers for hire the Board of Supervisors should declare by resolution that public convenience and necessity required such service. No declaration of public convenience was required of the old licensees or permittees. Section 1 (a) and (b). By the terms of the same ordinance the existing permits and licenses were recognized as remaining in force.

In February 1932 the present city charter became effective, and it divested the Board of Supervisors of the power to declare the existence of public convenience and necessity to operate vehicles for hire. A new ordinance was adopted, which vested such power in the police commissioners. The new ordinance, like the old, provided that a declaration of public convenience and necessity was not required if the applicant was then engaged in the operation of motor vehicles for passenger service for hire. Section 1 (a).

On June 13, 1932, a formal permit was issued to the Yellow and Checker Cab Co. to operate under its own and under fictitious names 500 taxicabs. The result of this action was a clarification, if any doubt existed that appellant held one permit for the operation of 500 taxicabs.

The license tax ordinance (5132 NS, Municipal Code, Part III, Art. 2) was construed by appellant and others to require a taxicab permittee to pay a license tax on each taxicab varying in amount according to its seating capacity, and whether the cab was in operation or not. The tax collector was authorized to issue drivers' annual identification cards upon the presentation of drivers' annual permits.

Ordinance 11.01111 enacted in February 1932 was still in effect in 1935. It provided that the Police Commission should under certain circumstances direct the Police Department to revoke a license or permit. Section 5. An ordinance was passed requiring the chief of police in writing to submit to the tax collector data showing the number of permits outstanding and the amount collectible depending upon the seating capacity of each taxicab, etc. San Francisco Municipal Code, Part III, sec. 128, p. 691.

There is evidence that a lieutenant of police under direction of the chief of police in the month of December of each year, in pursuance of the provisions of the ordinance, supplied the required information to the tax collector. The chief of police notified the tax collector near the end of 1940 that for the calendar year 1941 the Yellow cab company was entitled to an additional 125 licenses. The city attorney advised the tax collector to collect for the year 1941, taking into consideration such addition, but not for past years, nor penalties for non-payment in past years.

It seems necessary to repeat that in 1935 the Police Commission was not authorized to "cancel" permits. Under the provisions of ordinance 11.01111 it was given power to pass resolutions of necessity and convenience and to grant permits and purportedly to revoke them. However, in 1935 ordinance 3.04121 was in effect. That ordinance provides that permits for "the operation of vehicles for hire" shall be issued by the "Police Department." Sections 24 and 26 of Part III of the San Francisco Municipal Code respectively provide: "Any department may revoke any permit subject to issuance by said department when it shall appear that the business or calling of the person, firm or corporation to whom it was granted is conducted in a disorderly, improper or hazardous manner, or that the place in which the business is conducted or maintained is not a proper or suitable place in which to conduct or maintain such business or calling." "* * * and in granting or denying said permit, or revoking or refusing to revoke a permit, [the department] may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked." Under section 25 the Police Commission acts in an advisory capacity to the chief of police in the matter of permits. The Police Commission may pass a resolution of convenience and necessity but the chief of police is empowered to issue and revoke licenses.

The chief's authority is also found in the charter. Under the provisions of the charter the Board of Supervisors was made a legislative body exclusively, and required thereby to designate the "department" which should issue and revoke permits and licenses. The chief administrative officer of each appointive department is head of such department, responsible for its conduct to a board or commission or to the chief administrative officer of the city and county. Charter, sec. 20, Stats.1931, Ch. 56, p. 2973, 2989. Relative to the conduct of affairs a board or commission must deal with "its chief executive officer." Charter, sec. 22. That the chief of police as the head of the Police Department had the power to issue and revoke permits and licenses is shown by charter section 35, at p. 2998, which, in part reads: "The chief of police may refuse to issue any permit that is subject to police department investigation and issuance, if it shall appear that the character of the business or the applicant requesting such permit does not warrant the issuance thereof, or he may revoke any such permit as soon as it shall appear that the business or calling of the person to whom it was granted is conducted in a disorderly or improper manner, or that the place in which the business is conducted or maintained is not a proper or suitable place in which to conduct or maintain such business or calling." He could, however, revoke only for good cause as set forth in section 35.

In 1935 not only the commission but the chief acted upon the application of appellant relative to the 125 taxicab rights. On the back of the communication in 1935 the then chief wrote, as stated: "Red Top Cab Co., 125 Permits cancelled," etc. If it be assumed that he intended to cancel "125 Permits," his action was technically incorrect. There was only one permit. If he intended to cancel the right to the licensing of 125 taxicabs, he was likewise technically incorrect. There was no provision by statute or ordinance to "cancel" the licenses.

There was no conflict in the facts presented to the Board of Permit Appeals. Neither the chief nor the Board of Permit Appeals was called upon to interpret provisions of the charter or ordinances in the same manner as the supreme or a lower court of record. The board is always able to obtain advice from the city attorney. The actions of the board and its power should not be "hedged about with subtle technicalities so as to hamper" the fair disposition of an appeal. Lindell Co. v. Board of Permit Appeals, supra, 23 Cal.2d at page 319, 144 P.2d at page 13.

[13, 14] The real issue was a factual question: Was there a cancellation of the permits by abandonment? Abandonment, even if the permit should be deemed to be a franchise, is determined by intent. The circumstances of lapse of time and mistake of law may be considered in determining intent. People v. Southern Pacific Co., 172 Cal. 692, 158 P. 177; Watson v. Heger, 48 Cal.App.2d 417, 120 P.2d 153. There is a mistake of law appearing in the record, a mistake evidently made by county officials and the Yellow cab and other companies, namely, the exaction and payment of taxes that should not have been paid. See Flynn v. City and County of San Francisco, supra. It may not be assumed that appellant knowingly intended to surrender rights in respect of which, had the opinion in the Flynn case been rendered at that time, it would have been apparent that no action on the part of the commission or the chief was required canceling or accepting surrender of the right to operate any of the 500 taxicabs. White v. Stevenson, 144 Cal. 104, 77 P. 828.

Before passing to the final question presented by appellants, it may be well to once more refer to petitioners' contention that the Board of Permit Appeals does not possess judicial power. The distinction between state and local boards is recognized in Sipper v. Urban, 22 Cal.2d 138, 137 P.2d 425. It must be remembered that here we are not dealing with a state wide but a local board. In Walker v. City of San Gabriel, 20 Cal.2d 879, 881, 129 P.2d 349, 350, 142 A.L.R. 1383, it is said: "Either certiorari or mandamus is an appropriate remedy to test the proper exercise of discretion vested in a local board." Among the decisions cited in support thereof we find Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 110 P.2d 513, and Naughton v. Retirement Board of San Francisco, 43 Cal.App.2d 254, 110 P.2d 714.

[15] The San Francisco Board of Permit Appeals is a local board and comes within the classification of a board with discretionary powers. The San Francisco charter directly confers such powers upon this particular board. Charter, sec. 39. Ordinance 3.0411, sec. 13 (Municipal Code, Pt. III, art. 1, sec. 26, p. 673) directs the use of discretion in granting or denying any permit. The Supreme Court of this state has declared it to be a board that was not only permitted, but directed, to use "sound discretion." Lindell Co. v. Board of Permit Appeals, supra. In that case, 23 Cal.2d at page 314, 144 P.2d at page 10, the court said: "* * * the charter clearly contemplates a *full* hearing of the case brought before the Board of Permit Appeals, where after considering the matter on its merits as presented by the applicant, the 'head or representative of the department' in vindication of the result reached at the initial hearing, and the interested parties therein, said board is authorized to make *final* disposition of the application for the permit. In view of such elaborate provision for the hearing on appeal it cannot be argued that the designated appellate board—the Board of Permit Appeals—was in any way limited or restricted in its consideration of the instant case, in the light of the disputed issues of fact." (Second italics added.)

[16] In Dierssen v. Civil Service Commission, supra, this court held that judicial or quasi judicial power may be conferred on a local board. At pages 59, 60 of 43 Cal.App.2d, at page 517 of 110 P.2d, it was stated: "The question as to whether by charter provision local boards, such as a Civil Service Commission, may be invested with judicial fact finding powers seems never to have been seriously questioned in this state. The books are full of cases expressly or impliedly holding that where fact-finding powers have been conferred on local boards their determination will not be set aside unless an abuse of discretion is pleaded and proved, that is, unless it be alleged and proved that the board acted arbitrarily, capriciously or fraudulently. [Citing cases.] It is true that in Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119, and Drummey v.

State Board of Funeral Directors, 13 Cal. 2d 75, 87 P.2d 848, and other recent cases, it has been held that state-wide administrative boards constitutionally cannot be vested with judicial or quasi judicial power. Those cases are predicated on the theory that Art. VI, section 1, of the State Constitution vests the entire judicial power *of the state* in the courts. All of those cases, including the earlier cases of Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874, and Department of Public Works v. Superior Court, 197 Cal. 215, 239 P. 1076, upon which the later cases are predicated, expressly recognized that the holdings therein were applicable only to state-wide boards and did not apply to local boards. * * * the courts are empowered to interfere with the findings of such boards only where a clear abuse of discretion is alleged and proved. If there is any substantial evidence to support the board's findings the courts, are powerless to interfere." See, also, Naughton v. Retirement Board of San Francisco, supra.

[7] Appellant contends that "The order must be reversed, because the trial Court tried the case de novo, and made no pretense of reviewing the decision of the Board of Permit Appeals, thus denying any weight or effect to the administrative process." It must be admitted that if this were merely a petition for certiorari the superior court would be powerless to take evidence. As previously stated, upon the authority of Walker v. City of San Gabriel, supra, and other cases, either mandamus or certiorari may be used. In Ware v. Retirement Board, 65 Cal.App.2d 781, 151 P.2d 549, referring to cases cited herein, the court said (65 Cal.App.2d at page 794, 151 P.2d at page 556): "In the present case, had certiorari been used, the power of the court would have been limited to annulling the order refusing to grant the hearing. No reason exists why, when mandamus is used to review the determinations of local boards invested with quasi judicial power, the scope of the review should be any broader. The above cited cases, in fact, establish that the scope of the review is identical, whichever remedy is used."

In the present case a stipulation of facts was introduced which reserved the right to either party to offer additional evidence, either oral or documentary. Evidence was introduced by the petitioner union, the petitioner competing company, and on behalf of the chief of police, and the Police Commission which had been made a party upon the insistence of the trial judge. After all evidence had been submitted, and a few days prior to judgment, the Board of Permit Appeals was made a party in the superior court, a return and answer filed and the record before the Board of Permit Appeals made a part of the record before the superior court.

The case was tried de novo prior to the introduction of the Board of Permit Appeals record. The trial judge drew his own conclusion from the evidence and decided accordingly. The superior court not only admitted evidence additional to that presented to the Board of Permit Appeals, but did not limit its findings to the record before the board. The superior court found that the chauffeurs' union had entered into a wage contract; "That separate and apart from said contract" the Yellow Cab Company had agreed to pay the members of the union a certain percentage of its weekly receipts taken in by such members in excess of a specified amount, and later agreed to pay a bonus per day for each six-day week in which the driver's receipts exceeded a specified amount. Evidence before the superior court shows, and the court so found, that the drivers received a substantial part of their income from tips from passengers. The point that we are interested in is the fact that the evidence referred to was produced for the first time before the superior court, and was not introduced before the Board of Permit Appeals, or at least our attention has not been called to any place in the transcript of the record before the board where it may be found, and an independent search on our part has failed to find any such evidence. The above is merely illustrative of the fact that evidence other than that contained in the board's record was introduced in the superior court. There are other instances that could be mentioned but in the interest of brevity they will not be here set out.

[18] The legislature by general law or by special charter provision may vest judicial power in commissions and boards established in any incorporated city or city and county. "The distinction between the powers of state-wide administrative boards and federal administrative boards is also existent between boards with state-wide authority in this state and local bodies created by legislature. By article VI, section 1, of the state Constitution, the judi-

cial power of the state is vested in the enumerated courts, municipal courts as may be established, and 'such inferior courts as the Legislature may establish in any incorporated city or town, township, county or city and county.' This latter provision is similar to the provision in the federal Constitution." Laisne v. California State Board of Optometry, 19 Cal.2d 831, 847, 123 P.2d 457, 466. See, also, California Const., Art. XI, sec. 8½, subd. 3; Irvine v. Citrus Pest Dist., 62 Cal.App.2d 378, 144 P.2d 857; Nider v. City Commission, 36 Cal.App.2d 14, 97 P.2d 293; Shewbridge v. Police Commission, 64 Cal.App.2d 787, 149 P.2d 429. There is a clear distinction between state-wide agencies to which such power has not been extended, and local boards which have been specifically directed to assume functions which in their nature are judicial.

[19, 20] In a proceeding in certiorari or mandamus the superior court is not permitted to accept evidence in addition to the record of a local administrative board possessing judicial or quasi judicial power. The court may not pass upon the truth or falsity of the facts. If there be any substantial evidence the order of such local tribunal must be sustained. In Lindell Co. v. Board of Permit Appeals, supra, 23 Cal.2d at page 315, 144 P.2d at page 11, it was held: "It is the general rule that the writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner. The court in response to appropriate application may compel such agency to act, but it may not substitute its discretion for the discretion properly vested in the administrative agency. 16 Cal.Jur. 809, § 28, and cases there cited; 34 Am.Jur. 856, sec. 68, with supporting authority." In Shewbridge v. Police Commission, supra, the court said (64 Cal.App.2d at page 793, 149 P.2d at page 432): "If it did confer jurisdiction, that jurisdiction in the abstract was power to determine incorrectly as well as correctly." See, also, Maxwell v. Civil Service Commission, 169 Cal. 336, 146 P. 869. In Hogan v. Retirement Board, etc., 13 Cal.App.2d 676, 57 P.2d 520, the appellate court condemned the effort to substitute the court for a fact finding board. See, also, Dierssen v. Civil Service Commission, supra; Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 110 P.2d 453; Vaughn v. Board of Police Com'rs, 59 Cal.App.2d 771, 140 P.2d 130; Brant v. Retirement Board of San Francisco, 57 Cal.App.2d 721, 135 P.2d 396. In Willer v. Quinn, 4 Cal.App.2d 663, 41 P.2d 572, it was held that a permit issued to a pawnbroker could be revoked by the chief of police (Charter, sec. 35); that the pawnbroker had the right to appeal (Charter, sec. 39) to the Board of Permit Appeals, and that in the application for a writ it was necessary to prove that the board lacked jurisdiction or the pawnbroker could not prevail.

[21] In the present case it is not contended that any pertinent provision of the charter or ordinance was unconstitutional, unreasonable or unfair in any respect to any of the interested parties. We are not permitted to substitute our opinion or to disagree with the implied finding of the Board of Permit Appeals if there is substantial evidence to sustain the conclusion reached. The trial court did not find that the board was without evidence to uphold its conclusion. Consideration of the entire record before that board does not convince us that the board acted in abuse of discretion, in excess of jurisdiction, arbitrarily, capriciously or against law.

[22] As already pointed out on this certiorari-mandamus proceeding the superior court tried the matter de novo, and only at the end of the trial introduced the record of the proceedings before the board. As also already pointed out, the trial court's findings were partially based on evidence introduced before it and not introduced before the board. This was clearly error. But the error would not be prejudicial if the conclusion that the license to operate the 125 cabs had in fact and in law been cancelled was the only legal conclusion that either the board or the trial court could lawfully reach. This question was presented to the board. It determined that the license had not been cancelled. That determination was a mixed question of law and fact. As already pointed out, insofar as it was a question of law the board correctly decided it. Insofar as it was a question of fact there was substantial evidence to support the board's finding. Thus the procedure adopted by the trial court of trying the issue de novo was prejudicial to appellant. That court was without power to disturb the finding of the board.

The judgment is reversed.

PETERS, P. J., and KNIGHT, J., concur.

PEOPLE v. CORLETT.

Cr. 1875

District Court of Appeal, Third District, California.

Nov. 27, 1944.

Rehearing Denied Dec. 12, 1944.
Hearing Denied Dec. 21, 1944.

1. Assault and battery 🔑92

Evidence sustained conviction of an assault with a deadly weapon. Pen.Code, § 245.

2. Criminal law 🔑742(1)

In prosecution for assault with a deadly weapon, it was province of jury to determine which person told the truth regarding circumstances of affray. Pen.Code, § 245.

3. Assault and battery 🔑92

In prosecution for assault with a deadly weapon, evidence that when victim told defendant to get back into his automobile or he would be shot, defendant reached for his rifle, advanced two steps towards victim and fired when victim raised his gun, established that shooting was not accidental or in self-defense. Pen.Code, § 245.

4. Criminal law 🔑1172(8)

In prosecution for assault with intent to commit murder and for assault with a deadly weapon, defendant, who was acquitted on charge of assault with intent to commit murder, could not complain of instructions relating to that charge. Pen.Code, § 245.

5. Criminal law 🔑829(5)

In prosecution for assault with a deadly weapon, there was no prejudicial error in giving of People's instruction on self-defense where that matter was fully and clearly covered by other instructions given at request of defendant. Pen.Code, § 245.

6. Criminal law 🔑1172(1)

In prosecution for assault with deadly weapon, use of word "absolutely" in instruction permitting resort to deadly weapon if it appeared that shooting of victim was absolutely or at least reasonably necessary to save life or prevent great bodily harm was not reversible error, in view of fact that word "absolutely" was not used unconditionally and jury was otherwise correctly instructed. Pen.Code, § 245.

7. Criminal law 🔑823(6)

In prosecution for assault with a deadly weapon, fact that People's instructions on issue of self-defense were couched in negative language did not render them prejudicial, where defendant's instructions couched in strong affirmative language were given to jury. Pen.Code, § 245.

8. Criminal law 🔑814(17)

In prosecution for assault with a deadly weapon, where facts were presented by direct evidence and jury was correctly charged upon essential elements of crime and defendant's theory of defense, instruction on circumstantial evidence was unnecessary. Pen.Code, § 245.

9. Criminal law 🔑552(4)

The degree of proof required to support a verdict of conviction applies alike to both circumstantial and direct evidence.

10. Criminal law 🔑814(17)

Refusal to instruct upon subject of circumstantial evidence is not error where case depends chiefly on direct evidence.

11. Criminal law 🔑814(17)

In prosecution for assault with a deadly weapon, where case depended almost entirely upon direct evidence and circumstantial evidence introduced was merely incidental, instruction on circumstantial evidence was properly refused. Pen.Code, § 245.

12. Criminal law 🔑829(18)

Instructions that defendant was entitled to benefit of reasonable doubt were properly refused where that matter was covered by other instructions.

13. Criminal law 🔑1130(2)

A contention that trial court erred in failing to instruct that evidence of defendant's alleged oral declarations should be received with caution was waived where defendant failed to specify the alleged admissions in his brief by either reference to record or by stating the language. Code Civ.Proc. § 2061, subd. 4.

14. Criminal law 🔑829(4)

In prosecution for assault with a deadly weapon, instructions on right to shoot in defense of the curtilage were properly refused where that matter was adequately covered by other instructions. Pen.Code, § 245.

15. Assault and battery ⚷96(4)

In prosecution for assault with a deadly weapon, where victim was defendant's discharged employee, who was on premises for purpose of procuring his personal effects and had not been refused permission to get them, defendant was not entitled to instruction on right to shoot in defense of the curtilage drawn on theory that victim was a trespasser. Pen.Code, §§ 245, 602(j).

16. Assault and battery ⚷96(4)

In prosecution for assault with a deadly weapon, several of defendant's requested instructions on defense of property were erroneous in failing to state that property owner may use force or deadly weapon to eject trespasser only when it is manifest to one, as a reasonable person, that injury to property is contemplated, and that only such force as is reasonably necessary may be used. Pen.Code, § 245.

17. Assault and battery ⚷96(4)

In prosecution for assault with a deadly weapon occurring near bunkhouse for defendant's employees, instructions on right to defend habitation were erroneous in failing to draw distinction between the "castle" and the curtilage. Pen.Code, § 245.

18. Assault and battery ⚷69

A property owner in protecting either the habitation or the curtilage may not use more force than is reasonably necessary to prevent imminent damage to property, even though person endangering it is in fact a trespasser. Pen.Code, § 245.

19. Assault and battery ⚷96(8)

In prosecution for assault with a deadly weapon, where defendant deliberately armed himself with rifle and followed victim to scene of shooting, there was no error in refusal to instruct that defendant had right to have rifle in his house, in his automobile or on his person, in absence of any qualification concerning purpose for using the rifle. Pen.Code, § 245.

20. Criminal law ⚷1130(2)

The reviewing court is not required to search record for alleged erroneous instructions or to speculate upon undisclosed reason why appellant may deem a rejected instruction to be erroneous.

21. Assault and battery ⚷96(8)

In prosecution for assault with a deadly weapon, there was no error in failing to instruct upon theory of unavoidable accident, where there was no substantial evidence of an accidental shooting, but entire defense was founded on theory of necessary self-defense. Pen.Code, § 245.

22. Assault and battery ⚷56

An assault with a deadly weapon does not involve necessity of proof of any specific intent to commit it. Pen.Code, § 245.

23. Criminal law ⚷829(1, 9, 16)

There was no error in refusal of requested instructions relating to standard of conduct which would control a reasonable person, burden of proof and impeachment of witnesses, where those matters were covered by other instructions.

24. Witnesses ⚷268(1)

Where direct examination of prosecuting witness consumed only 14 pages of transcript and cross-examination consumed 150 pages, there was no basis for contention that cross-examination had been unduly limited.

25. Witnesses ⚷282½

In prosecution for assault with a deadly weapon, there was no undue limitation of cross-examination of prosecuting witness on question of whether he was under influence of liquor prior to offense, where many pages of evidence were adduced on that subject, and trial court finally stated that it was in the record that prosecuting witness was under influence of liquor and sustained an objection to pursuing subject further. Pen. Code, § 245.

26. Criminal law ⚷1166½(12)

Statements of trial judge in reproving defendant's attorney for his persistence did not constitute reversible error.

27. Witnesses ⚷267

The limitation of cross-examination of witnesses is within sound discretion of trial judge.

28. Criminal law ⚷633(1)
Witnesses ⚷225

It is duty of trial court to see that a trial is conducted in an orderly and expeditious manner and to protect witnesses against efforts to intimidate or unfairly discredit them.

29. Criminal law ⚷338(8), 1170(1)

In prosecution for assault with a deadly weapon, evidence that prosecuting witness had sustained illicit relations with a named woman was incompetent, and defendant was not prejudiced by limitation of examination on that matter. Pen.Code, § 245.

◆

Appeal from Superior Court, Colusa County; Ben R. Ragain, Judge.

Shirley William Corlett was convicted of an assault with a deadly weapon and he appeals from the judgment of conviction and from an order denying a new trial.

Judgment and order affirmed.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, for appellant.

Robt. W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

The defendant was charged with an assault upon James Carl Stafford, on October 31, 1943, with a deadly weapon with intent to commit murder. In a second count of the information he was accused, under section 245 of the Penal Code, of an assault upon the same person with a deadly weapon. The jury acquitted him of the first charge, but convicted him of the crime of an assault with a deadly weapon. A motion for new trial was denied. From the judgment of conviction and from the order denying a new trial the defendant has appealed.

As grounds for reversal the appellant contends that the judgment is not supported by the evidence; that the court erred in giving to the jury and in refusing certain instructions. It is also asserted that the court erred in several specified rulings upon the admissibility of evidence, and in unduly restricting defendant's cross-examination of witnesses. The comments of the trial judge, in passing upon objections to evidence, are likewise assigned as prejudicial error.

The defendant was engaged in farming rice in Colusa County. He lived on the premises and employed sixteen men to assist in the farming enterprise. Among those farm hands was the prosecuting witness, James Carl Stafford. He had been employed by the defendant for some time. His chief business was driving a truck. The men, including Mr. Stafford, occupied bunkhouses situated on the farm. They ate together in a large messroom in the main building. They were paid for their services $1 per hour, and were furnished their meals. The defendant had difficulty in supplying them with sufficient meat to satisfy them, without the aid of their food ration books. He had often requested them, including Mr. Stafford, to turn in their ration coupons. He said Stafford told him his ration book "was in Colusa with his girl and he didn't know whether he would bring it or not." The defendant also claimed he had trouble with Mr. Stafford on account of his failure to perform his farm duties. He said he had been informed "Stafford isn't getting the loads in." There is evidence to indicate that Stafford had previously been in considerable trouble, and that he may have been quarrelsome and dangerous. The defendant testified that he inquired about Stafford and learned those facts. He said "I investigated him this morning and [decided] the best thing to do is to get rid of him."

At six o'clock on the evening of October 30th, Stafford met the defendant and asked him for his pay check, saying, "I want to get off early." There was some dispute regarding the amount which was due, but the defendant gave him a check for $47, and then asked him if he intended to deliver his ration book. Stafford replied, "I don't think so." The defendant then said "Don't come back then." He said Stafford shrugged his shoulders and warned him, "You will be sorry." Stafford then drove away in his own machine and returned the following morning.

Mr. Stafford testified that he received the $47 check, and drove to his uncle's ranch twelve miles south of Yuba City to return his .22 caliber rifle which he had previously borrowed to shoot hawks and pheasants with. Without request the uncle handed Stafford his (Stafford's) own .25 caliber revolver which had been left with the uncle. Stafford threw it onto the seat of his automobile and drove to Marysville, where he spent several hours at the Aloha Club. He then drove to Colusa, where he arrived about three or four o'clock Sunday morning, and went to bed in an auto court. After about one and one-half hours' sleep he arose and returned to the Corlett ranch where he arrived about eight o'clock that morning. As he got out of his automobile he picked up the revolver from the seat of the car and put it in his pocket, saying that he did so to prevent someone from taking it. He then entered the dining room for breakfast. Mr. Corlett was present.

After breakfast an employee by the name of Griffin asked Stafford to take a truck and haul a bale of sacks "down to the rig." He agreed to do so. For that purpose he got into a truck and started the motor. The defendant, who was standing by the gate, shouted at him to "shut her down, shut her down." Stafford stopped the motor, got out of the machine and "asked him what was the matter?" A controversy ensued. Corlett was very angry and told Stafford he could not go to work; that he was discharged. Stafford testified that Corlett then called him a "god-damned s-of-a-b," and "told me to leave the place." He said he requested the defendant to "give me time to get my clothes" from the bunkhouse. He said that Corlett ordered him off the place, saying that "he would get his gun." Stafford said that, when Corlett threatened him with a gun, he replied that he had one of his own, but didn't "need it." When Corlett asked him where the gun was, Stafford took it from his pocket and exhibited it in the palm of his hand. Then he replaced it, and walking to his own machine, which was parked nearby, he got in and drove off toward the bunkhouse for the purpose of securing his personal effects and then of leaving the ranch. The defendant corroborated those facts, except that he did not admit that he threatened to get his rifle.

On his way to the bunkhouse Stafford passed two workmen, Frank Dawson and George Kaufman. He told the latter that he "had got canned and not to work too hard." He drove his machine to his bunkhouse and parked it near the door, for the purpose of removing his personal effects. When Stafford left, the defendant entered his house, but observing Stafford's car going toward the bunkhouse, he took his rifle and got into his machine and drove over there, parking about a car-length behind the Stafford machine. He immediately got out, and after some controversy he seized his rifle and shot Stafford through the shoulder. There is an absolute conflict of evidence regarding the circumstances attending the actual shooting.

The defendant testified that he had trouble with Stafford over the ration book, and on account of his failure to properly perform his farm duties. He said he had been told of Stafford's previous difficulties; that he had investigated his conduct and made up his mind to get rid of him. He claimed to have overheard Stafford say as he came out of the mess hall that morning that, "The big so-and-so fired me last night and thinks he is going to get away with it. I wonder how he would like to lose another building." No other witness corroborated that statement. There is evidence that Stafford had been previously involved in other affrays, and that he had a reputation as a violent and a quarrelsome man.

Regarding the incident of Stafford's attempt to comply with Griffin's request to haul the sacks with a truck Sunday morning, the defendant testified that he did order him to shut off the motor and to get out of the truck. Corlett said that when he hollered at Stafford, he stopped the motor and got out of the truck and said "What the hell is the matter?" The defendant said he then replied, "I told you you weren't going to work, you were fired"; that Stafford cursed him and "whipped out an automatic," saying, "I can whip you any day you want and I have got a gun and I stand behind it, go and get your gun." The defendant, however, admitted that Stafford then made no attempt to use his revolver, but that he put it back in his pocket and drove off toward the bunkhouse, saying "he wanted to get his socks." Corlett testified that he returned to his house, but when he looked out of the window and saw Stafford's machine parked at the bunkhouse "I went down stairs and got my gun * * * and drove over to the bunkhouse, * * * to look after my property." The defendant explained that he had previously lost two buildings, and said that he didn't know whether Stafford "was going to shoot me or burn my house down." The defendant stopped his machine a short distance behind Stafford's parked car, and promptly got out of his automobile. His rifle was resting against the front seat in the car. Stafford stood by the side of his own machine twenty or twenty-five feet distant. There is a radical difference between their stories with respect to what actually transpired at the time of the shooting. Mr. Stafford testified in that regard:

"Q. Did you see Mr. Corlett come to the vicinity of the bunkhouse? A. I didn't see him come, no sir.

"Q. When was the first time you saw him? A. When he hollered 'I am going to kill you, you god-damned s-of-a-b.' * * *

"Q. Anything else? A. 'Throw that gun on the ground.'

"Q. Where was your gun at that time? A. In my right front pocket. * * *

"Q. Did you say anything back to Mr. Corlett? A. I started to say 'Let me explain.' * * *

"Q. Did he fire a shot from his rifle? A. Yes sir. * * * I hadn't gotten the 'explain' hardly out of my mouth when he shot. * * *

"Q. What happened to you? A. I fell forward on my face. * * * He walked up straddle of me and I hollered 'Oh god, don't shoot me any more, you have already killed me,' and he stooped over * * * and turned me over on my back. * * *

"Q. When he fired the shot where was your gun? A. In my right front pocket."

Stafford testified that he was shot through the shoulder and fell to the ground upon his face, and that the defendant then walked up to him, rolled him over, took his revolver from his pocket and walked away. When the defendant reached the house he told Frank Dawson that he had shot Stafford and he directed Dawson to take him to the hospital at Colusa. Corlett handed Stafford's revolver to a man by the name of Russell, who subsequently delivered it to the sheriff.

The defendant said that he took his rifle from his home and drove over to the bunkhouse to eject Stafford from the premises, and to "look after my property." He claimed that he feared Stafford might burn his building. He said he didn't know whether Stafford "was going to shoot me or burn my house down." Corlett testified that, when he stopped his machine, Stafford was standing near the rear of his own car, and that he then had no revolver in sight. The defendant said that when he started to get out of his automobile Stafford pulled his revolver from his pocket and said "Get back in there or I will shoot you." Corlett testified that "I reached for my rifle. * * * I took a couple of steps toward the front end of the car, and he had his automatic out and he was fumbling with the safety on it, and he had it pointed toward me and I said 'Stafford, drop that gun,' and he raised his gun and as he raised it, I fired a shot." The defendant claimed to have fired his rifle from his hip, without placing the butt to his shoulder. He said that he did not intend to shoot Stafford, and that when he fired his rifle Stafford's revolver fell to the ground and he walked over and picked it up and drove away. The defendant did not claim that he shot Stafford to prevent him from then damaging the property.

Evidently the jury believed Mr. Stafford's story of the shooting, or the defendant would have been acquitted.

[1, 2] It is not seriously contended there is insufficient proof of an assault with a deadly weapon to support the judgment. It was the sole province of the jury to determine which person told the truth regarding the circumstances of the affray. In support of the verdict it may be reasonably inferred that if the defendant was really afraid that Stafford would shoot him, he would have remained away from the bunkhouse until after Stafford had left the ranch. Instead of doing so, he deliberately took his rifle and drove down to the bunkhouse, parking his machine directly behind Stafford's car, and then he got out and advanced toward him two steps before he fired the rifle. That does not appear to be the conduct of a man who was afraid of being shot. Nor does it seem likely that if Stafford had intended to burn the defendant's bunkhouse, he would have proceeded to do so in broad daylight and in the presence of other workmen. It is evident that the jury believed that the defendant was the aggressor in that affray, and that he did not shoot Stafford in necessary self-defense, anticipating that he was about to receive great bodily harm at his hands. On the contrary, it is entirely reasonable to believe that when Stafford was discharged and ordered to leave the premises, he would naturally wish to remove his personal belongings from the bunkhouse before he departed.

[3] The defendant may not reasonably contend that he accidentally shot Stafford. He did say that he fired the shot with his rifle at his hip, and that he did not intend to hit him. But he testified that when Stafford told him to get back in his car or he would shoot him, he deliberately reached for his rifle and advanced two steps toward him; and when Stafford raised his gun and pointed it at him, he said. "I fired the shot." That statement infers a deliberate intent to shoot Stafford in what the defendant would have the jury believe was necessary self-defense.

[4] The defendant may not complain of failure to adequately instruct the jury upon the essential elements of an assault with intent to commit murder, for he was ac-

quitted of that charge. The jury either believed he was not guilty of an intention to kill Stafford, or, at least, they gave him the benefit of a doubt upon that particular issue. The verdict of the jury merely found him guilty of an assault with a deadly weapon, which, under the circumstances of this case, necessarily infers that he did not intend to kill his adversary. The verdict having been favorable to the defendant on the subject of the intention to kill Stafford, he may not complain of a failure, if any, to adequately instruct the jury on that particular subject.

[5] The appellant challenges the giving of plaintiff's instructions numbers 9, 10, 10a, 11 and 21, as prejudicially erroneous. Each of those five instructions involved the general principle of self-defense and the particular phase thereof applicable to one who stands his ground and uses a deadly weapon against his assailant, in the belief, as a reasonable man, that he is in imminent danger of receiving great bodily harm. Neither of those instructions refer to the charge so frequently criticised by the authorities to the effect that it is necessary for a defendant to first "retreat to the wall" before he may resort to a deadly weapon in necessary self-defense. The clear import of each of those five instructions, in spite of the fact that some of them were couched in negative language, is that the jury was informed that if the defendant, acting as a reasonable man, had cause to believe he was about to receive great bodily harm at the hands of Stafford, he had a right to stand his ground and shoot or even kill his assailant. Instruction number 11 said in that regard: "Where one without fault is placed under circumstances sufficient to excite the fears of a reasonable person, that another person designs to commit a felony or some great bodily injury upon him, and said circumstances afford grounds for reasonable belief that there is imminent danger of the accomplishment of this design, he may, acting under these fears alone, shoot or slay his assailant and be justified by the appearances."

The right of the defendant to use a deadly weapon and to shoot or even kill his adversary, if the circumstances warranted him in believing, as a reasonable person, that he was in imminent danger of receiving great bodily harm, was fully and clearly covered by other instructions upon that subject which were given to the jury at the request of the defendant. Defendant's instruction number 69 informed the jury that an assault with a deadly weapon is justifiable when it is accomplished in "resisting any attempt * * * to do some great bodily injury upon any person." Defendant's instructions numbers 2, 107, and 112, which were given, clearly charge the jury in strong, affirmative language favorable to the defendant, that if they believed from the evidence that Corlett went to the bunkhouse for the purpose of lawfully protecting his property, and that Stafford became angry and drew his revolver, and that, from Stafford's conduct and the surrounding circumstances, the defendant believed, as a reasonable man, that he was about to receive bodily injury at the hands of Stafford, he "had a right to reach for his rifle in his own defense, and shoot Stafford even if it killed him." In said instruction number 107, the jury was told that "It does not matter if such danger was real or apparent; and if the defendant Shirley William Corlett acted in self defense from real and honest convictions as to the character of the danger, induced by the existence of circumstances [such] as would appear to a reasonable man, you should find him not guilty, even though he was mistaken as to the extent of the danger."

We are convinced that the jury was fully and fairly instructed on every essential element of self-defense applicable to the facts of this case, and that neither of said five challenged instructions are prejudicially erroneous.

[6] It is true that plaintiff's instruction number 10 did state that to justify the defendant in using a deadly weapon in the belief that he was in imminent danger of great bodily harm, "the danger must have appeared to defendant Corlett to have been so urgent and pressing that, in order to save his own life or to prevent his receiving great bodily harm, the killing or shooting of Stafford *was absolutely or at least reasonably necessary.*" (Italics added.) The use of similar language, including the italicized word "absolutely", was criticised by the Supreme Court in a late decision in People v. Holt, 25 Cal.2d 59, 153 P.2d 21. The erroneous use of that word, however, was held not to constitute reversible error because the jury was elsewhere correctly instructed that if the defendant, as a reasonable man, was warranted in believing that he was in imminent danger of great bodily harm, he was justified in shooting and killing his adversary and would be

excusable for the homicide on the doctrine of necessary self-defense. In that case the defendant was convicted of murder of the first degree, without recommendation. The Supreme Court reduced the judgment to murder of the second degree.

In the present case the jury was clearly and correctly elsewhere instructed regarding the well known principle that the circumstances which may justify a defendant in shooting his assailant must be such as would warrant a reasonable person to believe that it was necessary to do so to protect him from imminent danger of great bodily harm. Moreover, in this case, the objectionable word "absolutely" was not used unconditionally. It was immediately followed by the alternative, "or at least reasonably necessary." It follows that, for the same reason assigned in the Holt case, the use of that word "absolutely" in said challenged instruction does not render it reversible error. It will be observed that the jury in this case was not definitely told that the right to use a deadly weapon depended solely upon the question as to whether it was *absolutely* necessary. That word was modified and used in the alternative only. The challenged instruction says that before the defendant could resort to a deadly weapon it must appear that the "shooting of Stafford was absolutely *or at least reasonably necessary.*" On the authority of the last cited case, we are satisfied the use of the word "absolutely", in the alternative, was not misleading or prejudicial. Certainly it was not reversible error.

There is nothing in the late opinion of the Supreme Court, in the case of People v. Hatchett, 63 Cal.App.2d 144, 146 P.2d 469, 476, or in any of the other cases relied upon by the appellant, in conflict with what we have previously said regarding the five challenged instructions. In the Hatchett case, the defendant was convicted of manslaughter on purely circumstantial evidence. There was no eyewitness to the affray in that case. The defendant offered an instruction on the subject of circumstantial evidence, which was refused. Other proffered instructions, which were deemed to be correct and which contained essential statements of the law were refused. The court said "Defendant's two proposed instructions which we have quoted should have been given." It is true that the court criticised negative language used in the four Hatchett case instructions, which language was similar to the negative language used in the preceding five challenged instructions of this case. But the Hatchett case was not reversed on that account. The reviewing court conceded that the four Hatchett case instructions correctly stated the law. It said in that respect: "It is true that the four instructions given at the request of the People *do not incorrectly state the law of self-defense,* but they stated the rule negatively and from the viewpoint solely of the prosecution." (Italics added.)

[7] The opinion in the Hatchett case assigned numerous other reasons for reversing that judgment. It criticised the negative form of the said four instructions because they were the only ones given to the jury on that particular subject. In the present case several other instructions on that same subject, which were couched in strong affirmative language favorable to the defendant, were offered by him and given to the jury. The mere negative form of the five challenged instructions in this case may therefore not be said to be prejudicial to this defendant as were the criticised ones which were given in the Hatchett case. That case is not authority for the reversal of this case on the ground of the mere use of negative language contained in the five instructions which correctly stated the principles of law discussed therein.

[8-10] The court did not err in failing to instruct the jury, on its own initiative, upon the subject of circumstantial evidence. The jury was fully and fairly instructed that the defendant was presumed to be innocent and that the burden of proof of every essential element of the crime rested upon the prosecution to establish his guilt beyond a reasonable doubt. The jury was told that the burden did not shift from the prosecution on account of the defendant's claim that he shot Stafford in self-defense, or otherwise. This is not a circumstantial case. The proof of the assault itself was dependent almost entirely upon the direct evidence of the defendant and the prosecuting witness. Both were examined at great length. There was no occasion to give to the jury an instruction on the subject of circumstantial evidence. The instructions which were given correctly informed the jury upon all of the essential elements of the crime with which the defendant was charged and upon his theory of defense upon which the case was tried. The degree of proof required to support

a verdict of conviction applies alike to both circumstantial and direct evidence. People v. Bailey, 82 Cal.App. 700, 706, 256 P. 281, 284; 8 Cal.Jur. 191, sec. 266. In the case last cited it is said, "The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction." The prosecution relied, in this case, on direct evidence. Whatever circumstances that appear in evidence were merely incidental to or corroborative of the direct evidence of the eyewitnesses to the affray. It has been repeatedly held it is not error for the court to refuse to instruct juries upon the subject of circumstantial evidence where the cases depend chiefly on direct evidence. People v. Lapara, 181 Cal. 66, 70, 183 P. 545; People v. Lonnen, 139 Cal. 634, 73 P. 586; People v. Harvey, 109 Cal.App. 111, 292 P. 654; People v. De Voe, 123 Cal.App. 233, 11 P.2d 26; People v. Williams, 134 Cal.App. 232, 25 P.2d 259; 8 Cal.Jur. 369, sec. 404.

[11, 12] The appellant assigns the refusal to give his proffered instructions numbers 76, 77, 83 and 164, as prejudicially erroneous. The first one was properly refused because it stated in effect that when circumstantial evidence is relied upon to establish the guilt of the defendant each fact or circumstance must be proved beyond a reasonable doubt and if any material circumstance in the chain of evidence is not so proved the defendant must be acquitted. This case did not depend upon mere circumstances. It depended almost entirely upon the direct evidence of the defendant and Stafford. The circumstances, such as their disagreement over the delivery of ration coupons, and over hauling of sacks with a truck on Sunday morning, and the evidence of the alleged bad character of Stafford, were adduced by the defendant to establish his claim of having shot Stafford in necessary self-defense. That evidence was merely incidental to the proof of the actual assault with a deadly weapon. Instruction number 76 was therefore misleading. Instruction number 164 defined circumstantial evidence. For the reasons previously stated it was not prejudicial error to have refused to give it to the jury. The other two instructions merely charged the jury that if they entertained a reasonable doubt about any material circumstance in the chain of evidence, the defendant was entitled to the benefit of that doubt and that he should therefore be acquitted. That principle of law was adequately covered by several other instructions which were given to the jury. For instance, defendant's instruction number 149 closed with the charge that, "This presumption of innocence is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created. *Every reasonable doubt* or presumption arising from the evidence *must be construed in favor of the defendant Corlett.*" (Italics added.)

In defendant's instruction number 54, the jury was again charged as follows: "The law requires more than mere probability of guilt; it requires that the jury be satisfied and convinced of guilt to a moral certainty and beyond a reasonable doubt; therefore, if you are not convinced to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, but if you conclude notwithstanding that the defendant is probably guilty, you nevertheless must find the defendant Shirley William Corlett 'not guilty'."

Again, in the court's instruction number 17, the jury was charged that, "In this case the burden rests upon the prosecution to establish every element necessary to constitute the guilt of the defendant to a moral certainty and beyond all reasonable doubt."

[13] The appellant charges the court with prejudicial error in failing to instruct the jury in accordance with section 2061, subdivision 4, of the Code of Civil Procedure, as stated in his proffered instructions numbers 156 and 158, that evidence of certain alleged oral declarations of the defendant should be considered "with caution." It has been held that such cautionary instructions may be refused as "mere commonplace" statements; that "a judgment will not be reversed either for the giving or the refusing of this instruction." People v. Raber, 168 Cal. 316, 143 P. 317, 318; People v. Hansen, 130 Cal.App. 217, 220, 19 P.2d 993. Moreover, the appellant failed to specify or identify in his briefs the alleged admissions of the defendant to which he refers, by either reference to the record where they may be found, or by stating the language to which they apply. The appellant has therefore waived his right to rely on that assignment of error, even if it has merit, which we do not concede. Rule 15 of Rules on Appeal provides that "The

statement of any matter in the record shall be supported by appropriate reference to the record." The transcript consists of 877 pages, and a reviewing court may not be expected to search the record to discover whether alleged admissions of the defendant are contained therein.

[14, 15] The appellant has assigned as reversible error the refusal of the court to give to the jury twenty-two instructions offered by him on the theory that he had a right to shoot Stafford in defense of the curtilage as an inseparable part of his dwelling house to prevent damage to his property, as distinguished from mere necessary self-defense of his person. Those refused instructions include defendant's proffered instructions numbers 35, 117 and 119 to 140, inclusive. We are of the opinion the court did not err in rejecting those instructions. They are adequately covered by other instructions which were given to the jury. They were drawn on the theory that Stafford was a trespasser. The evidence clearly shows that he was not a trespasser. He was an employee who may have been discharged, but who, after a request to secure his personal belongings, was apparently proceeding to get them from the bunkhouse where he was accustomed to sleep. There is no evidence that the defendant had denied Stafford the privilege of first procuring his personal effects. He was undoubtedly entitled to peaceably do so. He returned to the ranch Sunday morning and ate breakfast in the mess hall with the other workmen. The defendant was then present and made no objection to his doing so. The defendant testified that it was the custom and permissible for discharged employees to remain overnight and to partake of a last meal before they were expected to leave the premises. After breakfast, at the request of a workman, Stafford, evidently assuming he was still an employee, proceeded to haul sacks of rice. It was at that time the defendant told Stafford he was fired. But when Stafford said "Give me time to get my clothes," the defendant did not refuse that request. Those facts indicate clearly that Stafford was not a trespasser on the premises. For the reason that Stafford was not a trespasser, section 602(j) of the Penal Code, upon which the appellant relies, is not in point. That section merely provides that,

"Every person who *wilfully commits any trespass* by either:

* * * * *

"(j) Entering any lands, whether uninclosed or inclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession; * * *. Is guilty of a misdemeanor."

At the actual time of the shooting the defendant did not tell Stafford he could not enter the bunkhouse to get his clothing and effects. He did not warn him that if he did not immediately leave the premises he would use his weapon to force him to do so. The defendant did not claim that he shot Stafford to prevent him from entering the bunkhouse or from burning or doing damage to the property. His sole defense was that he shot Stafford in necessary self-defense because he first threatened to shoot him and because Stafford actually resorted to overt acts to carry out that threat by pointing his revolver directly at the defendant and by fumbling with the safety device. It does not seem reasonable that if Stafford was actually pointing his revolver at the defendant and threatening to shoot him, Corlett would have taken the time to reach for his rifle and then to step forward two steps before he fired his rifle. We are of the opinion there is no substantial evidence to warrant the defendant in believing, as a reasonable man, that Stafford was about to burn or damage the bunkhouse. He certainly was making no effort to accomplish that purpose at the time of the shooting. It is evident that the only valid defense which the appellant may reasonably urge was that, as a reasonable man, he believed that he was about to be shot by Stafford and that he therefore shot him in necessary self-defense. But the jury found that issue against the defendant, and the jury had the sole province of determining the credibility of the respective stories told by the defendant and the prosecuting witness.

[16] Most of the rejected instructions were erroneous in failing to state that the owner of property is justified in using force or a deadly weapon to eject a trespasser only *when it is manifest to one, as a reasonable person,* that injury to the property is contemplated, and that the owner is then entitled to use only such force as is *reasonably necessary* to justify the attack or to protect the property. People v. Teixeira, 123 Cal. 297, 55 P. 988, 989; Civil Code, sec. 50; 26 Am.Jur. 272, sec. 172; 40 C.J.S.,

Homicide, p. 976, § 110; 25 A.L.R. 547, note; 9 Southern Cal.Law Rev., 377. In the Teixeira case, supra, it was held that the refusal to give such defective instruction was not erroneous. The court said: "Error is predicated upon the refusal of the court to give the following instruction: 'If the defendant, at the time of the alleged assault, was engaged in the defense of property lawfully intrusted to his care, and which it was his duty or his right to maintain the possession of, the assault was justified, and you should acquit him.' *This instruction places no limit upon the amount of force which the defendant might use in the defense of the property in his possession. In law he was only entitled to use that amount of force necessary for the protection of his property. The instruction fails to make the distinction.*" (Italics added.)

In 40 C.J.S., Homicide, pp. 972–976, § 109, it is said with respect to the right to resort to force in defense of habitation that,

"A person is justified in taking life in defense of his habitation where it is actually or apparently necessary to do so in order to repel another person who attempts to enter in a forcible or violent manner for the apparent purpose of committing a felony therein on either person or property. * * *

"The right * * * is subject to the qualification that the danger must be imminent. * * * The attempt must be manifest, that is, it must be so plainly made that no reasonable doubt exists as to the purpose of the aggressor; and a mere demonstration, or even threat, to break into a house will not justify a homicide by the occupant. * * *

"The force used by him must be neither greater in degree nor earlier or later in point of time than is necessary or apparently necessary.

In 26 Am.Jur. 272, sec. 172, it is said: "Only in extreme cases can one endanger human life or do great bodily harm in defense of property."

Moreover, the court elsewhere adequately instructed the jury that an assault with a deadly weapon is justifiable when in *necessary* defense of the habitation. Defendant's instruction number 47 charged the jury that the burden was on the prosecution to prove the defendant's unlawful use of a weapon, and that the burden did not shift "because the defendant claims that he shot Stafford * * * in lawful defense of his property or dwelling." In defendant's instruction number 69, the jury was charged that an assault with a deadly weapon "is also justifiable when committed by any person * * * (2) When committed in defense of habitation." Defendant's instruction number 70 charged the jury that "Resistance sufficient to * * * prevent an illegal attempt by force to take or injure property in his lawful possession," is justifiable.

The defendant's rejected instructions are nearly all too broad and unlimited in their application to the doctrine of justification for the use of force in defense of the habitation. The two which did confine that principle to the *necessary* use of such force were covered by other instructions which were given to the jury.

[17, 18] There is authority which may support the contention that the right to use *necessary* force in defense of the habitation or "castle" also extends to the curtilage which includes the outer buildings, such as bunkhouses. 40 C.J.S., Homicide, p. 973, § 109, subsec. b; 10 Words and Phrases, Perm.Ed., p. 709. There is, however, a conflict of authorities as to whether the rule which authorizes necessary defense against threatened injury to the habitation also extends to the curtilage. Certainly the same necessity for defending the habitation and the members of the family therein does not exist to the same extent with respect to remote outbuildings in which no members of the family reside. Moreover, not even the "castle" is entirely exempt from the application of the law. The lord of the manor may not ruthlessly or brutally assault his guest or an employee because, forsooth, he does not like him. If he desires to eject one he may use only the force *necessary* to do so, and that only after fair warning to depart. He is certainly not entitled to use force and violence against one who is not likely to injure or destroy the property. It is apparent that the curtilage is not as sacred in the eyes of the law as is the "castle." But for the protection of neither the habitation nor the curtilage may the owner use more force than is reasonably necessary to prevent imminent damage to the property, even though that person is in fact a trespasser. The rejected instructions made no such distinction. They were therefore erroneous and misleading

in that respect, and the court was justified in refusing to give them to the jury.

[19, 20] There is no merit in the contention that the court erred in refusing to instruct the jury that the defendant had a right to keep in his house or in his automobile or on his person the rifle with which he shot Stafford. That instruction is misleading for it is not qualified in any respect. Of course, if he had the rifle for the lawful purpose of necessary self-defense or for necessary defense of his property, he had a right to its possession. But the evidence is undisputed that he deliberately armed himself with the rifle when he started to follow Stafford to the bunkhouse. The instruction contained no intimation of the purpose for which he had a right to arm himself with a rifle. The brief fails to assign any reason or authority for stating that the failure to give such an instruction is erroneous. Our attention is not even directed to the number of the instruction or the page where it may be found. Defendant offered 167 instructions. This court is not expected to search the record for an alleged erroneous instruction or to speculate upon an undisclosed reason why an appellant may deem a rejected instruction to be erroneous.

[21, 22] The court did not err in failing to instruct the jury upon the theory that Stafford was shot as the result of an unavoidable accident. There is no substantial evidence of an accidental shooting. The entire defense was founded on the theory of necessary self-defense, and not upon an accidental shooting. The defendant's own testimony was that he deliberately took his rifle with him when he followed Stafford to the bunkhouse. He placed it by his side in the front seat of his automobile. He says that when he started to get out of his machine Stafford said "Get back in there or I'll shoot you; * * * With that he pulled his gun out of his pocket. * * * I [then] reached for my rifle. * * * I took a couple of steps toward the front end of the car, and he had his automatic out and he was fumbling with the safety on it, and he had it pointed toward me and I said 'Stafford, drop that gun,' and he raised his gun and as he raised it, *I fired the shot.*" (Italics added.) That version of the affray leaves no room for the contention that the defendant accidentally shot Stafford. Clearly it was not an accident in spite of the fact that the defendant said he fired the rifle from his hip and that he did not intend to shoot Stafford, or, as he stated, "I didn't want to shoot him, I thought more to scare him." The defendant was convicted of a mere assault with a deadly weapon under section 245 of the Penal Code. That section provides that "Every person who commits an assault * * * with a deadly weapon or instrument or by any means or force *likely to produce great bodily injury,*" is guilty of that offense. The *intention* to actually injure another is not mentioned in that section. Section 240 of that code provides that "An assault is an unlawful attempt, *coupled with a present ability,* to commit a violent injury on the person of another." If a rifle is deliberately and unlawfully fired toward another person in a manner "likely to produce great bodily injury," an assault with a deadly weapon may be accomplished even if the defendant does not really intend to *hit* the victim. It has been held that an assault with a deadly weapon does not "involve the necessity of proof of any specific intent to commit it." People v. Marseiler, 70 Cal. 98, 100, 11 P. 503, 504; People v. Gordan, 103 Cal. 568, 37 P. 534; People v. Lopez, 81 Cal.App. 199, 202, 253 P. 169; People v. Lim Dum Dong, 26 Cal.App.2d 135, 140, 78 P.2d 1026.

Defendant's rejected instruction number 110 was completely covered by other instructions which were given to the jury. For instance, the court directed the jurors that it was their duty to consult with each other "with a view to reaching an agreement, if you can do so without violence to your individual judgment. You each must decide the case for yourself, but should do so only after a consideration of the case with your fellow jurors."

[23] Defendant's rejected instruction number 115, with relation to the asserted standard of conduct which would control a "reasonable person," was fully covered by defendant's instructions numbers 107, 112, and several others which were given to the jury.

Defendant's rejected instruction number 82, which asserted that the burden of proof did not shift to the defendant in this criminal action, was covered by defendant's instruction number 47, and others which were given to the jury.

Defendant's rejected instruction number 111, regarding the impeachment of witnesses by evidence of conflicting statements, was also elsewhere covered by the court's charge to the jury. Moreover, the appellant failed to designate any evidence in the record by appropriate reference to the transcript or otherwise, to which that refused instruction may be deemed to apply.

We find no reversible error in the instructions, either given or refused. A careful consideration of all instructions given and refused convinces us that the jury was very fully and fairly charged upon every essential issue presented at the trial.

[24, 25] The court did not unduly limit the cross-examination of the prosecuting witness Stafford, nor of any other witness. The direct examination of Stafford consumed only 14 pages of the transcript. The cross-examination consumed 150 pages. We are of the opinion the court was extremely indulgent with the defendant in that regard. There is no merit in the contention that the cross-examination of witnesses was unduly restricted. There are instances when a repetition of questions which the court deemed to have been fully answered, were refused, and when the court did request the defendant's attorney to refrain from further questioning of witnesses on particular subjects. We have critically examined each such assigned error, and find no merit in any of them. The chief incident of that nature involved defendant's effort to prove that Stafford was under the influence of liquor Saturday night and the following morning. That evidence was competent, but evidently not of great importance. He admitted that he had been drinking to some extent, but insisted that he was not drunk. Many pages of evidence were adduced on that subject. Mr. Russell, one of defendant's witnesses, said Stafford appeared as though he had been drinking "a little." There was much controversy over the question as to whether a certain bottle of wine came from Stafford's bunkhouse. Several objections to questions on that subject of intoxication were correctly sustained because they were incompetent, or argumentative or unnecessary repetitions of questions which had been answered. Some controversy arose between defendant's attorney and the judge regarding the state of the record. Stafford became vexed and curt. Defendant's attorney seemed rather persistent. The judge was firm in his rulings, but we think he was extremely patient, and courteous. Time and time again he admonished the jury that it must disregard such statements of either counsel or the court, and that they must render their verdict solely on the evidence adduced. Finally, in an urgent effort to pursue the subject of Stafford's intoxication, the court said "I think it is in the record that he was under the influence of liquor at the time of the breakfast." That was a statement favorable to the defendant. The court then sustained an objection to pursuing that subject further. We think that subject was very fully developed. The defendant was not prejudiced by the limitation of cross-examination of Mr. Stafford, or any of the other witnesses.

[26-28] The cross-examination of the sheriff, George R. Houx, was not unduly restricted. On the assumption that he was prejudiced in favor of the prosecution, he was asked many questions as to whether he made an investigation of the previous reputation of Stafford, or as to whether he had been unlawfully carrying a concealed weapon. On several occasions the prosecution charged that the defendant was attempting to discredit witnesses. The case was hotly contested. Considerable zeal was exercised by respective counsel, but we do not criticise that fact. We do not think the court unfairly reproved defendant's attorney for his persistence, or that the jury could have been prejudiced by the remarks of the judge. Certainly the statements of the judge do not constitute reversible error. People v. MacDonald, 167 Cal. 545, 550, 140 P. 256; People v. Emmett, 123 Cal.App. 678, 12 P. 2d 92. The limitation of cross-examination of witnesses is within the sound discretion of the trial judge. It is the duty of the trial court to see that a trial is conducted in an orderly and expeditious manner, and to protect witnesses against efforts to intimidate or unfairly discredit them. We find no prejudicial error in those assigned rulings. The court was not guilty of misconduct in that regard, or otherwise.

[29] Numerous other assignments of errors in rulings upon the evidence of half a dozen witnesses are cited and discussed. Defendant was limited in his effort to prove that Stafford had sustained illicit relations with a named woman. That evidence was clearly incompetent. The defendant was not prejudiced by limiting that examination or by striking out certain answers of witnesses with relation thereto. We have critically examined the record

upon each assigned error, and find no reversible error in the rulings of the court.

We are convinced the defendant was fairly and impartially tried, and that there was not a miscarriage of justice.

The judgment and the order denying a new trial are affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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67 Cal.App.2d 93

PACIFIC FRUIT EXPRESS CO. v. McCOLGAN.

No. 12656.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1944.

As Modified Dec. 30, 1944.

1. Constitutional law ⚷48
Taxation ⚷37

In case of a corporation engaged in a unitary business within and without the state, allocation of income to the states in which the business is done, for franchise tax purposes, by means of a formula that gives weight to factors such as property, services and income is reasonable, and to rebut presumption that the formula produced a fair result the burden is on taxpayer to make oppression manifest by clear and cogent evidence. St.1935, p. 965, § 10.

2. Taxation ⚷543(1)

A suit to refund taxes is in the nature of an action in assumpsit and taxpayer may recover only if it be shown that more taxes have been exacted than in equity and good conscience should have been paid.

3. Taxation ⚷37

The franchise tax statute directing that allocation of income, with respect to corporation engaged in a unitary business within and without the state, be made upon the basis of "sales, purchases, expenses of manufacture, payroll, value and situs of tangible property, or by reference to these or other factors", is not invalid for failure to adopt a more rigid formula. St.1935, p. 965, § 10.

4. Taxation ⚷376(4)

Under the Franchise Tax Act the Commissioner has the power to originate and employ a formula for the allocation of income of corporation engaged in business within and without the state where the taxpayer has used an improper formula. St. 1929, p. 28, § 22; St. 1935, p. 965, § 10; p. 976, § 25; Const. art. 13, § 16, subd. 2, amended in 1933.

5. Taxation ⚷28

Business franchise tax provision giving Commissioner authority to adopt a formula to fix the tax is not unconstitutional as being an illegal delegation of the taxing power. St.1935, p. 965, § 10; Const. art. 13, § 16, subd. 2, amended in 1933.

6. Taxation ⚷376(4)

In determining franchise tax of California corporation engaged in renting refrigerator cars to railroads and doing a unitary business within and without the state, allocating 26 per cent. of its entire net income to the state by means of a formula which gave consideration to property, pay roll and mileage was not shown to have resulted in the payment of more taxes than the corporation, in equity and good conscience, should have been required to pay, even though allowances should have been made for out of state labor performed under contract. St.1935, p. 965, § 10.

7. Taxation ⚷47(4)

Allocating to the state 26 per cent. of entire net income of corporation engaged in unitary business within and without the state of renting refrigerator cars to railroads, as basis for corporation franchise tax, was not shown to have resulted in subjecting corporation to double taxation. St.1935, p. 965, § 10.

◆

Appeal from Superior Court, San Francisco County; Frank T. Deasy, Judge.

Action by Pacific Fruit Express Company against Charles J. McColgan, Franchise Tax Commissioner of the State of California, to recover taxes alleged to have been wrongfully exacted under the Bank and Corporation Franchise Tax Act. Judgment for defendant, and plaintiff appeals.

Affirmed.

C. W. Durbrow and Harry H. McElroy, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and John L. Nourse and James E. Sabine, Deputy Attys. Gen., for respondent.

KNIGHT, Justice.

Plaintiff brought this action against the Franchise Tax Commissioner of the State of California to recover taxes and interest it claimed were wrongfully exacted by defendant for the tax years 1935, 1936, 1937 and 1938. The trial court found in defendant's favor, and from the judgment entered therein, plaintiff appeals.

Plaintiff's business consists principally of renting its refrigerator cars to railroads, of performing services designed to keep the cars in condition to preserve fruit, vegetables and other items shipped therein, and of repairing and reconditioning the cars. The earnings from plaintiff's business are derived chiefly from the rental of the cars, and from services performed in connection with the refrigeration, ventilation and heating of such cars. Both the rental of such cars and the performance of such services are done within the State of California, and in many other states as well, as the cars are rented to the Southern Pacific Company, the Union Pacific Railroad Company, and the Western Pacific Railroad Company and their shortline connections. The rental paid to plaintiff by the carriers for the use of its cars is computed at the rate of two and a half cents per mile for express cars, and two cents per mile for all other cars. Plaintiff made and filed its tax returns for the tax years mentioned and paid the taxes so computed, using as the basis for the returns, in computing the percentage of business done in California, the miles which the cars it had leased to the railroads were hauled in California, in proportion to the miles such cars were hauled in other states by the railroads. On this basis plaintiff allocated approximately 9% of its total net income to California for the four tax years. After a hearing the Franchise Tax Commissioner, hereafter referred to as the commissioner, determined that the allocation so made by plaintiff was not a proper one, and made a reallocation on the basis of a three factor formula, consisting of property, payroll and mileage, and made an assessment based on such reallocation. Under such formula, about 26% of plaintiff's total net income was taken as a measure for the four years involved. Plaintiff paid the assessments under protest, and in this action sought to recover the amount so paid.

The taxes protested were levied under the Bank and Corporation Franchise Tax Act. This act provides for a franchise tax of 4% of the net income of a corporation, not exempted, derived from business done within this state. Section 10 of the act, St. 1929, p. 24 (as amended, Chap. 275, p. 965, Stats. 1935), provides: "If the entire business of the bank or corporation is done within this State, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this State, the tax shall be according to or measured by that portion thereof which is derived from business done within this State. The portion of net income derived from business done within this State, shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacture, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation. If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made."

[1, 2] The allocation method of taxation of the income of a corporation such as this, engaged in a unitary business within and without the State of California, was approved in Matson Nav. Co. v. State Bd. of Equalization, 3 Cal.2d 1, 43 P.2d 805, affirmed 297 U.S. 441, 56 S.Ct. 553, 80 L. Ed. 791; also in the later case of Butler Brothers v. McColgan, 17 Cal.2d 664, 111 P. 2d 334, 341, affirmed 315 U.S. 501, 62 S.Ct. 701, 86 L.Ed. 991, wherein the court said: "In such case as the instant one [a unitary, interstate business], allocation of income to the various states in which the business is done by means of a formula that gives weight to the various factors such as property, services of * * * income, appears entirely reasonable. To rebut the presumption that the formula produced a fair result, 'the burden is on the taxpayer to make oppression manifest by clear and cogent evidence.' Norfolk & Western Ry. Co. v.

North Carolina, 1936, 297 U.S. 682, 688, 56 S.Ct. 625, 628, 80 L.Ed. 977." Furthermore, since a suit to refund taxes is in the nature of an action in assumpsit, the taxpayer may recover only if it be shown that more taxes have been exacted than in equity and good conscience should have been paid. Stone v. White, 301 U.S. 532, 57 S.Ct. 851, 81 L.Ed. 1265; Lewis v. Reynolds, 284 U.S. 281, 52 S.Ct. 145, 76 L.Ed. 293.

The main contentions made by plaintiff in support of the appeal are that the statute does not prescribe a definite method, rule or formula for allocation; that the commissioner is without authority to originate and prescribe a formula or method for allocation of net income; and that the formula prescribed by the commissioner is contrary to such direction as is contained in the statute, is arbitrary and insufficient. The determination of these questions necessitates a more detailed description of the nature and scope of plaintiff's business, since the purpose of allocating the net income, where the entire business of the corporation is not done within this state, is to fix the tax according to the portion or amount of net income which is derived from business done within this state; in other words, the tax is to be calculated so as "to assign to the State the portion of net income reasonably attributable to the business done within this State * * *." Sec. 10 of the Act. The following are the essential facts as they appear from the stipulation of facts on which the action was tried, and from the findings of the trial court: In connection with its business plaintiff employs people to perform various duties, such as persons chosen to perform executive and clerical functions, to perform repairs and to perform icing and other preservative operations with respect to the refrigerator cars. It also maintains within California and elsewhere, either under ownership or lease or hire, property, including rolling stock and property with a fixed location, such as icing platforms, ice houses, ice manufacturing plants, ice ponds, ice storage plants, offices and office buildings, car repair shops, car yards, storage and repair tracks and other facilities and property. Furthermore it owns repair shops and yards where any heavy repairs and reconstruction necessary to keep its cars in good condition are with rare exceptions made. It does these heavy repairs and reconstruction in its own shops because to do so is more economical than to have it done by independent contractors. Running repairs, that is, those repairs necessary to meet requirements of the Federal Safety Appliance Acts, 45 U.S.C.A. § 1 et seq., and regulations thereunder and to keep cars in suitable condition for efficient and satisfactory operation, are made by the railroads on the lines of which plaintiff's cars happen to be when such repairs become necessary. These running repairs are made under rules of the Association of American Railroads, which rules prescribe the charges to be made therefor, and the charges are based on average cost of such repairs to all railroads in the country, and may have no relation to the actual cost of the particular repairs in the particular locality where they are made. Over half of the total repairing and rebuilding done by plaintiff is done in its California shops, and over seventy per cent of its total payroll for persons employed in repairing its cars is for persons employed by it in its car shops in California. Most of the shipments carried in the cars leased by plaintiff to the railroads originate in California. The percentages of total shipments so originating were 62.44% in 1934, 63.82% in 1935, 61.74% in 1936, and 64.05% in 1937. A substantial portion of plaintiff's net income is derived from its icing operations in precooling and cooling the cars. Plaintiff derives a larger profit from its icing operations when it uses ice manufactured by itself than when it uses ice purchased from others. Most of the icing operations in California are performed with ice which plaintiff manufactured for itself, and most of such operations in other states are performed with ice purchased by plaintiff from others. Over half of plaintiff's total icing operations are performed in California. In 1934, 59%, in 1935, 62%, in 1936, 63% and in 1937, 60% of the cars which were iced in California and then moved out of the state were not iced again prior to reaching their destination. A table showing the relation existing in the various states (only those in which an amount in excess of 1% of the mileage of plaintiff's cars is run) between mileage, ice manufacture and use, and repairing done by plaintiff, discloses the following: Plaintiff makes repairs and manufactures ice in only a few of the states through which its cars are hauled by the railroads. It makes repairs in only nine states, and in five of those states the combined repairs amount to less than 2½% while over 56% of the total repairs made by plaintiff are made in California. No other state approaches the figure for California, the nearest state being Idaho, with less than 16%. Plaintiff has car repair shops in only three states; and of plaintiff's six car repair shops, three are in California. It manufactures ice in only seven states, and over 63% is manufactured in California. No other state approaches this figure, the nearest again being Idaho with slightly over 8%.

The stipulation of facts was offered in evidence subject to the objections and exceptions of both plaintiff and defendant. No definite ruling was made thereon by the trial court, but the stipulation of facts was adopted and made part of the findings of fact, the court thereby in effect having overruled all objections thereto.

[3] Plaintiff's first point that the statute does not provide any formula, rule or standard for the allocation of net income, is based apparently upon the contention that such a statute should prescribe a fixed and precise formula which must be used in all cases regardless of the nature of the business in which the particular corporation is engaged, and regardless of the obvious fact that a single formula cannot be devised which will operate equitably as to all corporations. In this regard plaintiff argues that while the statute directs that an allocation shall be made upon the basis of "sales, purchases, expenses of manufacture, pay roll, value and situs of tangible property, or by reference to these or other factors," it does not say how any factors shall be considered or put together in a mathematical computation. In other words, it is asserted that the statute by stating five factors on which allocation can be made and then saying that an allocation may be made by reference to these or other factors is left "wide open" so that it provides no formula for the computation of the tax. We are unable to sustain plaintiff's view.

Flexibility is recognized not only as a desirable but an essential feature of any workable system for the allocation of income, whereas a single, rigid statutory formula would doubtless be productive of injustice in particular cases, and lead to unconstitutional results as to certain corporations, since it would be impossible to make it adaptable to different types of business. For example the precise formula that was applied in fixing the tax in the Matson case, supra, which was upheld by the courts, would not be workable in the present case; nor could the formula applied in fixing the tax in the Butler Brothers case, supra, which was likewise sustained by the courts, have been used in either the Matson case or the present one; and again the formula used in this case could not be made workable in either of the other two cases. Examples of unconstitutional results flowing from the adoption of an inflexible formula are found in several adjudicated cases. Thus the same formula which was prescribed by the Connecticut legislature and held constitutional in Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113, 41 S.Ct. 45, 65 L.Ed. 165, was prescribed by the North Carolina legislature. Its use was therefore compelled in the case of Hans Rees' Sons v. North Carolina, 283 U.S. 123, 51 S.Ct. 385, 75 L.Ed. 879, and the resulting tax in that case was held unconstitutional as a denial of due process because it taxed income derived from other states. Another example is where the use of the mileage factor, which was upheld in Norfolk & Western Ry. Co. v. Maxwell, 297 U.S. 682, 56 S.Ct. 625, 80 L.Ed. 977, was required by statute to be used in another case and its use there was held unconstitutional in Piedmont & N. Ry. Co. v. Query, D.C., 56 F.2d 172. See also Wallace v. Hines, 253 U.S. 66, 40 S. Ct. 435, 64 L.Ed. 782.

Among the hypothetical cases which may be suggested as demonstrating the unsoundness of plaintiff's argument in favor of a rigid formula are the following: A personal service corporation may not use property at all in its business, or may use very small amounts of office furniture. Manifestly, in such a case, to use the property factor and to treat it on an equality with the payroll factor would result in a distorted allocation of income. Or take the case of a corporation which merely owns railroad cars subject to a long term lease and which does not maintain or repair them, or perform any other services at all, so that its entire income, gross and net, is derived from the rental of the cars; in such case, only the property factor would have any significance and a factor such as sales would be inapplicable. In fact plaintiff's own expert witness, Mr. Holbrook, definitely expressed the need for flexibility of formula when in answer to a question as to whether it was possible to allocate income between states with absolute and scientific accuracy he replied: "Well, I have always felt that considerable latitude should be allowed for special cases, and different kinds of corporations, and the character of the business, rather than trying to define a set formula."

The argument advanced by plaintiff that section 10 of the Act prescribes an unworkable formula is completely negatived by the decisions rendered in the Matson and Butler cases, supra, which sustained the formulas there employed; also by the fact that section 10 has been in actual operation for some fifteen years.

[4] Nor is there any merit in plaintiff's contention that the statute does not give the commissioner authority to employ formulas or methods of allocation. By section 22 of the Act, St.1929, p. 28, he is in express terms made the administrator of the act; and section 25 thereof imposes upon him the duty to examine the returns made by taxpayers and to make deficiency assessments if not satisfied with the returns so made; and obviously the legislative intent to authorize him to employ a formula for the allocation of the income in case the taxpayer has used an improper one, is clearly shown by the inclusion in the section of the last paragraph thereof, which reads: "If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made." Moreover, the decisions rendered in the Matson and Butler cases, supra, may be taken as indicating the view that the statute does authorize the commissioner to apply formula allocation; otherwise the formulas therein adopted and applied by the commissioner could not have been sustained.

[5] Plaintiff further contends that if section 10 of the Act does give the commissioner the authority to adopt a formula to fix the tax, it constitutes an illegal delegation of power; that the taxing power of a state is vested exclusively in the legislature, and taxes can be imposed only in pursuance of legislative authority, and that therefore the Act in that respect is unconstitutional. We do not agree with this contention. In 1929, Article XIII, section 16, subd. 5 of the Constitution read as follows: "The legislature *shall define 'corporations'* and 'doing business'; *shall define 'net income,'* and may define it to be the entire net income received from all sources; *shall provide for the allocation of income,* for the assessment, levy and collection of the aforesaid taxes * * *." In 1933, section 16 was amended, and subdivision 2 thereof reads: "The Legislature *may provide by law* for the taxation of corporations, their franchises, or any other franchises, by any method not prohibited by this Constitution or the Constitution or laws of the United States." (Italics added.) And it has been held under similar provisions of the Constitution that the Legislature need not prescribe the exact method by which the tax is to be fixed, but may delegate to its taxing officers the power to adopt a suitable method. Utah Construction Co. v. Richardson, 187 Cal. 649, 203 P. 401. In that case the Constitution, Article XIII, section 14(d), in authorizing the imposition of the old corporation franchise tax, declared that the assessment of franchises should be made "in the manner to be provided by law." Although the Legislature in establishing the tax provided that the actual valuation of franchises for assessment purposes should be determined by the State Board of Equalization, the court held that this delegation of power to the board was "in the manner to be provided by law" as required by the Constitution. Similarly, if the power delegated to the State Board of Equalization in that case is upheld as valid, it is difficult to see how the delegation of power to the Franchise Tax Commissioner in the Bank and Corporation Franchise Tax Act can be held invalid. Such is the view expressed in an exhaustive article written by Mr. Justice Traynor, then a member of the faculty of the School of Jurisprudence, University of California, soon after the adoption of the Bank and Corporation Franchise Tax Act in 1929, wherein among other things the author stated: "Although the question is by no means free from doubt, it is submitted that the authority granted the Franchise Tax Commissioner is not in violation of the Constitution. In the first place, the power of allocation given the Commissioner seems to be permissible under the wording of the constitutional provision; for, while it states that the legislature 'shall *define* "corporations", shall *define* "net income"' as to allocation, it reads 'the legislature * * * *shall provide for* the allocation of income.' It would, therefore, seem that if the intent had been that the legislature should make the specific alloca-

tion the section would have read, 'shall allocate' instead of 'shall provide for the allocation of.' Therefore, it is submitted that in delegating to the Commissioner the power of determining upon the allocation under certain rules, the legislature was 'providing' for the allocation of income within the meaning of the constitutional provision." 17 Cal.L.Rev. pp. 509, 510.

As stated, the article was written soon after the adoption of the Bank and Corporation Franchise Tax Act in 1929, St. 1929, p. 19, and the soundness of the conclusion reached therein, that there had been no invalid delegation of power to the commissioner, would seem to be attested to by the fact that during the fifteen years intervening since the Act was adopted, thousands of allocation problems have been acted upon every year by the commissioner, and several cases involving section 10 of the Act have gone to the United States Supreme Court; but in no case has it been held that the provisions of section 10 constituted an unlawful delegation of legislative power.

As supporting its contention that if the Act delegates the authority to the commissioner to adopt a formula such delegation of power is illegal, plaintiff cites a number of cases from other jurisdictions concerning unconstitutional delegations of taxing power. None of the statutes involved in those cases, however, seem to present the same problems as those raised by the California statute. Several of the cases involve attempts on the part of the taxing body to allocate income where no statutory authority to allocate existed. For the reasons stated, the cases so cited are not determinative of the issue here involved.

Plaintiff's contention that the formula adopted by the commissioner is contrary to the directions contained in the Act and is arbitrary and insufficient, is based mainly upon the ground that although the act provides that five or more factors shall be taken into account in adopting a formula, the commissioner's formula is based on only three, one of which is "wages, salaries, commissions and other compensation of employees." In that factor the commissioner included the payroll of plaintiff for the labor employed by it in the manufacture of ice and in icing its cars, and making the repairs thereto; but he excluded therefrom and refused to make any allowance for the out-of-state expenses incurred by plaintiff for labor furnished by various railroads in repairing cars in conformity with the rules prescribed by the Association of American Railroads, and for cost of ice and the icing of its cars furnished by railroads and commercial firms under contract. Plaintiff contends, therefore, that the commissioner's formula does not fairly represent the cost of the effort which enters into the production of plaintiff's net income, and that the formula should be corrected at least to the extent of including the additional out-of-state labor costs, which would result in reducing plaintiff's assessment.

[6] The justification for the refusal is placed by the commissioner upon the ground that the employees furnishing such labor were not plaintiff's employees, and that the activities of the employees of an independent contractor performing a contract with the taxpayer are not activities of the taxpayer. We are of the opinion that the reason so given for the refusal is not sound, for as will be seen, the expenses thus incurred were necessary to the operation of plaintiff's business, and that being so, it would seem that plaintiff was entitled to an allowance thereof, irrespective of whether the labor was performed by its own employees within the state or by others, under contract, out of the state. However, it does not follow that plaintiff is entitled to a refund of any taxes, for as heretofore pointed out, a taxpayer may recover a refund only if it be shown that he has paid more taxes than in equity and good conscience he should have been required to pay; and in the present case plaintiff has failed to show that the formula applied resulted in the payment of more taxes than in equity and good conscience it should have paid, or that under the formula applied it had paid a tax measured by more than the amount of net income reasonably and fairly attributable to the business done in this state. On the contrary, while the use of the mileage factor, as used by plaintiff as the sole basis of its allocation, allocated approximately only 9% of plaintiff's net income to California, the record shows that over 50% of plaintiff's property other than rolling stock is in California; that between 55% and 60% of its payroll is for services performed in California; that its principal office is here, and that it here maintains business and accounting offices where some part of its general management and its general accounting are performed; that over 56% of the total repairs made by plaintiff are made in this

state; over 63% of the ice manufactured by plaintiff is manufactured in California, and over 50% of plaintiff's icing activities are performed in California. However, the commissioner allocated only some 26% of the total net income to business done in California, and this was largely brought about by the use by the commissioner of the mileage factor as the basis for determining the amount of plaintiff's rolling stock within and without the State for purposes of the property factor in the formula, and also car mileage was included by the commissioner as one of the factors in the three-factor formula. It would seem, therefore, that the formula used by the commissioner was much more favorable to plaintiff than the situation warranted, and that even though allowances should have been made for out-of-state labor performed under contract, the amount of taxes called for by the commissioner's formula was not more than plaintiff in equity and good conscience should have been required to pay.

The fact that the commissioner's formula was based on only three of the five factors specified in the act did not constitute a violation of the section, for as will be noted, under the broad provisions thereof, the commissioner is authorized to determine the net income derived from business done within this state by an allocation upon those specified factors, "or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State * * *."

[7] Plaintiff makes the additional point that the commissioner's formula runs afoul of the law relating to extra-territorial and double taxation. The basis of its argument is that there is a wide variation of formulas prescribed by the different states through which its cars are operated, and that according to a table appearing in the record, if the commissioner's three-factor formula is permitted to be used in California and a mileage basis pro-rate were to be used in all other states, the total tax measure for all states for the year 1934 would be 117.9344% of plaintiff's net income for that year, thus showing a double taxation on at least 17.9344% of plaintiff's net income. As pointed out in the commissioner's brief, however, there was no showing made by plaintiff that all of the states through which plaintiff's cars were hauled by the railroads imposed a net income or franchise tax; nor was any showing made that all or any of the other states allocated any such taxes on the mileage basis; and that as a matter of fact it appears from the record that the State of Kansas proposed to assess plaintiff on a mileage basis, but on plaintiff's request applied a different formula. In that state of the record it cannot be said that plaintiff has been or will be subject to any double taxation.

The final point made by plaintiff is in substance but a repetition of its contention that it was entitled to have the amount of its taxes fixed on a mileage basis; and the facts justifying the rejection of an allocation of net income on that basis have already been pointed out. Whatever other contentions are made by plaintiff in support of its appeal are deemed to be without sufficient merit to require special attention.

The judgment is affirmed.

WARD, J., concurs.

PETERS, Presiding Justice.

I concur.

I agree with all portions of the majority opinion except that portion which holds that the commissioner should have included in his formula sums paid to out of state independent contractors for repair of the cars. In my opinion, the commissioner correctly excluded that item.

As the majority opinion clearly and correctly points out, the statute confers discretionary powers upon the commissioner in drafting a formula. The purpose of the formula is to ascertain, within reasonable limits, the portion of the net income which is derived from doing business in this state. The purpose of the formula is not to ascertain what the net income is, but what portion of the total net income is reasonably attributable to business done in this state. The majority opinion states that the out of state expenses "were necessary to the operation of plaintiff's business, and that being so, it would seem that plaintiff was entitled to an allowance thereof, irrespective of whether the labor was performed by its own employees within the state or by others, under contract, out of the state." In my opinion that holding indicates a confusion of thought as to the issue involved. If we were considering what the net income of this company was, of course, the sums paid to the out of state independent contractors would constitute a deductible expense. But that is not the issue. Here there is no dispute over the amount of net income. The dispute is over whether the formula adopted is reasonably designed to allocate to California that portion of the total net income "which is derived from business done within this State" as provided in § 10 of the act. The commissioner decided that that result could be achieved by a three factor formula. He determined that that result could be reasonably achieved by considering the property, the payroll, and the mileage of this concern. There were many other factors he could have considered, including sales and purchases, and other factors. He believed that these factors would not help in ascertaining the proportion of this company's income derived from business done in this state. In considering the pay roll factor he considered every cent paid to any employee of the company in all the states where this company operates. But, say the majority, he should, in addition, have included sums paid not to employees but to independent contractors. What that amounts to is saying that the three factor formula was unsound and that this fourth factor should have been included. This fourth factor is completely independent of any of the three factors used by the commissioner. It differs in no respect from any other purchase made by the company. Yet purchases were not included. If the commissioner had failed to include an item within any of the three factors he used, there would be merit in the contentions of appellant. But the sums paid to independent contractors have no necessary relation to the business done by this company in this or any other state, any more than other purchases made by the company would necessarily have reflected the amount of business done. The necessary implication of the majority opinion is that the three factor formula used was improper and that this fourth factor, as a matter of law, should have been included. If sums paid to independent contractors must be included as a fourth factor, why should not all purchases be included?

I believe the three factor formula used was admirably adapted to ascertain the only question then before the commissioner—i. e., what proportion of the net income was derived from business done within this state—and that the factor of sums paid to independent contractors for repairs introduces a totally false issue into the case.

With this exception I heartily concur in the reasoning and holding of the majority opinion.

On Petition for Modification

Modification denied in all other respects; PETERS, P. J., dissenting.

67 Cal.App.2d 164

In re VAN EVERY'S ESTATE.

BOSSERT v. CURTIS et al.

Civ. 14549.

District Court of Appeal, Second District, Division 1, California.

Dec. 1, 1944.

Hearing Denied Jan. 29, 1945.

1. Executors and administrators 🔑216(2)

The probate court has broad discretion in allowing attorneys' fees.

2. Executors and administrators 🔑256(6)

In absence of abuse of probate court's discretion, an appellate court cannot disturb an allowance of attorney's fees.

3. Executors and administrators 🔑216(2)

Where estate's attorney received $4,000 willed him as probate fees, which was more than $2,000 more than the ordinary fees, denying attorney's petition for a further allowance of $7,500, an extraordinary compensation from an estate of $86,633.25, was within probate court's discretion. Probate Code, § 900.

Appeal from Superior Court, Los Angeles County; Clarence H. Hanson, Judge.

Proceeding in the matter of the estate of John Loftus Van Every, deceased, between Grover Bossert, petitioner, and Iris M. Curtis and another, contestants, and Henry Van Every and others, legatees, for an attorney's fees. From an adverse judgment, petitioner appeals.

Judgment affirmed.

Lawrence Paul Scherb, of Culver City, for appellant.

Hanna & Morton and James M. McRobarts, all of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

In this case the decedent left a last will and testament, a codicil to which contained the following provisions:

"Article II. I give and bequeath to Grover Bossert the sum of Four Thousand ($4,000.00) Dollars to be paid him in lieu of statutory attorney's fees for his services in probating my Last Will and Codicil thereto, it being my intention that he receive an additional Two Thousand ($2,000.00) Dollars provided to be paid him for such services in my Codicil dated April 10, 1940.

"Article III. I realize the extent and proportion of my estate and the difficulty that may be connected with the probate thereof by reason of the antagonism and unfriendliness which my relations have exhibited and held toward me in recent years, and should my estate at the time of my death be diminished to the point where the above monies provided to my executor and attorney be greater than statutory, I nevertheless direct that they, and each of them, shall receive the amounts as herein provided."

The probate court held that by this provision in the will the testator intended $4,000 to include all attorney's fees in the probate of the estate, and refused to grant appellant $7,500 extraordinary fees. Appellant contends that this was error because the testator's intention was to pay the attorney for his estate extraordinary fees in addition to the $4,000 paid him in lieu of regular probate fees. Petitioner applied for and was paid this amount during the course of administration.

When fees of an executor are involved, Probate Code, § 900, provides: "but when the decedent, by his will, makes other provision for the compensation of the executor, that shall be a full compensation for his services, unless by a written instrument, filed in the court, he renounces all claim for compensation provided for in the will."

Commenting upon the application of this code section, the Supreme Court in Estate of Runyon, 125 Cal. 195, 197, 57 P. 783, 784, observes: "The amount provided by the will must be taken as the measure of compensation which the testator deemed ample for all services to be rendered in the execution of the trust, and if the executors, either upon assuming their office, or by reason of unexpected circumstances occurring during the course of their administration of the trust, are called upon to perform extraordinary services, they must first renounce the compensation provided for by the will before they can be entitled to any allowance for such additional services. The compensation of an executor, whether according to the rates fixed by the statute, or as determined by the testator, is not a gratuity, but is in consideration of the services he may render, and the amount fixed by the statute is deemed ample compensation for the services ordinarily required. If the executor would claim that his services entitle him to a greater compensation then that allowed by the statute, he must first renounce that provided by the will, and the court can then make him such allowance as will fully compensate him. Unless such renunciation is made, the provision in the will will be held, under section 1616, to be 'full compensation' for his services."

The present case involves counsel's rather than executor's fees.

[1, 2] The allowance of attorneys' fees is committed to a broad discretion in the Probate Court. The court determines what would be a just and reasonable allowance (Estate of Hite, 155 Cal. 448, 101 P. 448); and, unless there appears to be an abuse of discretion in such allowance or disallowance, an appellate court is not at liberty to disturb the trial court's conclusion. Estate of Fulton, 23 Cal.App.2d 563, 73 P.2d 664.

By the executor's account, the total value of the estate was $86,633.25; computing a statutory fee of $1,696.33. When the estate's attorney received $4,000, he was paid $2,203.67 more than the ordinary probate fees. In addition, he then petitioned the court for a further allowance of $7,500 as extraordinary compensation.

[3] Regardless of the process of reasoning by which the probate judge determined to deny appellant's petition for extraordinary fees, the order as finally made was within the discretion of the court, and there appears to have been no abuse of such discretion.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

67 Cal.App.2d 162

McFARLAND v. McFARLAND.

Civ. 14528.

District Court of Appeal, Second District, Division 1, California.

Dec. 1, 1944.

1. Divorce ⚷303(3)

Evidence of change in circumstances of the parties justified amendment of divorce decree awarding custody of 10-year-old boy to mother by awarding custody to father and permitting mother to have boy with her week ends twice a month.

2. Divorce ⚷298(1)

While situation of mother must be viewed with sympathy, nonetheless paramount consideration in determining to whom custody of a child be awarded is its welfare.

◆

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action by Ina Parks McFarland against Russell Kent McFarland for divorce. Plaintiff was granted a divorce upon defendant's default and custody of their minor boy was given to her. On defendant's affidavit to amend such order by giving the custody of minor boy to him. From an order giving defendant custody of the minor boy, plaintiff appeals.

Affirmed.

Phil O. Clough, of Los Angeles, for appellant.

Clarence M. Heublein and H. Eugene Breitenbach, both of Los Angeles, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff and defendant, formerly husband and wife, have one child, a boy 10 years of age. This appeal is from an order of the trial court awarding custody of the boy to the father.

An interlocutory decree of divorce was granted to the mother July 21, 1942, upon default of the defendant. In this decree, custody was given to the mother. July 26, 1943, final decree followed continuing the mother's custody. August 10, 1943, defendant filed his affidavit, praying that the order be amended to give him custody. September 21, 1943, all of the parties appeared before the Superior Court with counsel. Evidence was heard, the trial judge interrogated the boy in chambers, then modified the decree, giving the father custody.

Appellant asserts that there is no evidence to support the order, or of any change of circumstances sufficient to warrant making the same.

[1] Examination of the record discloses that after the interlocutory decree the boy never lived with his mother. For a time he lived with the father and his present wife. Then the mother placed him in a military school. In accordance with the rules of the school, she was permitted to take him out twice a month. On these occasions the relationship between the boy and his mother was all that could have been desired. There is some suggestion in the record that he was not properly clothed or looked after physically. On the other hand there is evidence that so far as she could, the mother took good care of him.

But, the boy was unhappy in the school. He complained about it to his father, and when he talked with the judge in chambers, he told the judge that certain attendants at the school made the students stand up for hours at a time. And he told the judge that he was fond of his father and his stepmother and that it was his desire to be with them. The only home to which the boy could go was that maintained by his father, who had in the meantime remarried. And the father's present wife testified that she would be glad to have the child in the home. The trial court properly concluded that the father's home was better than a boarding school. The order permits the mother to have the boy with her week ends twice a month, and thus gives her all that she enjoyed while he was in the school.

[2] While the situation of the mother must be viewed with sympathy, nonetheless the paramount consideration in determining to whom the custody of a child shall be awarded is its welfare. Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582.

There was sufficient evidence to justify the order of the court, and there was sufficient evidence of change in the circumstances of the parties.

The order is affirmed.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 59

TAYLOR v. BANK OF AMERICA NAT. TRUST & SAV. ASS'N et al.

No. 12632.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1944.

As Corrected Dec. 6, 1944.

1. Deeds ⚷200

A grantor's testimony relating to the circumstances attending the delivery of deed to grantee was admissible to show delivery notwithstanding that co-grantor was not present at time of alleged delivery.

2. Fraudulent conveyances ⚷174(3)

Defendant who intentionally and knowingly conveyed her interest in property to plaintiff for the purpose of defrauding the creditors of defendant's grantor was not entitled to any relief under cross-complaint seeking reconveyance of her interest.

3. Fraudulent conveyances ⚷174(3)

Equity will not lend its aid to one who intentionally conveys property for the purpose of defrauding creditors, in a suit brought to obtain a nullification of the conveyance or a reconveyance, but will leave grantor exactly where it finds him.

4. Fraudulent conveyances ⚷174(3)

The doctrine that equity will not aid a grantor in obtaining reconveyance of property which was conveyed for purpose of defrauding creditors is not limited in application to case where grantor so conveys for purpose of defrauding his own creditors, but embraces any grantor seeking equitable relief who is a party to the fraudulent purpose for which the conveyance was executed.

5. Fraudulent conveyances ⚷121

A transfer of property in satisfaction of a pre-existing debt cannot be attacked by one creditor as fraudulent simply because a preference resulted or debtor was thereby rendered insolvent.

6. Lost instruments ⚷23(3)

Evidence was sufficient to establish the execution and delivery of a deed transferring full ownership in realty to plaintiff, which deed was lost before being recorded.

◆

Appeal from Superior Court, Tulare County; Glenn L. Moran, Judge.

Action to quiet title by Caroline F. Taylor against Bank of America National Trust & Savings Association and others, wherein the defendant M. Rossa Andrews filed a cross-complaint alleging ownership of an undivided one-half interest in the property. From a judgment for defendant on the cross-complaint, plaintiff appeals.

Reversed.

J. LeRoy Wehr, of Healdsburg, for appellant.

Booth B. Goodman, of San Francisco, and John M. Hoffmann, of Oakland, for respondent.

KNIGHT, Justice.

The plaintiff, Caroline F. Taylor, brought this action to quiet title to real property of which she claimed to be sole owner. One of the parties defendant, M. Rossa Andrews, filed a cross-complaint claiming to be the owner of an undivided one-half interest in the property. The trial court found in favor of the defendant on the cross-complaint, and accordingly adjudged and decreed that each of the parties was the owner of an undivided one-half interest in the property. Plaintiff appeals.

The property consists of 320 acres of land in Tulare County. The ownership thereof has remained in the Taylor family for many years, during which time numerous transactions were had among various members of the Taylor family involving the title to the property. However, at the time the present action was submitted for decision, the only persons claiming any interest in the property were the parties to this appeal, and the determination of the controversy between them centers upon the question of the legal effect of a deed executed and delivered by the cross-complainant and Beatrice Taylor, in whom the record title then stood, conveying sole ownership in the property to plaintiff.

The transactions that took place and the events that occurred leading up to the execution and delivery of the deed, and which have a bearing on the question at issue, may be stated as follows: On August 14, 1928, A. V. Taylor, then being the owner of the entire property, mortgaged it to the Federal Land Value Insurance Company for upwards of $16,300. The note and mortgage were subsequently assigned to A. V. Taylor's sister-in-law, Agnes E. Taylor, and in December, 1932, she assigned the note and mortgage to her son, Everett B. Taylor, an attorney, for the purpose of collection. Three months thereafter and in March, 1933, Everett obtained a personal loan of $4,900 from one Leo Vanucci, and as security for the payment thereof he assigned to Vanucci the A. V. Taylor note and mortgage, but the assignment was not recorded until three and a half years later, to-wit, in September of 1936. Meanwhile, in August, 1934, A. V. Taylor conveyed the property to Everett, the latter taking title thereto in trust for his mother, and in September, 1934, Everett filed a release of the outstanding mortgage. The plaintiff, Caroline F. Taylor, is the divorced wife of Everett; Beatrice Taylor is their daughter; and Miss Andrews, the cross-complainant, is a sister to Agnes, Everett's mother. The divorce was granted in 1922, at which time a property settlement agreement was entered into between the parties, and in March, 1935, Everett was indebted to Caroline under the property settlement agreement in the sum of $23,500. On March 12, 1935, Everett deeded the property to Beatrice and Miss Andrews as joint tenants. This was done at the request of his mother, the real owner of the property. Neither Beatrice nor Miss Andrews knew that the property was to be deeded to them, nor did either pay any consideration whatever therefor. They resided at different places a considerable distance apart around or near the East San Francisco Bay region, and the first information they received regarding the matter was when each received a letter from Everett, dated March 13, 1935, stating that at his mother's request he had deeded the property to them and had sent the deed to the county recorder at Visalia to be recorded. In July of the following year Agnes, the mother of Everett, died, and two months after her death and on September 30, 1936, Everett died. Within seven months subsequent to Everett's death, the evidence as to the exact time being uncertain, Beatrice and Miss Andrews executed and delivered the deed in question conveying full title to plaintiff. The deed was drawn at the request of the grantors by Attorney Charles Wehr, a friend of the Taylor family, who had been acting as legal adviser of the grantors as well as plaintiff; and under the circumstances hereinafter related plaintiff gave the deed to Attorney Charles Wehr to be recorded. He died on April 25, 1939, and up to the time of his death the deed had not been recorded. After his death it could not be found.

Plaintiff's complaint set forth five causes of action. The first was in the usual form to quiet title to the entire property and was directed against all defendants. The purpose of the second was to clear the title of the assignment by Everett to Vanucci of the A. V. Taylor note and mortgage. It was therein alleged in substance that Everett never was the owner of the note and mortgage; that he took the assignment thereof "in trust as a matter of convenience only" for his mother, for the purpose of collection, and that the subsequent assignment thereof by him to Vanucci was fraudulent and void. In the third cause of action it was alleged on information and belief that while Everett held title to the property in trust for his mother he executed a deed purporting to convey the property to Yolanda Taylor (to whom he was then married), which deed plaintiff sought to have cancelled and declared void. The fourth cause of action concerned the deed from Everett to Beatrice and Miss Andrews, and the subsequent deed from Beatrice and Miss Andrews to Caroline. The substance of the allegations thereof was that Agnes, the mother of Everett, desiring to satisfy her son's indebtedness to Caroline, "gave plaintiff said property and caused the said E. B. Taylor [Everett] to deed said property" to Beatrice and Miss Andrews in trust for plaintiff, and that thereafter "as evidence of said trust, the said M. Rossa Andrews and Beatrice V. Taylor did make, execute and deliver to plaintiff a deed of all of their right, title and interest in and to the said above described property." In the fifth cause of action it was alleged that Attorney Wehr had advised plaintiff in March, 1937, that in order to clear the title to the property a test case should be brought as to a portion thereof; that he further advised that such a case could be prosecuted more expeditiously if brought in his name; that to carry out such purpose he caused Beatrice and Miss Andrews to deed to him one quarter of the property (this was prior to the execution and delivery of the deed in question); that thereupon he brought suit in his own name to quiet title thereto; that he had agreed to reconvey the one-quarter interest back to Beatrice and Miss Andrews after the suit was determined, but that his death occurred prior to the trial of the action, leaving outstanding in his name a one-quarter interest in the land. Plaintiff asked, therefore, that the deed to him be cancelled and declared void.

However, after the commencement of the present action and prior to the rendition of the decision, all persons against whom the several causes of action were directed, except Miss Andrews, assigned or quitclaimed to plaintiff any interest they may have had in the property. In this connection the record shows that Vanucci and his wife reassigned to plaintiff the A. V. Taylor note and mortgage, and that Beatrice conveyed to her mother by deed all interest she had in the property. Thus there was left for determination only the respective rights of Caroline and Miss Andrews under the lost deed whereby Miss Andrews and Beatrice conveyed to Caroline full ownership in the property, and as shown by the bill of exceptions upon which the appeal was taken, the vital point in that controversy was not whether there was a valid delivery of the deed on the part of Miss Andrews, but was whether, in view of the evidence adduced at the trial as to the reason and purpose for the execution and delivery of the deed, Miss Andrews was entitled to seek the aid of a court of equity in having the interest she had thus conveyed to Caroline restored to her. On that point it was claimed on behalf of the appellant Caroline that it was the desire of Agnes, the real owner of the property, to satisfy the debt owing by her son to appellant under the property settlement agreement; that she had previously caused Everett to convey the property to Beatrice and respondent, in trust for appellant; and that after the deaths of Agnes and her son, Beatrice and respondent as such trustees in execution of their trust and for the purpose of carrying out the wishes of Agnes, conveyed the property to appellant. In support of such claim Beatrice testified that subsequent to the death of Agnes her father, who had again married, demanded that the property be reconveyed to him; that respondent was informed of such demand, but that they did not comply therewith; that after the death of her father she had a conversation with respondent in her mother's apartment in Berkeley, in her mother's presence, at which time she told respondent that she considered it advisable for them to deed the property to her mother in payment of the debt owing to her by Everett, and that respondent replied: "I am agreeable to that." Continuing, Beatrice testified: "I told Miss Andrews that Mr. Wehr had requested me to ask her for a letter ordering him or authorizing him to prepare the deed to Mrs. Taylor. Miss Andrews gave Mr. Charles Wehr such a letter. I saw the letter. Mr. Wehr brought the letter to my mother's home at the time he brought the deed which Miss Andrews had signed. I recognized Miss Andrews' signature to the letter. Mr. Charles Wehr brought the deed to my mother's home at 2641 Dwight Way, Berkeley."

[1] The witness then proceeded to relate the circumstances attending the delivery of the deed to her mother. After she had done so counsel for respondent moved to strike out the testimony upon the ground that the respondent was not present. The trial court ruled that it was hearsay and granted the motion, saying: "The statement of all the parties there, what was said as to the conversation, what was said will stand out, and it is so ordered." However, on this appeal counsel for respondent concedes that testimony of the kind stricken out is admissible, citing Dinneen v. Younger, 57 Cal.App.2d 200, 134 P.2d 323, and Williams v. Kidd, 170 Cal. 631, 151 P. 1, Ann.Cas.1916E, 703. The testimony so stricken was as follows: "Mr. Charles Wehr brought the deed to my mother's home at 2641 Dwight Way, Berkeley. He came in and announced, 'I have a deed with Miss Andrews' signature on it, and Beatrice, you will sign it' and I signed the deed, and he said, 'Now hand it to your mother,' and I handed the deed to my mother and she looked it over and handed it back to Mr. Charles Wehr. At the time I passed the deed to my mother, Mr. Wehr said, 'Now Beatrice, you understand that the title has passed from you to your mother and you are no longer the owner of the Deland property,' and he also said, 'This completes the transaction.'" Supplementing the foregoing testimony appellant testified that after the deed had been thus handed to her she "in turn, looked it over and handed it back to Mr. Wehr and asked him to record it"; but in this connection Beatrice testified that inasmuch as Mr. Wehr was going to bring suit to quiet title (as alleged in the fifth cause of action of the complaint) the deed "was not to be recorded until the termination of that quiet title action."

So far as the record shows, respondent did not deny the testimony given by Beatrice as to the conversation that took place in her mother's apartment at which her mother was present, wherein respondent stated that it was agreeable to her to deed the property to Beatrice's mother; furthermore, respondent admits having subsequently "executed a deed of the property in question; deeded it to Caroline Taylor," and having delivered the deed to Mr. Wehr; but as to her reason for having done so she testified as follows: "Mr. Charles Wehr told me that the banks were going to take over this property for debts that Everett Taylor had incurred, and in order to save the property, he thought I ought to deed it to someone for the time being, and suggested I deed it to Caroline Taylor and I consented to do that; and there was nothing more said about it until a few months later when he sent me the deed and said in the letter that if I did not understand it, to communicate with him, which I did, and he said it was only for protection and I signed the deed and sent it right to him."

On cross-examination she gave the following testimony:

"Q. Miss Andrews, did Charles Wehr tell you that the banks were going to take over this property? A. Yes, he did.

"Q. What banks? A. The Antioch Bank, the Abstract Bank and the Brentwood Bank.

"Q. And did he say they had filed suit? A. He was having trouble with them, he did not say how far they had gone. He said that he was having trouble in settling with them, and this deed was executed to hold until he made a settlement with the bank."

She was then asked the question: "What debt or bill was it that the banks were trying to collect? * * * who owed them the money?" and she replied: "Everett Taylor got part of the money, and I think a couple of notes his mother signed, see, those were the notes that he felt the bank should have the money, and the money that Everett got on his own, Mr. Charles Wehr said that they would have to give them that, and see if they let that go, but the notes that Mrs. Taylor, my sister signed with them, see, that they were paid, or at least he made a settlement with them."

She further testified that it was sometime in July, 1936, that Mr. Wehr spoke to her first about the deed, that he afterwards sent to her for her signature, and that he heard nothing more about it until he wrote her the letter and sent the deed. The letter was dated November 2, 1936, and read as follows: "Dear Miss Andrews: I am enclosing a deed from Beatrice and yourself to Caroline, which Beatrice has already signed. Would you please sign this and return it to me? If you do not understand it or if you want any further information I would be very happy to give it to you and suggest in that case that you telephone to me before signing it. Very truly yours, Charles Wehr."

The trial court made no finding as to the execution and delivery of the deed in question, nor as to its purpose or effect. It found first that the allegations of paragraph 1 of each cause of action set forth in the complaint were untrue. Those allegations were merely that plaintiff was the owner and in possession of the property. The second finding was as follows: "2. That the allegations set forth in paragraph 2 of the plaintiff's complaint are untrue"; but obviously this finding is meaningless because there were five causes of action set forth in the complaint, each embodying "paragraph 2," no two of which were alike, and the court did not specify to which of the several paragraphs 2 its finding was intended to apply. The substance of the third finding was that all parties sued except Miss Andrews had assigned and quitclaimed to plaintiff any interest they may have acquired in the property; and the substance of the fourth and fifth findings was merely that Miss Andrews claimed an undivided one-half interest in the property and that the allegations of the cross-complaint to that effect were true; that consequently she was the owner of an undivided one half interest in the property, and that plaintiff was entitled to the other half. The conclusions of law were in form similar to the findings of fact.

[2, 3] Resolving all conflicts in the evidence in respondent's favor and accepting as true the explanation given by her for having executed and delivered the deed, it is apparent that under well settled doctrines of equity jurisprudence she was not entitled to any relief under her cross-complaint for the reason that according to her own testimony she intentionally and knowingly executed and delivered the deed in question conveying the property to appellant for the purpose of divesting herself temporarily of title thereto so that thereby the property would be placed beyond the reach of her grantor's creditors who were then threatening to seize it in payment of his indebtedness to them. In other words, it is a fundamental rule, strictly adhered

to, that equity will not lend its aid to one who intentionally conveys property for the purpose of hindering, delaying or defrauding creditors, in a suit in equity brought by him to obtain a nullification of the conveyance or a reconveyance of the property from the grantee, but will leave the grantor exactly where it finds him. In such a case it is held that the grantor is a particeps doli in the transaction, and therefore in no position to ask a court of equity to restore to him the title to the property of which he, ex industria, has divested himself in order to defraud others. See Saint v. Saint, 120 Cal.App. 15, 7 P.2d 374, and authorities therein cited; also Allstead v. Laumeister, 16 Cal.App. 59, 116 P. 296, 297, quoting Pomeroy's Equity Jurisprudence, §§ 397 and 401.

[4] Respondent evidently contends that the foregoing equitable doctrine applies only in cases where the grantor has conveyed his property for the purpose of hindering, delaying or defrauding his own creditors and it is asserted that there is no evidence in the present case showing that respondent had any creditors, and that therefore the doctrine may not be invoked against her. An analysis of the doctrine as it is set forth in Allstead v. Laumeister, supra, shows, however, that the doctrine embraces within its scope any grantor who is seeking equitable relief, and is shown to be a party to the fraudulent purpose for which the conveyance was executed. In this regard the court in that case, after citing section 397 of Pomeroy's Equity Jurisprudence, goes on to say: "That author, in the same section, thus states the rule as to the application of the equitable maxim, 'He who comes into equity must come with clean hands.' 'It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.' "

[5] It is equally apparent that this same doctrine may not be invoked against appellant in her action to quiet title to the entire property for the reason that the record is barren of any evidence tending to show that appellant was ever told or understood that respondent's purpose in conveying her half-interest to appellant was to vest title in her only temporarily so that the property would not be subject to seizure by Everett's creditors; and at the time of oral argument on this appeal counsel for respondent conceded that there was no such evidence. Moreover, it cannot be successfully maintained that appellant is retaining title in fraud of Everett's bank creditors for the reason that at the time of the execution and delivery of the deed in question she herself was a bona fide creditor of his to the extent of $23,500; and it is well settled that a preexisting debt is sufficient consideration for a transfer of property and that such a transfer cannot be attacked by one creditor simply because the transferor has seen fit to give a preference to another creditor, even though the debtor is thereby rendered insolvent. Bradley v. Butchart, 217 Cal. 731, 20 P.2d 693.

[6] The final point urged by respondent against appellant's right to a judgment in her favor quieting title to the entire property is that appellant failed to produce evidence legally sufficient to establish a trust. But the record shows that appellant did not rest her claim to a judgment solely on that ground. The main basis of her claim was that the deed executed and delivered by respondent and Beatrice constituted a valid transfer to her of full ownership in the property; and the evidence was legally sufficient to sustain a judgment in her favor on that basis of the claim.

Appellant urges other grounds in support of the appeal, but in view of the conclusions reached on those above discussed, it becomes unnecessary to inquire into the merits of the others.

The judgment is reversed.

PETERS, P. J., and WARD, J., concur.

25 Cal.2d 287

LUND et al. v. PACIFIC ELECTRIC RY. CO.

L. A. 19046.

Supreme Court of California.

Nov. 28, 1944.

Rehearing Denied Dec. 21, 1944.

1. Railroads ⚿351(20)

Instructions, in action for death of occupant of automobile struck by interurban car, that no recovery could be had if accident was caused solely by negligence of automobile driver and relating to driver's duty when approaching crossing, were correct insofar as they went.

2. Railroads ⚿351(20)

In action for death of occupant of automobile struck by interurban car, instructions that no recovery could be had if accident was caused solely by negligence of automobile driver and relating to driver's duty when approaching crossing were not objectionable on ground that they tended to lead jury to believe that determinative factor was negligence or lack thereof of automobile driver, rather than of defendant.

3. Railroads ⚿351(2)

In action for death of occupant of automobile struck by interurban car at boulevard crossing, instructions on subject of automobile driver's asserted negligence was proper, where such an issue was specifically raised by the pleadings.

4. Trial ⚿295(1)

A judgment will not be reversed for error which can be found only by detaching portions of a charge from the context, when such charge in its entirety correctly states the law.

5. Trial ⚿260(8)

Failure to give plaintiffs' requested instructions that negligence of driver of automobile in which plaintiff was riding when it was struck by interurban car could not be imputed to defendant, and that if both driver and defendant were negligent, and if their concurring negligence was proximate cause of accident, plaintiff could recover, did not constitute prejudicial error, where trial court, although not using language suggested by plaintiffs, adequately instructed jury on the subject.

6. Railroads ⚿301

Where defendant's electric cars were operated in interurban service upon tracks laid upon a private right of way rather than upon city streets, the rules governing their operation, including traversing of street intersections, are those pertaining generally to steam railroads and not those applicable peculiarly to streetcars.

7. Railroads ⚿301

The interest of the public in transportation between cities, the size, weight, and speed of trains, force of its inertia and controllability thereof relative to that of vehicular traffic ordinarily using public highways, are elements taken into consideration in evolvement of rules of law pertaining to reciprocal rights and duties of railroads and public in their joint use of crossing areas.

8. Railroads ⚿301

Rules regulating operation of streetcars differ from typical commercial railroad rules in that, generally, the rules require streetcar operator to recognize that he is sharing use of streets with public on a more nearly equal basis and that performance of his functions does not require high speeds over long distances without stop.

9. Railroads ⚿347(1)

In action for death of occupant of automobile struck by interurban car at boulevard crossing of defendant's private right of way in city, where it was established that defendant's car was being operated as a unit of interurban rapid transit system and not as a streetcar, refusal to admit evidence of city ordinance pertaining to streetcars was not error.

10. Railroads ⚿351(1)

In action for death of occupant of automobile struck by interurban car at boulevard crossing of defendant's private right of way in city, where defendant's car was being operated as a unit of interurban rapid transit system and not as a streetcar at time of accident, instructions on rules governing care to be observed at commercial railroad crossings were properly given.

11. Negligence ⚿83

The "last clear chance" doctrine comes into play only to enable a plaintiff to recover despite negligence on his or her own part.

See Words and Phrases, Permanent Edition, for all other definitions of "Last Clear Chance".

12. Appeal and error ⚷1066

Where jury were instructed not to consider defense of contributory negligence, requested instruction on last clear chance doctrine was not relevant to the submitted issues and failure to give it could not have prejudiced plaintiffs' case.

13. Appeal and error ⚷201(2)

Where plaintiffs did not, during course of trial, object to trial judge's remarks in presence of jury, plaintiffs could not complain for first time on appeal.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Jeannene Joy Lund, a minor, etc., and others, against the Pacific Electric Railway Company for the death of plaintiffs' mother as the result of a collision between an automobile and named defendant's electric car. From a judgment for defendant, the plaintiffs appeal. Affirmed.

Prior opinion 146 P.2d 916.

Paul Blackwood and Samuel P. Young, both of Los Angeles, for appellants.

Frank Karr, C. W. Cornell, and O. O. Collins, all of Los Angeles, for respondent.

SCHAUER, Justice.

In this wrongful death action plaintiffs, who are three minor children, appeal from a judgment entered upon a jury verdict denying them recovery from defendant Pacific Electric Railway Company for the death of their mother, Florence Boyd Lund, who died as the result of injuries sustained when an automobile in which she was riding was struck by an electric car of the railway company. The automobile was operated by decedent's husband, plaintiffs' father, Elmer J. Lund. Plaintiffs do not question the sufficiency of the evidence to sustain the verdict but complain that the trial court erred in giving and in refusing to give certain instructions, in refusing to admit certain evidence offered by plaintiffs, and in uttering certain comments in the presence of the jury. We have concluded that none of plaintiffs' contentions warrants a reversal of the judgment.

The fatal collision occurred at about noon of December 11, 1940, at the intersection of San Vicente and Redondo Boulevards in the city of Los Angeles. The weather was clear. Redondo Boulevard is a paved street running approximately north and south at the locale involved. It is 50 feet wide, except where it intersects San Vicente Boulevard, at which point it is 80 feet wide. San Vicente Boulevard, also a paved street, runs generally east and west and is divided lengthwise in its center by defendant's private, unpaved right of way, which is 53 feet wide and on which defendant maintains two sets of car tracks—the north set for westbound cars and the south set for eastbound cars. East of Redondo Boulevard the right of way extends straight and unobstructed to view for some 5,000 feet; west of Redondo it extends straight and unobstructed to view for approximately 3,500 feet from whence it continues on to the city of Santa Monica. It is separated from the paved roadways of San Vicente Boulevard by fences and by cement curbings so that vehicular traffic is effectively excluded from the track area except at crossings such as Redondo Boulevard, where, by legal requirement, the street pavement is laid flush to the tops of the rails. The distance from the southern curb of the right of way to the southernmost rail is 17 feet, the rails of each set of tracks are said to be spaced approximately five feet from each other, the distance between the two sets of rails is nine feet, and the distance from the northern rail of the westbound tracks to the northern curb of the right of way is 17 feet.

On each side of the right of way is a two-way, paved, public highway, 38 feet wide; that is, traffic runs both east and west on the roadways on each side of the defendant's private right of way. Although these two roadways form, in effect, two separate highways, they are both known as San Vicente Boulevard. Thus, there are six entrances to the intersection (or intersections) of San Vicente and Redondo Boulevards—two from Redondo and four from San Vicente. Each of the six was posted with a boulevard stop sign. At the northwest corner of the intersection of defendant's right of way with Redondo Boulevard (which forms a rectangle approximately 80 feet in an east and west direction by 53 feet in a north and south direction) there was a railroad cross-arm sign, and on a pole at the southeast corner there was an automatic signaling device or wigwag the disk of which, when in operation, swung in an east and west direction; i.e., parallel to the car tracks. The wigwag was suspended on an arm at least six feet long westerly from the pole to which it was attached and hung at an elevation of about ten feet above Redondo Boulevard.

At about noon of December 11, 1940, a clear day, Mr. Lund, with his wife sitting beside him in the front seat, was driving his Chevrolet sedan westerly on the north half of that portion of San Vicente Boulevard which is south of the defendant's right of way. He made the boulevard stop at Redondo Boulevard, and then started up and turned to the right or north on to Redondo to cross the tracks. He safely traversed the first, or south, set of tracks, but on the north set of tracks his automobile was struck by an interurban car of defendant, which was traveling westerly. Mr. Lund testified that as he approached Redondo Boulevard he observed the wigwag and looked several times to see if traffic was approaching, either on the highways or on the defendant's tracks; that he saw no cars on the tracks, heard no bell or whistle, and while stopped at the intersection could not see the wigwag overhead and did not hear it ring although he was listening for such a sound; that after making the boulevard stop he started his car in low gear, shifted to second, and was traveling eight or ten miles an hour at the time of the collision; that after he turned right and passed the wigwag pole he did not again look to the right, or east, to see if cars were approaching on the tracks, and did not see the interurban car of defendant until just as his automobile was crossing the third rail, when his wife called out "train" and that the train was then right upon them and struck the right side of the automobile at the door. There was nothing in the landscape to substantially obstruct his view of the approaching electric car. There was testimony from which it could have been found that the interurban car was traveling at a speed anywhere from 20 to 30 or 35 miles and hour, and that its motorman saw the Lund automobile but did not concentrate his attention on it exclusively after seeing it come to a stop. Such motorman testified that he saw the automobile make the boulevard stop at Redondo when the interurban car was about 200 feet from the crossing, that he watched it for "a couple of seconds" and then when his car was about 100 feet from the crossing took his eyes off the stopped automobile to look for traffic which might be approaching from other points and did not again see it until too late to stop his car. He testified further that when he was 200 or 300 feet from the crossing he observed that the wigwag was operating and he also blew the whistle on the car. Three disinterested witnesses confirmed that the wigwag was oscillating back and forth and its bell ringing and two of them testified that the whistle of the car was blown; one other disinterested witness testified that he heard no bell or whistle. As stated above, Mrs. Lund, the mother of plaintiffs, died as the result of injuries she received in the collision. It is obvious that the evidence is sufficient to support implied findings that defendant was not negligent and that negligence of the driver Lund was the sole proximate cause of the accident. Reversal is sought, however, upon technical grounds and in considering them we shall assume that the evidence is not, as a matter of law, insufficient to support a finding that defendant was guilty of negligence which contributed proximately to cause the accident.

[1] Plaintiffs first complain that the trial court "erred in instructing the jury over and over that the question of negligence or lack of negligence of the driver [Mr. Lund] was a crucial or determinative issue," and in support of their position quote the following instructions:

"If you find from the evidence that the accident was caused solely by the negligence of the driver of the automobile, then none of the plaintiffs can recover and your verdict should be in favor of the defendant Pacific Electric Railway Company. * * *

"It is the duty of the driver of an automobile to approach railroad tracks at a crossing in such a manner and at such a speed as to be able to control the movements of his automobile and stop the same in the event it should appear to be dangerous to attempt to cross the tracks; and it is further his duty to look and listen before attempting to cross the tracks and to heed the warning of the whistle of an approaching car or train if the same is being blown, and of the crossing signal or wigwag if one has been installed and is operating, in order to ascertain if any train or car is approaching the crossing; and if before going upon the track the driver by the use of ordinary care could have seen or known of the existence of an approaching car or train on the tracks, but failed to do so, then such driver would be guilty of negligence * * *.

"If you find that the driver of the automobile, Elmer Lund, was guilty of negligence and that such negligence on his part was the sole proximate cause of the accident, then your verdict must be for the defendant, Pacific Electric Railway Company. * * *

"If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence."

[2] These instructions correctly state the law so far as they go, but plaintiffs, relying upon the cases of Renowden v. Pacific Electric R. Co. (1925), 73 Cal.App. 383, 387, 238 P. 785, and Krupp v. Los Angeles Ry. Corp. (1943), 57 Cal.App.2d 695, 698, 699, 135 P.2d 424, assert that they tended to lead the jury to believe that the determinative factor in the case was negligence or the lack thereof on the part of Mr. Lund, rather than on the part of defendant. Plaintiffs also maintain that they were entitled to instructions, requested but not given, that the negligence of Mr. Lund could not be imputed to them, and that if both Mr. Lund and the defendant were negligent and if their concurring negligence was "the sole proximate cause of the accident" the jury were not to compare the negligence of one with that of the other but should return a verdict for plaintiffs. That the court should have given these instructions or their equivalent is established by the Renowden and Krupp cases. In the latter case, in which the plaintiffs sought recovery for injuries suffered when the automobile in which they were riding was struck by a streetcar of the defendant therein it was pointed out (at page 698 of 57 Cal.App.2d, at page 425 of 135 P.2d) that "the ultimate question for the determination of the jury was whether defendants were guilty of negligence [proximately] contributing to plaintiffs' injuries. The conduct of the driver of the automobile, not being in issue, was admissible in evidence only to the extent that it might aid in the determination of the question of the negligence of defendants."

[3-5] Defendant seeks to justify on several grounds the giving of the instructions on the subject of Mr. Lund's asserted negligence. It points out that it did not rely merely on a denial that it was negligent, or that its negligence proximately caused the accident, but that it affirmatively pleaded, as its third separate defense, "That the accident and resultant damages, if any, by plaintiffs sustained were caused solely by the negligence of Elmer J. Lund, the driver of said automobile, in that he so carelessly, negligently, and unlawfully operated the same as to cause the accident mentioned in plaintiffs' complaint and damages, if any, by plaintiffs sustained." There is authority for the proposition that when such an issue is specifically raised by the pleadings the giving of an appropriate instruction thereon is proper (Dieterle v. Yellow Cab Co. (1942), 53 Cal.App.2d 691, 699, 128 P.2d 132; see, also, Ennulat v. Taylor (1932), 127 Cal.App. 420, 423, 15 P.2d 900; Haber v. Pacific Electric Ry. Co. (1926), 78 Cal.App. 617, 636, 637, 248 P. 741), but this does not entirely answer the argument of appellants on this phase of the case in that, as above disclosed, they attack not only the subject matter of the instructions which were given, but also their form, and complain that the giving of such instructions, coupled with the court's failure to give the instructions asked by them on the subject, may have resulted in misleading the jury into an erroneous and prejudicial concept of what constituted the ultimately controlling issue in the case. Assuming (but not holding) that the selected instructions hereinabove quoted could, when detached from the remainder of the charge, have the effect suggested, and bearing in mind the refusal of the court to give the precise instructions on the subject requested by plaintiffs, the record nevertheless negatives any prejudice to plaintiffs in this regard. It is elementary that a judgment will not be reversed for error which can be found only by detaching a portion or portions of a charge from the context, when such charge in its entirety fairly and correctly states the law. Here, although the court did not use the language suggested by plaintiffs, it did adequately instruct the jury to the effect that if they found defendant to have been guilty of negligence and "that such act of negligence was the proximate cause of the accident or that such act of negligence, *combined with negligence on the part of Mr. Lund,* was *one* [italics added] of the proximate causes of the accident; and * * * that the mother of the plaintiffs received injuries which caused her death as a result of that accident," then

plaintiffs were entitled to a verdict against defendant. This latter instruction necessarily negatived the theory that Mr. Lund's negligence could be imputed to the plaintiffs in bar of their claim; by it the jury were informed that if any negligence on the part of defendant had proximately contributed to the accident, whether it operated alone or "combined with negligence on the part of Mr. Lund," then plaintiffs were entitled to recover, and at no time were they instructed that recovery should be denied by reason of negligence on the part of Mr. Lund contributing with that of defendant to cause the fatal accident. On the contrary they were told that "the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case, each of the participating acts or omissions is regarded in law as a proximate cause" and "The law forbids you to attempt to classify negligence into degrees * * *, or to compare one instance of negligence with another * * *. If you should find that there was negligent conduct on the part of more than one person, you are not to attempt to determine which was guilty of the greater negligence." We are satisfied that the instructions taken as a whole were not prejudicial to plaintiffs.

[6] Plaintiffs contend further that the court erred (1) in rejecting evidence of a Los Angeles city ordinance regulating the speed of *streetcars* and in instructing the jury that defendant "had a right to operate its electric car at any rate of speed it saw fit, consistent with ordinary care," and (2) in giving instructions which made applicable to the conduct of Mr. Lund and of the motorman of defendant's car the grade-crossing rules of the steam or commercial railroad cases (see Peri v. Los Angeles Junction R. Co. (1943), 22 Cal.2d 111, 120, 137 P.2d 441; Rasmussen v. Fresno Traction Co. (1936), 15 Cal.App.2d 356, 363, 59 P.2d 617) rather than the rules relating to the operation of streetcars (see Scott v. San Bernardino Valley, etc., Co. (1908), 152 Cal. 604, 610, 611, 93 P. 677). The law of this state has already been settled adversely to plaintiffs' position. Here the defendant's cars were operated in interurban service upon tracks laid upon a private right of way, rather than upon city streets. Under such circumstances the rules governing their operation, including the traversing of street intersections, are those pertaining generally to steam or commercial railroads and not those applicable peculiarly to streetcars which use the city streets in common with other traffic. (See Simoneau v. Pacific Electric R. Co. (1911), 159 Cal. 494, 496-501, 115 P. 320, 329; Riney v. Pacific Electric R. Co. (1919), 45 Cal.App. 145, 148, 187 P. 50; Cash v. Los Angeles Ry. Corp. (1935), 6 Cal.App.2d 738, 740, 45 P.2d 280.)

[7, 8] It is not the motive power which fixes the character of a railroad transit operation. A transcontinental train carrying passengers or freight or both, operating principally over a private right of way, is nonetheless in character as a transcontinental train whether propelled by steam or by internal combustion engines or by electric power. Neither does it become a "street car" by virtue of the fact that its tracks cross public highways. The interest of the public in rapid transportation between cities, the size and weight and speed of the train, the force of its inertia and the controllability thereof relative to that of vehicular traffic ordinarily using public highways, are elements which have received consideration in the evolvement of rules of law pertaining to the reciprocal rights and duties of railroads and the public in their joint use of crossing areas. Streetcars, relatively light in weight, slower in speed, more flexible in control, operating on shorter runs and characteristically on and along city streets, using the streets more or less in common with the public, are reasonably, subjected to rules which differ from the typical commercial railroad rules in that, generally speaking, they require the streetcar operator to recognize that he is sharing the use of the streets with the public on a more nearly equal basis, that the performance of his function does not require high speeds over long distances without stops, but rather entails slower speeds, frequent stops, and flexibility of control.

With the differences in character of construction, function, and operation so marked there is relatively little confusion in the cases insofar as concerns distinguishing between commercial railroads and streetcars. But also prominent in the field of transportation is the hybrid interurban line. It partakes somewhat of the character of both its ancestors. It feels the urge for rapid transit over substantial distances between cities; but it also must deliver its passengers to the heart of metropolitan areas. It uses city streets, subways, elevateds, and private rights of way; its tracks cross public highways. Certainly its trains are not as heavy, their speeds not as high, and their runs not as long as are those of the typical transcontinental railroad. But, equally obvious, its trains or cars are not as light, their speeds are higher and their runs usually longer than are those of the ordinary streetcar. Its principal function is more like that of the through railroad than of the city street railway. The streetcar normally transports passengers over city streets from one street corner to another, all within a built up area. The interurban line provides for reasonably rapid transit over longer runs with fewer stops from one city to another. Insofar as it operates between stations on a private right of way the character of which is plainly visible, it conforms approximately to the character of a commercial railroad and its conduct in the premises is to be gauged accordingly by appropriate standards.

[9, 10] The ordinance which plaintiffs sought to introduce in evidence is entitled "Street Car Speed" and it ordains that "The operator of any street car shall not drive said street car at a speed exceeding the following," etc. If the drafters of the ordinance had intended to make it applicable to commercial railroad trains or to interurban service it would have been easy to so provide. Neither the expression "railroad train" nor "interurban train" (or "interurban car") is synonymous with the phrase "street car." Upon the record before us it is clear that at the time and place in question defendant's car was being operated as a unit of an interurban rapid transit system and not as a streetcar. Hence no error was committed in refusing to admit evidence of the ordinance pertaining to streetcars, or from instructing the jury on the rules governing the care to be observed at commercial railroad crossings rather than on those applicable to streetcar intersections. The rights of the plaintiffs in the premises, and the correlative duties of the defendant, were properly defined in the instructions which the court gave, including the express declarations that "Whether a given rate of speed is a negligent one is a question of fact for the jury to determine, the answer to which depends upon all the surrounding circumstances" and that "While a railway company has the right to run its electric cars over and upon a public crossing such as the one here involved, in running its cars thereon, where the public also has a right to travel, the Railway Company must exercise such care and precaution for the purpose of avoiding accidents, injuring property or persons, as reasonable prudence would suggest, and as are in its power to employ.

"It is the duty of those in charge of a train or car when approaching a public highway to give notice of the approach and its traveling over said highway by all warnings reasonably necessary under the conditions existing at the time and place in question."

[11, 12] Plaintiffs next urge that the court erred in failing to give their requested instruction stating the last clear chance doctrine. After setting forth the elements of that doctrine, commencing with "First: * * * Plaintiff, by his own negligence, got himself into a position of danger," the requested instruction concluded, "If all the conditions just mentioned are found by you to have existed with respect to the accident in question, then you must find against the *defense of contributory negligence.* * * *" (Italics added.) Thus the proposed instruction recognizes that the doctrine of last clear chance comes into play only to enable a plaintiff to recover despite negligence on his or her own part; i.e., the doctrine operates, where all of its elements are present, to defeat the defense of contributory negligence. (See Johnson v. Sacramento Northern Ry. (1942), 54 Cal.App.2d 528, 531, 533, 129 P.2d 503, and cases there cited.) That defense was specially pleaded by defendant in this action. However, in connection therewith, the court gave the following instructions to the jury:

"The defendant by its answer presents three different defenses: * * * Second: That the decedent Florence Lund was guilty of negligence proximately contributing to the accident and her death.

"This second defense *need not be considered by you* for two reasons: first, that the law presumes that Mrs. Lund used ordinary care for her own safety and no evidence has been introduced to overcome this presumption; and secondly, even if Mrs. Lund has been guilty of negligence which, were she alive and bringing an action to recover damages for her own injuries would constitute contributory negligence on her part, such contributory negligence cannot be imputed to her minor children, the plaintiffs in this case." (Italics added.)

Thus the jury were clearly and positively instructed that they were to ignore the defense of contributory negligence, and although the second of the reasons assigned by the trial court therefor—that contributory negligence on the part of Mrs. Lund could not "be imputed to her minor children, the plaintiffs in this case" was erroneous (see 8 Cal.Jur. 988-989, § 41), the error was favorable, rather than prejudicial, to plaintiffs. Inasmuch as the last clear chance doctrine may be utilized only to defeat the defense of contributory negligence, and the jury were instructed not to consider such defense, the requested instruction was not relevant to the submitted issues and failure to give it could not have prejudiced plaintiffs' case.

[13] Lastly, plaintiffs assert that various remarks of the trial judge in the presence of the jury constituted misconduct requiring the judgment to be reversed. We have reviewed the record in its entirety, including the statements complained of, and do not perceive that they could have influenced the jury to plaintiffs' prejudice. Moreover, plaintiffs did not, during the course of the trial, object to the remarks and they may not raise the point for the first time on appeal. (See Hughes v. Hartman (1929), 206 Cal. 199, 206, 273 P. 560; Karwoski v. Grant (1938), 30 Cal.App.2d 171, 178, 85 P.2d 944.)

For the reasons above stated, the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. Although as held by the majority opinion the evidence may be sufficient to support the implied findings of the jury that defendant was not negligent and that negligence of the driver Lund was the sole proximate cause of the accident, yet there was substantial evidence tending to show negligence on the part of the defendant, which would have supported findings in plaintiffs' favor. Under the particular circumstances of the occurrence of the accident, I do not believe that the jury was adequately or correctly instructed, which deficiency, together with improper and wholly uncalled for remarks of the trial judge, resulted in such prejudice as to require in my opinion, a reversal of the judgment.

The record discloses that the intersection of Redondo and San Vicente Boulevards is a heavily traveled one, and there was testimony that defendant's electric car which had no passengers and was on its way to the car house came into the intersection at approximately 35 miles per hour. The impact carried the Chevrolet sedan in which deceased was riding 132 feet. Mr. Lund who was driving the automobile heard neither bell nor whistle sounding at any time before the accident. His testimony was supported by the testimony of Mr. Bean, a witness who was driving alongside the streetcar as it approached the intersection. Mr. Bean further testified that the streetcar did not slow down until after the collision. One other witness also testified that she heard no whistle. The wigwag device is "cut in" so as when working properly to start swinging and ringing a bell when a streetcar from the east going west is approximately 1,927 feet from the wigwag at Redondo Boulevard. Mr. Lund testified that when he was about 160 feet to 200 feet from Redondo he saw the edge of the wigwag; and it was not oscillating, nor ringing. Defendant's motorman testified he saw the Lund automobile come to a stop at Redondo Boulevard when he was about 300 feet from the intersection and did not see it again until the automobile was "practically in front of his car," although he also testified that he was looking for traffic during at least the last 100 feet before reaching the intersection. Mr. Lund, after making a boulevard stop, started his car in low gear, shifted to second gear, and was traveling slowly, at a rate of about 8 or 10 miles per hour across the tracks at the time of the collision. He had proceeded about 32 or 33 feet from the southernmost boundary of the right of way when struck. He testified that he did not again look east, the direction from which the electric car approached after turning right, onto Redondo Boulevard.

In view of the foregoing testimony which creates a sharp conflict in the evidence concerning the conduct of defendant's motorman, and taking into consideration the prominent part played by Mr. Lund in the occurrence of events leading up to the accident, together with the inferences of negligence that such conduct may have created in the minds of the jury, it became particularly important that the jury be fully and clearly instructed in regard to the law of imputed negligence. This, the instructions of the trial judge fail to do. The right of the plaintiffs to recover, unaffected by the conduct of Mr. Lund, which was only inferentially covered by the instructions, was as to the jurors in all probability wholly off set by the emphasis placed upon the duty of care incumbent upon Mr. Lund to take in approaching railroad tracks, and the detailed circumstances under which he might be deemed guilty of negligence. And while it is correct to say that if the accident was caused solely as the result of negligence on his part, there could be no recovery, yet, repeated emphasis upon his conduct could not help but detract attention from the main issue of whether or not there was negligence on the part of the defendant which would entitle plaintiffs to judgment if proximately contributing to the accident with or without concurring negligence of Mr. Lund.

The situation is very close to that which faced the court in Krupp v. Los Angeles Ry. Corp., 1943, 57 Cal.App.2d 695, 135 P. 2d 424, 425, where in reversing a judgment for defendant it was pointed out that: "The laymen constituting the jury were not aided in their determination of the question of negligence of defendants by an elaborate statement of the rights and duties of someone not a party to the litigation together with the admonition that if the conduct of such third party was the sole cause of plaintiffs' injuries the verdict should be for defendants." If the defendant was entitled to this type of instruction, no less were the plaintiffs entitled to have the jury clearly informed in a tenor consonant with such instructions that any negligence of Mr. Lund, the driver of the automobile could not be imputed to them.

In addition to the instructions in all instances being made in the most favorable light to defendant's case, and at times being prejudicial to plaintiffs, it appears upon the face of the record that the trial judge throughout the trial maintained an attitude antagonistic to the presentation of plaintiffs' case and freely and out of turn made remarks in the presence of the jury, in the light of which, I am convinced that the plaintiffs did not have a fair trial. Nine such instances are assigned as error on behalf of appellants. The majority opinion avoids a consideration of these remarks, largely upon the ground that no objection or exception on behalf of the plaintiffs, the 1, 3 and 5 year old children of the deceased Mrs. Lund, was taken at the trial. It is plain, however, that such objection would have availed nothing. This is shown by the court's refusal to give plaintiffs' requested instruction, "* * * that if the judge has said or done anything which has suggested to you that he is inclined to favor the claims or position of either party, you will not suffer yourself to be influenced by such suggestion," and that "I have not expressed, nor intended to express, nor have I intimated nor intended to intimate, any opinion as to what witnesses are, or are not worthy of credence; what facts are, or are not established; or what inferences should be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard it." Furthermore, both of the authorities cited in the majority opinion recognize that where there has been a persistent course of misconduct on the part of the trial judge, or where the remarks are of such character that the prejudicial effect could not be cured by subsequent action of the trial court, the strict rule does not apply. Hughes v. Hartman, 206 Cal. 199, 203, 273 P. 560; Karwoski v. Grant, 30 Cal.App.2d 171, 178, 179, 85 P.2d 944.

Some of the prejudicial misconduct to which I refer, occurred when plaintiffs' counsel sought to impeach defendant's witnesses by reading inconsistent statements made by them, taken from the transcripts of testimony of a previous trial in this same action and at the coroner's inquest. The trial judge, while allowing some of these statements in evidence, preceded the reading thereof, with his opinion, expressed in the presence and hearing of the jury, that he could not see that it was impeaching, and at one time went so far as to remark, "Well, if you think that is impeachment * * * I guess the jury can take care of that," and at another time after the witness Mrs. Stuhr had placed the Lund automobile at one automobile length from the southernmost rail and the street car 75 feet to 100 feet away, counsel for plaintiff was allowed to read her testimony at the former trial where she placed the electric car 130 feet away and the automobile on the tracks. This was a material difference bearing upon the issues of fault and the speed and care with which the electric car was being driven, but whatever weight it might have had in the minds of the jury as impeaching testimony or upon the credibility of the witness was completely nullified by the following question asked Mrs. Stuhr by the court: "I do not suppose, Mrs. Stuhr, that you took a tape line and measured the distance that you testified to?" This question was asked just before Mr. Young, one of the counsel for plaintiffs, started to read from the transcript. It is obvious that the practical effect of this question was to minimize if not destroy the weight of the impeaching testimony so that the jury would not give effect to it. If there was any inconsistency in the testimony to submit to the jury, as the transcript discloses there was, it became a matter for the jury to determine, how far the inconsistencies went toward weakening the later testimony, or impairing the credibility of the witnesses. Abbott v. Coronado Beach Co., 55 Cal. App. 179, 203 P. 145; People v. Vogel, 36 Cal.App. 216, 171 P. 978; Vietti v. Hines, 48 Cal.App. 266, 275, 192 P. 80; Firth v. Southern Pacific Co., 44 Cal.App. 511, 186 P. 815.

In Abbott v. Coronado Beach Co., 55 Cal.App. 179, 203 P. 145, 146, it was sought to impeach a witness's testimony by showing that it was inconsistent with statements theretofore made by her at another trial. It appears that the trial judge referring to the testimony which she had formerly given, stated in the presence and hearing of the jury: "I hardly think there is such a conflict as to impeach the testimony given here." As to this the appellate court said, "That this was gross error admits of no controversy. Defendant sought to impeach the witness in the method prescribed by sections 2051 and 2052, Code of Civil Procedure, and the question as to whether there was a conflict, and, if there was, the extent to which the credibility of the witness was affected, was one solely and alone for the jury. People v. Wallace, 89 Cal. 158, 26 P. 650; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 P. 734. In People v. Vogel, 36 Cal.App. 216, 171 P. 978, the trial judge was guilty of a like act of misconduct by stating in the presence of the jury: 'The evidence in the transcript which has been produced I do not consider as impeachment.' In referring to such statement so made by the judge, this court said: 'His action in that regard was uncalled for. * * * His statement was distinctly prejudicial to the rights of the appellant.'"

As has been pointed out a number of times (and in cases appealed from the particular department of the superior court presided over by this same trial judge), a trial judge, by reason of the high and authoritative position occupied by him, is an influential person with the layman juror, who too often is ready to accept the judge's views and indication of opinion as his own without further consideration of the matter for himself, therefore the trial judge should be extremely careful so as not to exert his influence to the unfair advantage of one party and to the detriment of the other. People v. Mahoney, 201 Cal. 618, 626, 627, 258 P. 607; People v. Williams, 55 Cal.App.2d 696, 131 P.2d 851; Anderson v. Mothershead, 19 Cal.App.2d 97, 64 P.2d 995; People v. Earl, 10 Cal.App.2d 163, 51 P.2d 147; People v. Johnson, 11 Cal.App.2d 22, 52 P.2d 964. This was a close case and the statements made by the trial court may well have been the determining factor.

The majority opinion brushes aside appellants' charge of misconduct of the trial judge with the statement that "We have reviewed the record in its entirety, including the statements complained of, and do not perceive that they could have influenced the jury to plaintiffs' prejudice." But my experience in the trial of jury cases leads me to exactly the opposite conclusion. In my opinion the misconduct of the trial judge in this case was the controlling factor in influencing the jury to return a verdict in favor of the defendant. To hold that plaintiffs cannot now raise the question of misconduct because no objections were made to the remarks of the trial court during the trial is requiring plaintiffs to do an obviously idle act, because it is obvious from a study of the record that had plaintiffs' counsel objected to the facetious and caustic remarks of the trial judge he would simply have invited further abuse and intimidation.

I think it is time that this court should assume a more realistic approach to problems of this character and recognize the fact that there are trial judges who are temperamentally unfit for the trial of certain types of cases at least, and when a record of the character of the one now before us is presented to this court, and an obvious miscarriage of justice has resulted, the judgment should be reversed on the sole ground of the misconduct of the trial judge, to the end that such miscarriages of justice may not be repeated, and that it may be said in truth "that a court is a place where justice is judicially administered."

In my opinion the judgment should be reversed.

Rehearing denied; CARTER, J., dissenting.

25 Cal.2d 274

WINSLOW et al. v. HAROLD G. FERGUSON CORPORATION et al.

TREMAINE v. ALLEN et al.

L. A. 18836.

Supreme Court of California.

Nov. 28, 1944.

1. Attorney and client 🔑155

Where a number of persons are entitled to a common fund and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund.

2. Army and navy 🔑34

The Soldiers' and Sailors' Civil Relief Act should receive a liberal construction. Soldiers' and Sailors' Civil Relief Act of 1940, § 200(1, 4), 50 U.S.C.A.Appendix, § 520(1, 4).

3. Army and navy 🔑14

An order fixing fees of counsel in action by holders of certificates of beneficial interest in a trust to terminate the trust and for liquidation of trust assets, which order subordinated attorney's fees to claims of creditors of trust fund, made while such attorney was absent in military service, was within Soldiers' and Sailors' Civil Relief Act, entitling such attorney to vacation of the order of subordination. Soldiers' and Sailors' Civil Relief Act, § 200(1, 4), 50 U.S.C.A.Appendix, § 520 (1, 4).

4. Appeal and error 🔑805

Where appellant, before filing of record or transcript in appellate court, filed in trial court a written abandonment of appeal, trial court's jurisdiction over subject matter of order appealed from was completely restored and trial court had power to modify or vacate such order in appropriate circumstances. Code Civ. Proc. § 954a.

5. Appeal and error 🔑805

Appellant's action in filing in trial court, before filing of record or transcript in appellate court, of an abandonment of his appeal from order denying his motion to vacate a prior order rendered during his absence in military service making an allowance for his services as attorney for preserving trust fund but subordinating such allowance to claims of creditors, should not be treated as a dismissal of the appeal and as, in effect, an affirmance of order appealed from, and did not preclude appellant from seeking relief in trial court by motion to vacate such order under Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, § 200(1, 4), 50 U.S.C.A.Appendix, § 520(1, 4); Code Civ.Proc. §§ 954a, 955.

6. Appeal and error 🔑82(3)

Where law expressly provides for a motion to vacate an order, denial of such a motion is appealable as a "special order made after final judgment", notwithstanding general rule forbidding appeal from an order refusing to vacate a prior appealable order. Code Civ.Proc. §§ 473, 473a, 663, 663a, 963, subd. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Order Made after Final Judgment".

7. Appeal and error 🔑82(3)

An order denying a motion to vacate a prior order fixing fees of counsel in action to terminate trust and for liquidation of trust assets, and subordinating such allowance to claims of creditors, rendered during attorney's absence in military service, was appealable as a "special order made after final judgment". Code Civ. Proc. §§ 473, 473a, 663, 663a, 954a, 963, subd. 2; Soldiers' and Sailors' Civil Relief Act of 1940, § 200(1, 4), 50 U.S.C.A. Appendix, § 520(1, 4).

8. States 🔑4

The Soldiers' and Sailors' Civil Relief Act enacted by Congress in lawful exercise of its constitutional power to protect those in military service is the supreme law of the land. Soldiers' and Sailors' Civil Relief Act of 1940, § 200(1, 4), 50 U.S.C.A.Appendix, § 520(1, 4); U.S. C.A.Const. art. 6, § 2; Const.Cal. art. 1, § 3.

9. Attorney and client 🔑155

Attorney's fees directed by court order to be paid out of trust fund preserved through diligence of counsel for all persons interested therein are customarily made senior to other claims against fund.

10. Attorney and client 🔑155

In action by holders of certificates of beneficial interest in a trust to terminate trust and secure judicial administration and liquidation of trust assets, an order directing that attorney's fees and costs be paid out of trust fund preserved through diligence of counsel for all persons interested therein was a proper means of securing contribution from those entitled to participate in benefits of litigation.

11. Attorney and client ⚷155

Where court order properly directed that attorney's fees and costs be paid out of trust fund preserved through diligence of counsel for all persons interested therein, court erroneously subordinated the allowance of counsel fees to claims of creditors of fund.

12. Attorney and client ⚷155

Where a lawyer has rendered such valuable service as to make available a fund for a class, even though he appeared for only one claimant to such fund, it is equitable that his compensation and expenses should come from entire fund saved for all classes concerned before it is distributed.

13. Receivers ⚷154(2)

The expense incurred by a litigant for legal services in causing appointment of a receiver is as much an expense of administration as the charge of receiver's counsel, and should have priority to same extent.

14. Attorney and client ⚷155
Costs ⚷172

Plaintiffs who have succeeded in protecting, preserving, or increasing a fund for benefit of themselves and others may be awarded compensation from the fund for services of their attorneys, and there is created in favor of attorney who renders such service an equitable lien against such fund.

15. Attorney and client ⚷155
Costs ⚷99

Where one of a group has borne cost of litigation resulting in benefit to entire group, the entire group should contribute to such expenses, including attorney's fees.

16. Attorney and client ⚷155
Joint-stock companies and business trusts ⚷20

Compensation due attorney for preservation of trust fund which is payable as an expense of judicial administration in making trust assets available for distribution to claimants thereof has priority over claims of all other creditors, including claim of federal government for income taxes which accrued before commencement of litigation in which such compensation was earned.

In Bank.

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Action by Glenn Winslow and another, on behalf of themselves and of all other holders of certificates of beneficial interest in a trust, against Harold G. Ferguson Corporation and others to terminate the trust and secure judicial administration and liquidation of trust assets, wherein R. E. Allen was appointed receiver, and Ella Stromgren, as executrix of the estate of L. G. Prentiss-Baker, deceased, was substituted plaintiff in intervention. From an order denying his motion to vacate an order subordinating his fee as attorney to claims of creditors of the trust fund, Raymond Tremaine appeals.

Reversed.

Prior opinion 148 P.2d 86.

Tuttle & Tuttle, of Los Angeles, for Appellant.

Meserve, Mumper & Hughes, of Los Angeles, for Respondents.

CURTIS, Justice.

Appellant, who is now an officer in the United States Army, was practicing law in the city of Los Angeles before the commencement of the war. He has appealed from a minute order made on June 8, 1943, denying his motion to vacate an order which was rendered during his military absence and which subordinated his previous allowance of counsel fees for preserving a trust fund to the claims of creditors thereof.

[1] It is a well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means all of the beneficiaries of the fund pay their share of the expense necessary to make it available to them. 14 Am.Jur. § 74, p. 47; Trustees of Int. Imp. Fund v. Greenough, 105 U.S. 527, 26 L. Ed. 1157; In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; see, also, notes 49 A.L.R. 1149; 107 A.L.R. 749. The propriety of the objections raised on this appeal de-

pends in large measure upon the application of this equitable principle to the facts of this case.

On January 30, 1931, certain beneficiaries of the so-called Ferguson Trust No. 50—"on behalf of themselves and on behalf of all other holders of certificates of beneficial interest" therein—commenced an action to protect the trust assets. Under the declaration of trust, executed in 1927, the Metropolitan Trust Company was a passive trustee and the Harold G. Ferguson Corporation was named "executive agent" and "syndicate manager" with "uncontrolled discretion" in the conduct of all investment matters relating to the administration of the trust property. It was alleged in the complaint that the Ferguson Corporation became insolvent, and for this and other reasons it became impossible to carry out the purposes of the trust; that it was impossible to appoint a succeeding trustee; and that the appointment of a receiver was necessary to prevent "great and irreparable injury to * * * all * * * holders of beneficial interests in said trust, together with the creditors" thereof. Accordingly, plaintiffs sought by their complaint to terminate the trust and to secure judicial administration and liquidation of the trust assets "for the preservation of all equities, rights, properties, claims and liens of all creditors and holders of beneficial interest in said trust." At the request of plaintiffs, R. E. Allen was appointed receiver pendente lite. Attempts were made by certain named defendants to have the action dismissed because not brought to trial within five years, and as an outgrowth of such proceedings another trust beneficiary on May 28, 1936—"on her own behalf and on behalf of all other owners of beneficial interests in Private Trust No. 50, * * * and on behalf of all creditors of said trust"—intervened in the litigation, also seeking the termination and liquidation of the trust and distribution of its assets to all persons entitled thereto, including creditors. The litigation was brought to a successful close, so far as the merits of the controversy were concerned, by the entry of an interlocutory judgment on March 5, 1940, dissolving the trust and making the receivership permanent for the purpose of completing the liquidation of the trust assets.

Appellant was one of counsel representing both the plaintiffs and the plaintiff in intervention, and he has succeeded to the interests of his associate attorneys in the matter of claims for legal services rendered. In this connection the first award was that of April 25, 1934 (which was prior to the date of the intervention), when the court made its order that "the fee of Raymond Tremaine, attorney for said plaintiffs, shall be not less than $500 and shall be not more than 2½ per cent of all moneys or the value of other property ordered distributed by this court to the beneficiaries of that certain trust heretofore described as P.T. 50 of the Metropolitan Trust Company of California, the exact amount and time of payment of said fee to be determined later. * * *" The $500 was paid by the receiver. No further award was made for some seven years. During that time, as above noted, an intervener came into the case and extensive services were performed by both counsel for plaintiffs and intervener in recovering and protecting the assets of the involved trust. Then, on August 11, 1941, following a joint application of plaintiffs and plaintiff in intervention, the court made its order that the total attorneys' fees for the several counsel appearing "be and they are hereby fixed at $5,000.00, the reasonable value thereof, of which $500.00 has been heretofore paid to Raymond Tremaine. Any previous orders for attorneys fees of plaintiffs are hereby modified to this extent." The order then directed that R. E. Allen, the receiver, pay to Raymond Tremaine from "sums available to him as receiver the balance of $4,500.00 * * * when said receiver shall have sufficient sums available to make the entire payment, or part thereof, or whenever this court shall determine there are sufficient funds available to pay these attorney fees."

A current account was filed by the receiver on December 8, 1942, in which he reported on the claims and petitioned for instructions as to their priority. On December 18, 1942, the court, in accordance with the receiver's petition, ordered that he pay the $4,500 balance of the prior allowance to appellant *after* the claims of the creditors were paid. Thus, this order in effect limited the source for payment of the attorney fees to funds which would belong to the beneficiaries of the trust. On February 17, 1943, appellant filed a notice of appeal from the order of December 18, 1942, and on March 24, 1943, he filed a notice of motion in the superior court to vacate that part of the order of December

18, 1942, by which his allowance of counsel fees was subordinated to the claims of creditors, on the ground that he was in military service and had not been given notice before the order was made. This motion was denied without prejudice, for lack of jurisdiction because of the appeal. Thereafter appellant filed with the clerk of the superior court a written abandonment of the appeal. Then on June 2, 1943, appellant filed another notice of motion to vacate the portion of the order of December 18, 1942, which affected his interest, and based his application again on the fact that the prejudicial order was made during his absence in military service and that he was entitled to relief under the Soldiers' and Sailors' Civil Relief Act of 1940. 54 Stats.L. 1180, § 200, Tit. 50 U.S.C.A.Appendix, § 520. The present appeal is from the order denying this renewed motion.

At the outset the circumstances of appellant's procedure as regulated by the cited federal act should be noted. Section 200, subdivision (1), of said act forbids the entry of a "judgment" in any action or proceeding commenced in any court, "if there shall be a default of an appearance by the defendant," without the plaintiff first filing "an affidavit setting forth facts showing that the defendant is not in military service" or in lieu thereof, the court appointing "an attorney to represent defendant and protect his interest." Admittedly no such preliminary steps were taken here prior to the entry of the order of December 18, 1942. Section 200, subdivision (4), of said act provides: "If any judgment shall be rendered in any action or proceeding governed by this section against any person in military service during the period of such service * * *, and it appears that such person was prejudiced by reason of his military service in making his defense thereto, such judgment may, upon application, made by such person or his legal representative, not later than ninety days after the termination of such service, be opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof."

[2, 3] The applicability of the act in probate matters was considered in Re Cool's Estate, 1941, 18 A.2d 714, 716, 19 N.J.Misc. 236, wherein after assigning to the "petitioner" and "an interested party" in such proceedings the respective status of "plaintiff" and "defendant," the court aptly said at page 716 of 18 A.2d: "The definition of a 'judgment' as a final determination of the rights of parties includes decrees of equity and probate courts. 30 Am.Jur. 822, Judgments, § 3. Since the Federal Act is for the purpose of protecting the rights of persons in military service and any judgment affecting the rights of such persons may be opened, stayed or vacated, a liberal construction should be accorded so that in probate court proceedings in default of any appearance by an interested party, either male or female, an affidavit as to military service should be filed or other action taken in accordance with the Federal Act." Upon like reasoning appellant's objection to the order of December 18, 1942, as an adjudication of the priority rights of claimants for payment from the trust assets here involved and adversely affecting his previous allowance for attorney fees, comes within the protective design of the federal act.

[4, 5] Two preliminary points remain to be considered with regard to appellant's procedure herein. As above noted, appellant, pursuant to section 954a of the Code of Civil Procedure, filed in the trial court a written abandonment of his appeal from the order of December 18, 1942, and "the jurisdiction of the trial court over the subject matter of the * * * order * * * [was] completely restored." Consistent with this specific language, appellant's abandonment of his appeal "before the filing of the record or transcript in the [appellate] court" would not deprive the trial court, restored to *complete jurisdiction* in the matter, of the power to modify or vacate the objectionable order in appropriate circumstances. 4 C.J.S., Appeal and Error, § 1386, p. 2007; State v. Superior Court of Franklin County, 86 Wash. 90, 149 P. 321. The argument is made that an abandonment should be treated as the equivalent of a dismissal of an appeal (Allen v. Brice, 40 Cal.App.2d 93, 104 P.2d 374)—"in effect an affirmance of the * * * order appealed from, unless the dismissal is expressly made without prejudice to another appeal." Code Civ. Proc. § 955. Such claim, of course, totally disregards the *distinct* statutory provisions regulating the *effect* of the respective procedures—an abandonment of an appeal accomplished through specified action in the trial court and a dismissal of an appeal through the order of an appellate court. Had the Legislature intended that a voluntary abandonment of an appeal was to have the same force as a dismissal, it is but reasonable to assume that in 1935 instead of enacting section 954a to provide for the abandonment procedure and the *effect* thereof, it would have amended section 955 to include the new matter. In view of this deliberate statutory distinction, cases dealing with the *effect of a dismissal of an appeal* from an order in establishing the terms of its finality (Smith v. Superior Court, 21 Cal.App.2d 160, 69 P.2d 176) have no application here as a basis for precluding appellant from seeking relief in the trial court under authority of the cited federal act.

[6-8] Nor does the general rule which forbids an appeal from an order refusing to vacate a prior appealable order (2 Cal. Jur. 164, § 30 et seq.) operate to appellant's disadvantage under the circumstances here prevailing. In those cases *where the law makes express provision for a motion to vacate*—as under sections 473, 473a and 663, 663a of the Code of Civil Procedure—an order denying such motion is regarded as a "special order made after final judgment" and as such is appealable under section 963, subdivision 2, of the Code of Civil Procedure. California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097; Fund v. Campbell, 15 Cal.2d 250, 100 P.2d 762. A like situation exists here where appellant, in moving to vacate the order in question, was undertaking to avail himself of a remedy *expressly provided by federal statute.* Congress, in the lawful exercise of its constitutional power, has thereby declared its purpose to protect those in the military service and to prevent injury to their civil rights during their term of service arising from judicial proceedings conducted against them in their absence. Such act is the supreme law of the land. U.S.Const. art. VI, § 2; Cal. Const. art. I, § 3; Annotation, 130 A.L.R. 774. The broad and sweeping relief provision of the act as above quoted, expressly conferring upon one in appellant's position the right to make the *motion to vacate at any time within ninety days after termination of military service,* was manifestly intended as a *complete remedy,* thus comprehending as a part thereof an appellate review of an adverse ruling and independent of the pursuit of an appeal from the alleged prejudicial order. According full recognition to the import of the federal act and by a parity of reasoning on the basis of legislative intent as to the availability of an appeal from an order denying an authorized motion to vacate under state law, as above noted, appellant's right to prosecute the present appeal is not open to challenge.

Turning now to a consideration of the merits of this appeal, the following points appearing of record herein must be noted. As above recited, on April 25, 1934, after the application of counsel for plaintiffs only, the court ordered that the attorneys' fee should be not less than $500 and should be no more than 2½ per cent of assets to be distributed to the trust beneficiaries, "the exact amount and time of payment of said fee to be determined later." Obviously, this order was interlocutory only in its effect. It provided for plaintiffs' legal expenses while acknowledging that other extensive labors should be performed in order to effect the ultimate purpose of the litigation. As contemplated, the proceedings continued over a protracted period of time—a complaint in intervention was filed on behalf of all interested parties, including creditors; the many connected details thereafter arising in the conduct of the action required constant and efficient attention from both counsel for intervener and counsel for plaintiffs; and the merits of the controversy were not brought to a successful close until March 5, 1940, when an interlocutory judgment was entered dissolving the trust and making the receivership permanent for the purpose of completing the liquidation of the trust assets. Then, on August 11, 1941, following a hearing on the joint application of all counsel and consideration of detailed affidavits enumerating the valuable legal services rendered over the years, particularly since the date of the intervention, a definitive order was made for counsel fees and costs of plaintiffs and intervener. The court, for the first time presented with the request for an allowance for counsel for intervener and in the exercise of the jurisdiction expressly reserved under the terms of the initial award to counsel for plaintiffs, undertook a complete appraisal of the record and the resulting order contained no limitations. It prescribed a sum to be paid upon its implied finding that services had been rendered to the trust. Such later order, necessarily involving an adjudication of the meaning and effect of the prior allowance, is both final and conclusive. Semple v. Wright, 32 Cal. 659, 668; Tyrrell v. Baldwin, 67 Cal. 1, 5, 6 P. 867. The amount of the total attorney fees finally determined as reasonable—$5,000—is some indication of the extent and value of the legal services which the court considered had been furnished to the trust. In view of such finding it would seem unjust to withhold from counsel fair compensation. Yet such is necessarily the effect of the order subordinating appellant's award of counsel fees to the payment of the numerous creditors of the trust.

[9-12] The order of August 11, 1941, directing that attorney fees and costs be paid out of the trust fund preserved through the diligence of counsel for all persons interested therein, finds support in a long prevailing rule in equity which allows such charge as a proper means of securing contribution from those entitled to participate in the benefits of the litigation. And such counsel fees are customarily made senior to other claims against the fund. Scott v. Superior Court, 208 Cal. 303, 281 P. 55. That the court could have made its 1941 award to appellant on no other theory readily appears from the nature of the involved action itself as revealed by the detailed pleadings of plaintiffs and intervener, emphasizing the purpose of the litigation to be the preservation of the trust assets for the protection of all claimants thereto. Moreover, the predominance of such equitable principle was recognized by the original order in 1934 in requiring the immediate payment of $500 counsel fees, to which ruling no objection appears to have been made by the receiver, but who, on the contrary, made the payment. Then wholly inconsistent with the established basis of appellant's allowance from the trust fund, the court, in response to the receiver's petition for instructions as to the priority of claims, made its order of December 18, 1942, giving appellant a secondary ranking. Practically all of the claims given precedence over that of appellant were those of general creditors only. The solitary exception appears to be that of the United States Government for income tax, which is supported by a statutory lien. All of these claims accrued long prior to the institution of this action, were comprehended in the express purpose thereof, and unquestionably were protected as the result of the judicial administration of the failing trust. Where a lawyer has rendered such valuable service as to make available a fund for a class, even though he appeared for only one claimant, it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184. Counsel's right to compensation under such circumstances arises from the benefit conferred upon those who would have suffered loss but for his timely intervention, and not by reason of an agreement to pay his fees. Buford v. Tobacco Growers' Co-op. Assn, 4 Cir., 42 F.2d 791.

[13-15] It would be wholly out of line with the traditional concept of equitable practice to pay the expenses of a receiver and the fees of his counsel prior to the participation of any creditor or beneficiary and at the same time to subordinate the payment of fees to the attorney who has invoked the powers of the court of equity to appoint that same receiver. The expense incurred by a litigant for legal services in causing the appointment of a receiver is as much an expense of administration as the charge of the receiver's counsel and should have priority to the same extent. Farmers' Loan & Trust Co. v. Green, 5 Cir., 79 F. 222, 24 C.C.A. 506; Muskegon Boiler Works v. Tennessee Valley I. & R. Co., D.C., 274 F. 836; McLane v. Placerville & Sacramento Valley R. Co., 66 Cal. 606, 622, 623, 6 P. 748. As is stated in Re Estate of Marre, 18 Cal.2d 191, 192, 114 P.2d 591, 592: "Plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys." This principle is derived from the equitable concept that where one of a group has borne the cost of litigation resulting in benefit to the entire group, the latter should contribute to such expenses. Nolte v. Hudson Nav. Co., 2 Cir., 47 F.2d 166; O'Hara v. Oakland County, 6 Cir., 136 F.2d 152.

Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but there is created in favor of the attorney who renders the service an equitable lien against the fund so preserved. Central R. & B. Co. v. Pettus, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915; Colley v. Wolcott, 8 Cir., 187 F. 595, 109 C.C.A. 425; Muskegon Boiler Works v.

Tennessee Valley I. & R. Co., D.C., 274 F. 836.

[16] These equitable considerations sustain appellant's position as to the priority of his claim against the trust fund. Having rendered valuable service over a period of ten years and having thereby brought into the protective custody of the court the trust assets, which avoided total loss to the creditors, appellant and his associates established their right to preference as against the creditors of the fund. That certain beneficiaries of the trust undertook to institute the action necessary to preserve the trust assets, and another beneficiary intervened for the same purpose, are but formalities of the litigation which do not affect points of substance herein. The pleadings plainly demonstrate that counsel acted for the benefit of all persons interested in recovery of the fund—including creditors and beneficiaries alike—and that legal fees for such service would be a proper charge upon the share due the creditors as well as upon the excess which might be distributable to the beneficiaries. Creditors daily seek judicial intervention to collect claims from solvent debtors and in such endeavors voluntarily pay for legal services. The situation here is in reality no different insofar as concerns the obligation of the creditors to pay their fair share of the legal expense necessary to maintain the representative and beneficial litigation for their protection. Tanner v. Superior Court, 43 Cal.App.2d 732, 736, 111 P.2d 713. Nor on equitable considerations should the claim of the federal government for income taxes accrued before the commencement of this action stand on a distinguishable level in relation to appellant's allowance for counsel fees for preservation of the fund. The latter, viewed as an expense of judicial administration in making the trust assets available for distribution to claimants should properly take priority. 1 Clark on Receivers (2d ed.), § 670, p. 951 et seq.; Kennebec Box Co. v. O. S. Richards Corporation, 2 Cir., 5 F.2d 951; In re Holmes Manufacturing Co., D.C., 19 F.2d 239; In re Columbia Ribbon Co., 3 Cir., 117 F.2d 999; Bauer & Son v. Wilkes-Barre Light Co., 274 Pa. 165, 117 A. 920, 24 A.L.R. 1171; Malm v. Home Riverside Coal Mines Co., 152 Kan. 419, 103 P.2d 798.

From these observations it follows that the order of December 18, 1942, made in response to the receiver's petition for instructions as to the payment of claims against the trust fund, improperly subordinated the allowance of counsel fees and virtually destroyed appellant's rights as established by the prior award of August 11, 1941. Under authority of the Soldiers' and Sailors' Civil Relief Act, appellant was entitled to and did move to vacate the objectionable portion of the 1942 order entered during his absence in military service and to which he had a meritorious defense. In the denial of his motion by order of June 8, 1943, the court erred and appellant justifiably seeks relief therefrom by this appeal. The order therefore is reversed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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25 Cal.2d 341

PEOPLE v. WILSON.

Cr. 4572.

Supreme Court of California.

Dec. 1, 1944.

Rehearing Denied Dec. 28, 1944.

1. Abortion 🔑11

In abortion prosecution, prosecuting witness' testimony required corroboration. Pen.Code, §§ 274, 1108.

2. Criminal law 🔑507(1)

A husband who accompanied his wife to defendant's office for an abortion was not an "accomplice" so as to require corroboration of his testimony. Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

3. Criminal law 🔑507(1)

Where husband provided fee for abortion on wife and assured accused money was ready, and showed intention to facilitate abortion by being at hand to take wife home, husband was an "accomplice" whose testimony required corroboration. Pen. Code, §§ 31, 274, 1111.

4. Abortion 🔑9

Criminal law 🔑510½

In prosecution for abortion on wife, wife and husband, who was an accomplice of accused, could corroborate each other's testimony. Pen.Code, §§ 31, 274, 1108, 1111.

5. Criminal law 🔑507(6)

A wife on whom abortion was committed was not an "accomplice" of accused or accomplice of husband so as to require corroboration of her testimony. Pen.Code, §§ 31, 274, 275, 1111.

6. Criminal law 🔑511(1)

Evidence corroborating an accomplice creating more than a suspicion of guilt is sufficient, notwithstanding it be slight, and, when standing by itself, entitled to but little consideration. Pen.Code, §§ 1108, 1111.

7. Criminal law 🔑511(3, 7)

Evidence corroborating an accomplice may consist of defendant's testimony and inferences therefrom as well as inferences from circumstances. Pen.Code, §§ 1108, 1111.

8. Criminal law 🔑511(1)

Corroborating evidence need not establish precise facts testified to by witness whose testimony it supports. Pen.Code, §§ 1108, 1111.

9. Abortion 🔑11

In prosecution for abortion on wife, husband's testimony that when wife entered accused's office wife was well, but was ill when she left office, supported inference that accused brought about the change and was sufficient to make husband's testimony as a whole corroborative of wife's, regardless whether corroboration of wife must tend to connect accused with offense, as required by statute relating to accomplices. Pen.Code, §§ 274, 1108, 1111.

10. Abortion 🔑11

Accused's failure to keep records was evidence supporting conviction of abortion. Pen.Code, § 274.

11. Abortion 🔑11

In abortion prosecution, testimony of prosecuting witness as to use of instruments did not require special corroboration. Pen.Code, §§ 274, 1108.

12. Criminal law 🔑486

The fact that a physician's opinion, that an abortion was induced and that it was not performed to preserve victim's life, was partly based on case history obtained from victim, did not make opinion inadmissible. Pen.Code, § 274; Code Civ.Proc. § 1870, subd. 9.

13. Criminal law 🔑486

A physician may consider a patient's declarations as to patient's condition, where necessary to enable physician in connection with his own observations to form an opinion as to patient's physical and mental condition. Code Civ.Proc. § 1870, subd. 9.

14. Criminal law 🔑485(1)

The trial court, in permitting examination for purpose of obtaining opinion evidence, should prevent use of misleading or unfair hypothetical questions, and permit only questions that sufficiently specify assumptions on which they are based and contain only such assumptions as do not contradict weight of evidence in case. Code Civ.Proc. § 1870, subd. 9.

15. Criminal law 🔑485(1)

Each hypothesis contained in question to obtain expert opinion evidence should have some evidence to support it, but it is unnecessary that the question include a statement of all the evidence. Code Civ. Proc. § 1870, subd. 9.

16. Criminal law 🔑485(1)

The statement for a hypothetical question may assume facts within evidence not unfairly assembled, and considerable latitude must be allowed in choice of facts as to basis upon which to frame the hypothetical question for an expert's opinion. Code Civ.Proc. § 1870, subd. 9.

17. Criminal law 🔑470

The admissibility of an expert's opinion coinciding with ultimate issues is largely within court's discretion, depending on nature of issue and circumstances, particularly where issue cannot be further simplified and cannot be fully tried without opinions from those in better position to form them than jury can be placed in. Code Civ.Proc. § 1870, subd. 9.

18. Criminal law 🔑470

Where there is no other practicable way of framing questions to obtain benefit of witness' expert knowledge for jury, expert may be asked a question coinciding with ultimate issue. Code Civ.Proc. § 1870, subd. 9.

19. Criminal law 🔑470

In prosecution for abortion, where all facts assumed in hypothetical questions, except one favorable to defendant, were sustained by evidence, and there was no other practicable way of framing the questions, physician's opinions as to whether abortion was induced, and whether it was necessary to preserve victim's life, were admissible. Code Civ.Proc. § 1870, subd. 9, Pen.Code, § 274.

20. Criminal law ⚿369(2)

In abortion prosecution, defendant's statement, when arrested, that instruments she used in curettements had never been returned to her after a previous arrest, was not inadmissible because of reference to former arrest. Pen.Code, § 274.

21. Criminal law ⚿673(5)

Where evidence referring to a former arrest was admissible, defendant was entitled to have jury instructed as to limited purpose for which evidence was admitted.

22. Witnesses ⚿275(2)

In abortion prosecution where defendant was examined in chief as to what happened when victim was in defendant's office and what fee defendant charged for alleged examination, the people could cross-examine defendant as to preparatory steps concerning appointment and other surrounding facts, including defendant's failure to enter alleged fee in record and defendant's questions to victim. Pen.Code, §§ 274, 1323.

23. Criminal law ⚿1167(3)

Where evidence supported conviction, alleged error in denying motion to set aside information on ground that there was no evidence at preliminary hearing of reasonable or probable cause, as required by statute, was not prejudicial. Pen.Code, § 995.

SCHAUER and CARTER, JJ., dissenting.

* * *

In Bank.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Mae A. Wilson was convicted of abortion, and she appeals.

Affirmed.

Prior opinion 150 P.2d 225.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards and T. G. Negrich, Deputy Attys. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment convicting her of the crime of abortion and from an order denying her motion for a new trial. The prosecuting witness, Mrs. Marcella Anderson, gave the following testimony: On August 2, 1943, defendant performed an illegal operation on her. She made the appointment for the operation with defendant over the telephone, and defendant asked her how many periods she had missed and stated that the fee would be $100. She went to defendant's office with her husband. Defendant inquired whether they had the money and received an affirmative answer. She then told the husband to wait outside the office because her patients were women. After her husband left, Mrs. Anderson paid defendant the $100 and asked defendant what method she used. Defendant replied that it was a curettement. During the operation, which took about 35 minutes, the witness lay on a table while defendant worked between her legs, and she could not see whether defendant used an instrument. She felt something inserted into her vagina, however, and also felt a painful scraping and pulling inside her body. She heard metallic sounds, caused by the different things that she had felt inside her body, as they were laid on the table and picked up again. She felt well when she went to defendant but very weak when she met her husband in the building after leaving defendant's office. When she reached home she went to bed with a fever and in great pain. During the second night following the operation she was brought to a hospital. Her husband's testimony was substantially the same with respect to the interview with defendant before he left defendant's office to wait for his wife and with respect to his wife's health before and after her stay in defendant's office. He testified that he reassured defendant that the money was at hand when she inquired about the money and that he asked defendant how long it would take and was advised by her that she could not tell; that it might be thirty minutes or three hours. His testimony differed from that of his wife as to the date she entered the hospital. He stated that it was the night of August 7th to August 8th.

Dr. Malone, the physician who attended Mrs. Anderson during her twelve days in the hospital, testified that he examined her after her arrival in the hospital on the morning of August 4th, that she was running a temperature, that her uterus was enlarged, that he found a body remaining therein, and that the cervix was effaced. He stated that this effacement indicated that the patient was about to lose the pregnancy conception in her uterus. He further testified that it was his opinion, based on his observations and the case history obtained from Mrs. Anderson when she was under his care that an abortion was induced by outside interference while she was in a stage of pregnancy of about two and a half or three months, and that the abortion was inevitable. Defendant, testifying in her own behalf, denied that she performed an abortion, claiming that she merely examined Mrs. Anderson but could not complete the examination and was therefore unable to discern whether Mrs. Anderson was pregnant. She testified that she charged $10 for the examination but that she did not keep written records, and she was unable to produce a written record of the fee.

Defendant contends that there was not sufficient evidence that an abortion was committed or that it was performed by the use of an instrument. If the verdict can legally be based on the testimony of the three witnesses, it is clearly supported by the evidence. Defendant contends, however, that the testimony of Mrs. Anderson and her husband was not sufficiently corroborated and that part of Dr. Malone's testimony was inadmissible.

[1-3] Mrs. Anderson's testimony required corroboration under section 1108 of the Penal Code, which provides that the testimony of the woman upon whom an abortion has been performed must be corroborated by other evidence. Mr. Anderson's testimony required corroboration if he was an accomplice of defendant. Pen.Code, § 1111. The mere fact that he accompanied his wife to defendant's office does not make him an accomplice. People v. Balkwell, 143 Cal. 259, 261, 76 P. 1017; People v. Brewer, 19 Cal.App. 742, 746, 127 P. 808; People v. Seiffert, 81 Cal.App. 195, 198, 253 P. 189. Mr. Anderson, however, also provided the $100 fee for the abortion and had a conversation with defendant in which he assured her that the money was ready and inquired of her how long he would have to wait, thus showing his intention to facilitate the commission of the crime by being at hand to take his wife home. He stated that he knew the purpose of his wife's appointment with defendant was an abortion. When he was asked whether he took his wife to defendant's office for the purpose of an abortion he answered that "that was more or less up to her." This evidence shows that he played an active part in the transaction and was therefore subject to prosecution for the offense with which defendant was charged, Pen. Code, § 31; People v. Shaw, 17 Cal.2d 778, 799, 112 P.2d 241, and was therefore an accomplice within the definition of section 1111 of the Penal Code. People v. Clapp, 24 Cal.2d 835, 838, 151 P.2d 237.

[4-11] Mr. and Mrs. Anderson could corroborate each other's testimony. Mrs. Anderson, as the woman on whom the crime of abortion was committed was subject to prosecution, not under section 274 of the Penal Code prescribing punishment for abortion, but only under section 275 of the Penal Code, and was therefore not an accomplice of defendant or the husband, who were subject to prosecution under section 274. People v. Clapp, supra. The wife's testimony adequately corroborated that of her husband. His testimony was also sufficient to corroborate hers even if it be assumed that the corroborating evidence required by section 1108 must, like that required by section 1111 with respect to accomplices, tend to connect the defendant with the offense. So long as corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it "be slight and, when standing by itself, entitled to but little consideration." People v. Negra, 208 Cal. 64, 69, 280 P. 354, 356; People v. Dorrance, 65 Cal.App.2d 125, 130, 150 P.2d 10; People v. Shaw, supra, 17 Cal.2d, at page 802, 112 P.2d 241. It may consist of testimony of the defendant and inferences therefrom as well as inferences from the circumstances surrounding the criminal transaction (People v. Negra, supra; People v. Garner, 60 Cal.App.2d 63, 140 P.2d 146; People v. Dorrance, supra; Commonwealth v. Follansbee, 155 Mass. 274, 29 N.E. 471; Commonwealth v. Fenno, 134 Mass. 217; see 1 C.J.S., Abortion, § 35, p. 338), and it need not establish the precise facts testified to by the witness whose testimony it supports. Peo-

ple v. Negra, supra; People v. Lee, 81 Cal.App. 49, 53, 252 P. 763; People v. Dorrance, supra. Mr. Anderson's conversation with defendant, and the latter's inquiry about the money and her statement that he might have to wait thirty minutes or three hours indicate something more serious than a routine examination. His observation that his wife was well when she entered defendant's office but ill when she left lends support to the inference that defendant brought about this change in Mrs. Anderson's condition. Further inferences connecting defendant with the abortion, which, according to the expert opinion of Dr. Malone, had occurred, could justifiedly be drawn from defendant's failure to keep written records. Mrs. Anderson's testimony as to the use of instruments does not need special corroboration. People v. Smitherman, 58 Cal.App.2d 121, 123, 135 P.2d 674; People v. Lorraine, 28 Cal.App.2d 50, 53, 81 P.2d 1004; People v. Thompson, 16 Cal.App. 748, 750, 117 P. 1033.

Defendant contends that the following opinion evidence was improperly elicited from Dr. Malone:

"Q. From your examination of this case, this patient, Mrs. Anderson, and from the case history that you took, did you form an opinion as to whether her abortion was spontaneous or induced? A. It was my opinion that the abortion was induced. * * *

"Q. Doctor, assuming for the purpose of this case that an abortion is performed on Mrs. Anderson on August 2nd, 1943 and that you examined her within a few days after it happened, on August 4th, 1943 and assuming further, Doctor, that an abortion had been performed on Mrs. Anderson for the purpose of preserving her life, would the conditions requiring that abortion be observable on August 4th? * * * A. At the time I examined the patient, Mrs. Anderson, I found no evidence that a therapeutic abortion was necessary.

"Q. * * * Then, in your opinion, Doctor, you would say that from your examination of Mrs. Anderson, the abortion was not performed in order to preserve her life, is that correct? A. That is correct."

Defendant attacks the admission of this testimony on the grounds that the questions called for answers based in part on the case history, namely, declarations of the patient, rather than on the observations of the physician, that they allowed the expert to make a determination that it was the sole province of the jury to make, and that the facts assumed were not proved.

[12, 13] The fact that Dr. Malone's opinion was partly based on the case history obtained from Mrs. Anderson does not make it inadmissible. It is settled that a physician may take into consideration a patient's declarations as to his condition, if they are necessary to enable him in connection with his own observations to form an opinion as to the patient's past or present physical or mental condition. People v. Shattuck, 109 Cal. 673, 678, 42 P. 315; Groat v. Walkup Drayage, etc., Co., 14 Cal.App.2d 350, 357, 58 P.2d 200; Willoughby v. Zylstra, 5 Cal.App.2d 297, 300, 42 P.2d 685; Tierney v. Charles Nelson Co., 19 Cal.App.2d 34, 37, 64 P.2d 1150; see 6 Wigmore, Evidence (3d ed.) § 1722(c); 67 A.L.R. 10; 80 A.L.R. 1527; 130 A.L.R. 977.

[14-17] The method of obtaining opinion evidence from an expert by hypothetical questions is unsatisfactory (see 2 Wigmore, Evidence (3d ed.) § 686; Hulbert, Psychiatric Testimony in Probate Proceedings, 2 Law and Contemporary Problems, 548, 554), but it is at present the least objectionable known to the law. People v. Le Doux, 155 Cal. 535, 554, 102 P. 517. The trial court, however, should prevent the use of misleading or unfair hypothetical questions, permitting only questions that sufficiently specify the assumptions on which they are based and contain only such assumptions as do not contradict the weight of the evidence in the case. Christiansen v. Hollings, 44 Cal.App.2d 332, 348, 112 P.2d 723; Weaver v. Shell Co., 34 Cal.App.2d 713, 94 P.2d 364; Bickford v. Lawson, 27 Cal.App.2d 416, 426, 81 P.2d 216; Graves v. Union Oil Co., etc., 36 Cal.App. 766, 770, 173 P. 618; Estate of Gould, 188 Cal. 353, 356, 205 P. 457. While each hypothesis contained in the question should have some evidence to support it, it is not necessary that the question include a statement of all the evidence in the case. The statement may assume facts within the limits of the evidence, not unfairly assembled, upon which the opinion of the expert is required, and considerable latitude must be allowed in the choice of facts as to the basis upon which to frame a hypothetical question. Treadwell v. Nickel, 194 Cal.

243, 267, 228 P. 25; Forbis v. Holzman, 5 Cal.2d 407, 410, 55 P.2d 201; Mirich v. Balsinger, 53 Cal.App.2d 103, 117, 127 P. 2d 639; Christiansen v. Hollings, supra. All facts assumed in prosecuting counsel's questions in the present case were sustained by the evidence except the assumed fact that the abortion was performed for the preservation of Mrs. Anderson's life. This fact, however, if true, would have been favorable to defendant.

[18-20] There is no hard and fast rule that the expert cannot be asked a question that coincides with the ultimate issue in the case. "We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. * * * Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in." Hamilton v. United States, 5 Cir., 73 F.2d 357, 358, 359; Rackoff v. United States, 2 Cir., 78 F.2d 671, 673; see, also, Nolan v. Nolan, 155 Cal. 476, 480, 101 P. 520, 132 Am.St.Rep. 99, 17 Ann. Cas. 1056; Giraudi v. Electric Imp. Co., 107 Cal. 120, 127, 40 P. 108, 28 L.R.A. 596, 48 Am.St.Rep. 114; Sim v. Weeks, 7 Cal.App. 2d 28, 39, 45 P.2d 350; Hurwit v. Prudential Ins. Co., 45 Cal.App.2d 74, 82, 113 P.2d 691; 78 A.L.R. 755; 4 Wigmore Evidence (3d ed.) § 1921; 7 N.C.L.Rev. 320. In the present case there was no other practicable way of framing the questions if they were to serve the purpose of obtaining the benefit of the witness's expert knowledge as to matters on which enlightenment of the jury by the expert was proper. Code Civ.Proc. § 1870(9); Moore v. Norwood, 41 Cal.App. 2d 359, 366, 106 P.2d 939; Engelking v. Carlson, 13 Cal.2d 216, 221, 88 P.2d 695; Patterson v. Marcus, 203 Cal. 550, 553, 265 P. 222; Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642.

[21, 22] Defendant contends that prejudicial error was committed by the trial court in denying defendant's motion to strike testimony of Maynard Young, an investigator for the State Medical Board, on the ground that evidence of another crime was inadmissible. The witness was asked by counsel for the People whether he had a conversation with defendant when he arrested her in her office. He testified that while arresting her he asked defendant where the instruments were that she used in curettements, and that she replied that those instruments had never been returned to her after they had been taken from her at the time of a previous arrest. Defendant's statement to the arresting officer, however, was admissible, not for the purpose of proving a former arrest of defendant, but to rebut the inference that no instruments were used, which could be drawn from the fact that the arresting officers at the time of the arrest were unable to find in defendant's office instruments that are regularly used for abortions of the type in question. The jury could infer from the fact that such instruments had been taken from defendant at a previous arrest that she would be careful not to keep new instruments in her office, or that she might have performed the abortion with instruments other than those regularly used. The latter inference finds support in defendant's inability to complete the abortion. The importance of this evidence in the proof of the People's case outweighed any prejudice to the defendant from the reference to her former arrest. Adkins v. Brett, 184 Cal. 252, 258, 193 P. 251. Defendant was entitled, however, to have the jury instructed as to the limited purpose for which the evidence was admitted (Adkins v. Brett, supra, 184 Cal. at page 259, 193 P. 251), but she does not contend that she requested such an instruction and that it was denied.

[23] Defendant contends that her constitutional privilege against self-incrimination was violated on the ground that the questions admitted on her cross-examination with respect to the telephone conversation preceding the appointment, the keeping of records by defendant, and her questioning Mrs. Anderson about the missing of periods, were outside the scope of allowable cross-examination. A defendant may be cross-examined under section 1323 of the Penal Code "as to all matters about which he was examined in chief." Here, defendant was examined by her counsel as to what happened when Mrs. Anderson was in defendant's office and what fee defendant charged for the alleged examination. This direct examination opened the door to inquiry as to preparatory steps concerning the appointment and other facts and

circumstances surrounding the transaction, including the failure to enter the alleged fee in a record as is customary. Ashley v. Rivera, 220 Cal. 75, 79, 29 P.2d 199; People v. Kynette, 15 Cal.2d 731, 753, 104 P.2d 794; People v. Smith, 43 Cal.App.2d 110, 116, 110 P.2d 472.

[24] Defendant contends that there was no evidence at the preliminary hearing of reasonable or probable cause, as required by section 995 of the Penal Code, and that therefore her motion to set aside the information was improperly denied. Defendant has failed to point out in what respect the proof at that time was insufficient to show reasonable or probable cause. See People v. Novell, 54 Cal.App. 2d 621, 623, 129 P.2d 453. If error was committed, it was not prejudicial, for the proof submitted at the trial was sufficient, not only to show reasonable and probable cause, but to support the verdict.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, CURTIS, and EDMONDS, JJ., concurred.

SCHAUER, Justice (dissenting).

I dissent. By the testimony of Mrs. Anderson she was not merely an innocent victim upon whom an abortion was attempted without her knowledge or consent; she was on the contrary an active participant, wilfully aiding and abetting in the project. Therefore she was guilty as a principal and as an accomplice of the defendant in violating section 274 of the Penal Code, if in fact any crime was proved, and not section 275. The latter section (275) is obviously designed primarily, if not exclusively, to cover situations not covered by the former. The latter section is intended to punish two things: (1) the solicitation and taking of drugs by a woman, on her own account and without the necessity for participation by any other person, "with intent thereby to procure a miscarriage"; (2) the *passive submission*, with like intent, to an operation. It does not cover active participation in the violation of section 274. That section (274), coupled with the provisions of sections 31 and 971 of the same code, covers the activities of both Mr. and Mrs. Anderson and the defendant. They are all accomplices and all principals in a single crime.

The experience and wisdom of mankind, particularly of those dealing with judicial trials, accumulated through many generations, have brought the conclusion that "evidence of an accomplice, coming from a tainted source, the witness being, first, an infamous man, from his own confession of guilt, and, second, a man usually testifying in the hope of favor or the expectation of immunity, was not entitled to the same consideration as the evidence of a clean man." (People v. Coffey, 1911, 161 Cal. 433, 438, 119 P. 901, 903, 39 L.R.A., N.S., 704). In recognition of this conclusion the Legislature of California has laid down the rule that "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Pen.Code, § 1111.

The majority opinion here, as in People v. Clapp, 1944, 24 Cal.2d 835, 151 P.2d 237, ascribes to section 275 a potency which I do not believe is justified by that section's language or purpose. Such construction appears to me to subvert the clear meaning of sections 274, 31, and 971 of the Penal Code, and to accomplish the circumvention of the salutary provisions of section 1111. Such strained constructions benefit neither law nor justice. The Legislature gave further evidence of its concern that there be no convictions in abortion cases upon tainted evidence alone—which may be wholly false and given for ulterior purposes—by the enactment of section 1108 of the Penal Code. If that section and section 1111 were given effect in this case the judgment could not stand. Regardless of our feeling as to the likelihood of guilt of the defendant in this or any other particular case it is our duty to scrupulously uphold the law as enacted by the State.

For the reasons above stated and for the additional considerations depicted in my dissenting opinion in People v. Clapp, 1944, supra, 24 Cal.2d page 840, 151 P.2d 237, the judgment should be reversed.

CARTER, J., concurred.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

25 Cal.2d 318

CROWE et al. v. McBRIDE.
L. A. 19116.

Supreme Court of California.
Nov. 28, 1944.

1. Appeal and error ⚿927(3)

Reviewing court in considering propriety of a nonsuit must accept the evidence most favorable to plaintiffs and disregard that which is unfavorable.

2. Appeal and error ⚿927(3)

In considering the propriety of a nonsuit, testimony of defendant who was called to testify under statute is to be treated as evidence in the case in so far as it is favorable to plaintiffs. Code Civ. Proc. § 2055.

3. Physicians and surgeons ⚿18(9)

Chiropractor's use of lamp containing a 1,000 watt electric therapeutic light bulb without a screen with resulting injury to patient who was burned when lamp exploded while taking a treatment presented a question for the trier of facts upon the issue of negligence, notwithstanding bulb exploded in an unusual manner and that exact cause of accident was unknown.

4. Negligence ⚿3

The care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated.

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In Bank.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Bertha Crowe and husband against R. J. McBride for damages for personal injuries suffered by plaintiff named from the explosion of an electric therapeutic light bulb. Judgment of nonsuit, and plaintiffs appeal.

Reversed.

Prior opinion, 149 P.2d 69.

Harry P. Sweet, of San Diego, for appellants.

Gray, Cary, Ames & Driscoll, of San Diego, for respondent.

GIBSON, Chief Justice.

Plaintiffs, husband and wife, brought this action for damages for personal injuries suffered by the wife (hereinafter called plaintiff) from the "explosion" of an electric therapeutic light bulb. Defendant, a licensed chiropractor, had been treating plaintiff for arthritis and neuritis over a number of years. The treatment consisted in part of exposure to the rays of certain therapeutic lamps in defendant's office. While taking one of these treatments plaintiff lay on a table with her back bared and exposed to a lamp which defendant had fixed in a position about two and one-half feet above her. Defendant then left the room, leaving plaintiff unattended. After she had been under the light about fifteen minutes, the bulb broke or exploded without warning, the hot glass falling upon plaintiff's back and other parts of her body, causing severe injuries.

At the close of plaintiffs' evidence a motion for a nonsuit was granted on the ground that plaintiffs had failed to prove negligence. Plaintiffs appealed from the judgment, contending that the evidence was sufficient to permit a finding of negligence.

[1, 2] In considering the propriety of the nonsuit, we must accept the evidence most favorable to plaintiffs and disregard that which is unfavorable. The testimony of the defendant, who was called to testify under section 2055 of the Code of Civil Procedure, falls within this rule and is to be treated as evidence in the case insofar as it is favorable to plaintiffs. Anderson v. Stump, 42 Cal.App.2d 761, 109 P.2d 1027; Dempsey v. Star House Movers, Inc., 2 Cal.App.2d 720, 38 P.2d 825; cf. People v. Mahoney, 13 Cal.2d 729, 91 P.2d 1029, motion for directed verdict; Smellie v. Southern Pac. Co., 212 Cal. 540, 299 P. 529.

Defendant testified that the lamp was an infra red, deep therapy lamp and that the bulb was a "thousand watt General Electric heating unit; it was one of the thousand watt electric bulb—daylight blue bulbs." He also described it as a "Standard Therapeutic bulb." Defendant's brief refers to it as a vacuum bulb, but plaintiffs argue that it might have been a vapor lamp filled with gas under pressure. There is no evidence thereon, nor does the record disclose the nature of the heating element or device within the bulb.

The bulb was in a large dome-shaped aluminum reflector on a "spring trolley" which permitted it to be moved up and down, but a chain was attached so that it could go down no farther than to a point about 30 inches above the table.

Defendant testified that he had used the bulb for approximately two years before the accident; that he had a number of the same type which he used as frequently as ten times a day each; that some operated as long as five years before burning out, but that one had burned out within ten minutes; that the lamp was a standard make, with one hundred and fifty or two hundred in use in the locality; that he had never heard of a bulb exploding; and that it was customary to use the bulbs until they burned out.

Defendant's own testimony shows that little, if any, inspection was made of the bulb. The "Electro-Therapy Products man" last inspected the equipment between six months and a year prior to the accident, but it does not appear that this included an examination of the bulb. All that defendant did was turn it on and see that it was functioning and in its proper place, explaining that "there is no inspection I could make on it. It is made just like a light bulb; you cannot open them up and look at them; all that you can do is to turn it on and off; the General Electric Company examines them when they make them. I have no possible way of examining it." He said he had noticed no discoloration in the glass but stated he had never looked at the bulb "with that thought in mind," adding that the bulbs got black after they had burned out, not before. When asked if he had ever cleaned the bulb he replied: "I do not touch it at all. The lamp unit, why, yes, we clean that; we dust it every week * * * but that is not the bulb, that is the lamp unit." He also stated that he did not take the bulb out of the socket.

The evidence shows that the lamp had no screen on it, although defendant did have screens on his other lamps. Plaintiffs contend that the trier of fact could reasonably conclude, under the circumstances of this case, that defendant's failure to use a screen or other protective device constitutes negligence. Defendant replies, first, that there is no evidence that he could have used a screen without interfering with the use of the lamp or that such a screen would have served to prevent the accident. He testified that prior to the accident he had used screens on the other lamps, although for the purpose of controlling the rays, and he stated, in response to a question by his own counsel, that after the accident he had used these screens as a protective measure. From this evidence the trier of fact could reasonably have inferred that the screens would not have interfered with the lamp and that they would have afforded at least some protection in the event of damage to the bulb. Defendant also conceded in his brief that if a screen had been used the injuries might not have been so serious "since only the smaller particles of glass would drop through the screen." The fact that an available safety device would not entirely prevent an accident would not, of course, excuse defendant from employing it to minimize injuries.

[3, 4] Defendant contends that there is no evidence of any similar explosions having occurred or that any manufacturer has recommended screens as a precautionary measure, and that, therefore, he had no reason to anticipate such an accident or take precautions to avoid it. We cannot hold as a matter of law, however, that defendant had no duty to take such precautions, and, under the circumstances of this case, it is our opinion that defendant's use of the lamp without a screen presented a question for the trier of fact upon the issue of negligence. Glass articles such as electric light bulbs are fragile and are frequently broken from many and varied causes. The 1,000-watt bulb involved in this case was an exceptionally large one in comparison with an ordinary light bulb; it was designed to generate heat; and it was placed approximately 30 inches above the patient's bared back. The likelihood of serious injury in the event of breaking of the bulb, whatever the cause, was obvious and was much greater than would be expected from the breaking of an ordinary illuminating lamp. As has often been said, the care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated. See Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 98, 239 P. 709, 41 A.L.R. 1027; 19 Cal.Jur. 579. The trier of fact might reasonably have concluded that the defendant should have anticipated that the bulb might break or be broken and that he did not take the precautions reasonably to be expected in order to avoid or minimize injury.

The fact that the bulb broke or exploded in an unusual manner and that the exact cause of the accident is unknown may be considered by the trier of fact, but it does not necessarily follow that defendant is free from liability as a matter of law. As said in the Restatement, Torts, § 435: "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred does not prevent him from being liable." Furthermore, accidents of this type are not entirely unknown, as at least two cases involving explosions of light bulbs have reached appellate courts. See Hughes v. Atlantic City & S. R. Co., 85 N.J.Law 212, 89 A. 769, L.R.A.1916A, 927; Russell v. St. Louis & S. F. R. Co., Mo.App., 245 S.W. 590.

The evidence of negligence is sufficient to present a question for the trier of fact, and, therefore, the nonsuit should not have been granted.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, CARTER, SCHAUER, and TRAYNOR, JJ., concur.

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25 Cal.2d 330

PEOPLE v. FOX.

Cr. 4561.

Supreme Court of California.

Dec. 1, 1944.

1. Criminal law 🔑1173(2)

Where the evidence, aside from alleged confession to police officer, was insufficient to sustain conviction of grand theft, and officer's testimony indicating confession was properly obtained was contradicted by defendant, refusing to submit to jury issue whether confession was freely and voluntarily obtained before admitting testimony as to confession in evidence was reversible error.

2. Criminal law 🔑736(2)

Although the question as to admissibility of confession is, in the first instance, one of law for the trial judge, if the evidence is received it is for the jury to determine whether the confession was freely and voluntarily made and entitled to consideration.

3. Criminal law 🔑519(3), 520(1), 522(1)

That statements are made when one is under arrest does not make them involuntary or inadmissible, but a confession which is given as result of either threat or inducement must be entirely disregarded.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Abe Fox was convicted of grand theft, and he appeals.

Reversed and remanded for a new trial.

Prior opinion, 148 P.2d 424.

Morris Lavine, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., T. G. Negrich and Frank Richards, Deputy Attys. Gen., Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

EDMONDS, Justice.

In a trial upon an indictment charging the two offenses, Abe Fox was convicted of grand theft and acquitted of receiving stolen property. He now challenges the judgment upon the ground that the evidence is insufficient to support the verdict, and that the trial court erred in receiving certain testimony relating to asserted confessions made by him. He also complains of the court's refusal to give several instructions which he proposed.

The prosecution of Fox is based upon the theft of a large quantity of cigars and cigarettes. The undisputed evidence shows that on January 11th, a short time after a truck was left near the dock of the System Freight Service, it was stolen by an unidentified person. When it was found, the cigarettes and other merchandise were missing.

At that time Fox owned a drugstore and was a customer of Alex Gorberg, who sold restaurant and soda fountain supplies. Police officers investigating the theft placed Gorberg under arrest and charged him with receiving stolen property. When Fox, accompanied by an attorney, went to the police station for the purpose of securing Gorberg's release from jail, Fox was arrested and for about forty-eight hours was held in custody without a warrant of arrest. Later, Fox and Gorberg were separately indicted, the charge against Gorberg being that he received, as stolen property, the cigarettes which had been taken from the freight truck.

The evidence relied upon by the district attorney to support the judgment of conviction consists entirely of the testimony of Gorberg, who declared that he disposed of a large quantity of cigarettes for Fox, and of police officers who related asserted conversations which they had with Fox during the time he was under arrest. In those conversations, the officers stated, Fox made certain confessions concerning the theft of the merchandise from the truck and the means which he took to store and later to sell it.

When called as a witness for the People, Gorberg stated that his testimony was given under a promise of immunity made by the district attorney, as he was then under indictment. He told the jury that on a day in January, the date of which he could not recall, Fox told him he had a quantity of cigarettes for sale. This conversation occurred at Fox's place of business. After several days, when he was again at the Fox store on a routine call, Fox informed him that he had ninety-six cases of cigarettes which he would sell at $50 a case. Fox also spoke of certain cigars he had for sale but said he had not then ascertained their value.

Two days later, the witness declared, he was at the drugstore on a business errand and Fox offered him the entire lot of cigarettes for $46 a case. On a Friday near the end of January, Gorberg again went to the Fox store. Gorberg then told Fox that he had arranged to sell the ninety-six cases of cigarettes to the Bower Tobacco Company at $50 a case, delivery to be made the next day, and Fox agreed to give him $4 per case profit for his part in the transaction.

From the garage at the rear of the Fox store, Gorberg continued, he and Fox loaded ninety-six cases of cigarettes into a truck, and he delivered them to the tobacco company. Two trips were required. Upon the return of Gorberg, Fox asked when payment would be made and Gorberg replied he would get it as soon as one Newman, through whom the sale had been made, received the money from the tobacco company. That evening about 5 p. m., said the witness, he delivered $3,360 to Fox in a paper bag. The money was in five, ten and twenty dollar bills. The following Tuesday afternoon, Gorberg testified, he gave Fox $1,150, the balance of the money due. All of the money which he gave Fox came from Newman. Concluding the account of his dealings with the appellant, Gorberg stated that a few days later he received a case of cigars from Fox at a warehouse garage on East First Street, to which Fox had a key. The cigars were taken from a pile of merchandise covered with a tarpaulin, and Fox told him that he had brought them from the garage at the rear of his store.

All of the other testimony tending to prove participation by Fox in the theft of the cigarettes was given by Captain G. A. Chilson, Officer Fred H. Doane, and Officer R. E. Varela of the Los Angeles Police Department, who related conversations assertedly had with the appellant during the time he was in custody. The policemen said that Officers Hanson and Hollery were present from time to time and also participated in the questioning of Fox. As the foundation for the presentation of Fox's statements to Captain Chilson and Officer Doane, each of them asserted during his examination by the district attorney that the declarations were made freely and voluntarily; also, that Fox did not speak under the compulsion of any force or threat or undue influence nor was any promise of immunity or reward made to him. Over the objection of Fox that his statements had not been made freely and voluntarily, the testimony of the officers was received in evidence.

According to their accounts of these conversations, when Fox appeared at the Newton Street police station to secure the release of Gorberg, Varela took him into custody for investigation. At the first conversation, Fox was questioned principally by Hanson and Doane. Asked whether he knew anything about cigarettes stolen from a System truck, Fox denied having any knowledge concerning them. The officers then told Fox that, according to information given them by Gorberg, the cigars and cigarettes had been stored for a time in a garage behind Fox's store and were later removed to a warehouse on East First Street. Fox still insisted that he knew nothing about the stolen goods or any place on First Street where they had been stored. He denied having a key to any such building and upon search of his person no key was found.

Chilson and Hanson then left the room and according to Doane, who was alone with the prisoner, he told Fox that the police would find his fingerprints on the merchandise. Fox then stated that he had merely permitted Gorberg to store the goods in the garage behind his place of business and, later, helped Gorberg move the goods to the First Street garage. Doane told Fox the police knew more about the case than he thought and demanded the key to the warehouse. Fox said he did not have it, and as he had also told the officers that his wife was expecting a baby and was in a delicate condition, Doane said that they would get a police matron and search the house "because we know that key is there." Fox then admitted having the key at home and agreed to produce it.

This was about 9 o'clock on Saturday night and the officers, with Fox, left the detective room for the Fox home. On the way out of the building, Fox said that he had changed his mind; he did not know anything. Nevertheless, the party got into two automobiles, Chilson, Doane, Varela and Fox in one of them. Again being told by Chilson that Gorberg had given them complete information concerning the theft, and by Doane that they would have a police matron search his home, Fox then said that, under the circumstances, he would produce the key.

When driven to his home, Fox obtained the key and the party then proceeded to a warehouse on East First Street. They entered and Fox, pointing to a pile of merchandise covered by a tarpaulin, said: "There it is." He then stated that the goods belonged to Gorberg and he was in no way involved; he had only accommodated Gorberg by permitting him to use the warehouse. Fox stated he had been in the building only on three occasions after the merchandise was stored there. He named these times as the day he helped Gorberg move it there, another visit for an unspecified purpose, and on an occasion when Gorberg went to the warehouse to obtain a case of cigars.

Fox was next taken to police headquarters in the City Hall for further questioning. It was then about midnight. Gorberg and all of the officers except Varela were present. Gorberg was asked if Fox was the person who had assisted him in loading the cases of cigarettes on the truck used to deliver them to the Bower company. Gorberg replied in the affirmative, and Fox remained silent. Asked to tell in detail the facts concerning his participation in the acquisition and sale of the cigarettes, Gorberg told substantially the same story related by him as a witness upon the trial of Fox. When Gorberg had finished, Fox was asked for a statement and he replied that he had nothing to say.

The next conversation with the police officers took place later that night at Newton Street station. The questioning commenced at about 3 o'clock Sunday morning and continued for three hours. Fox had been given no opportunity to sleep during the night because, said Chilson, "we were moving around on the investigation." At this conversation, which was with Chilson and Doane, Fox maintained that the merchandise belonged to Gorberg. Other than permitting Gorberg to store it in the two garages, said Fox, he was in no way involved.

Chilson then left Fox alone with Doane, who opened the conversation by saying that the police knew more than he imagined; that they had tapped a telephone conversation between him and Gorberg. Fox then stated that two days before the System truck was taken he received a telephone call from an individual he named his "banker." This person, Fox said, asked him if he could handle a large load of tobacco. Fox declared that he passed it off as "big town talk" and thought nothing more about it until, to quote Doane, "he received a telephone call stating the loan was taken." Fox then told his informant where to take the load and proceeded to the appointed rendezvous. There he saw a man "standing on the corner with an overcoat and a mustache; he knew the man to be the man * * * that brought the load there; that he circled the block * * * a couple of times and the man disappeared." He got on the System truck and drove it to the garage at the rear of his Boyle Street drugstore and unloaded its contents. He then parked the truck where it was found by the police. During this questioning Fox also said, the officer told the jury, that he knew he had three hours before the theft would be discovered and reported; that the job was set up by a System man and the truck had been driven away by "a two time loser." But he refused to divulge the place of the rendezvous where he obtained the truck.

On the afternoon of the next day, Monday, Varela drove Fox from the Newton Street station to the City Hall. On the way, Varela testified, he asked Fox what it was all about. Fox replied that his attorney had told him he had already talked too much. He had nothing to do with the theft, Fox then said; the merchandise belonged to Gorberg; it was an inside job and if he was released he would produce the thief.

At the City Hall Fox was delivered to Chilson. Doane, Hollery and Hanson were present, as was Varela. Fox said he wanted to assist the officers. Chilson replied that they wanted to know the identity of the persons involved in the theft. Fox said he did not know who drove the truck in the first instance, but added the man he spoke of as "his banker" was the man above him. Fox stated that, as "he had to protect that man," he could not divulge his identity. He added, however, that he was not adverse to "his banker" being prosecuted but, Chilson testified, he said the police would have to develop their case without his assistance.

Three hours later, the officers and Fox left the City Hall to obtain a meal. Again Fox stated he wanted to help the police because, being a family man, he could not afford to go to the penitentiary. If he could be released, he said, he would make "his banker" reveal the identity of the thief. Fox promised to give this information to the police, and he repeated that the theft was a set up job, engineered by a System man and a two-time loser. When Chilson returned to the City Hall with Fox, he learned that a writ of habeas corpus on behalf of Fox had been served at the Newton Street station. Varela took Fox there and he was released.

Examined by his counsel regarding his detention and interrogation by the police, Fox testified that at all times he was cooperative; stating the goods belonged to Gorberg and he had nothing to do with the theft. When asked about the conversations related by the officers, Fox categorically denied all of the statements assertedly made by him other than those of innocence. He said he was arrested at the police station early Saturday evening and questioned until about 6 o'clock the next morning. He was then taken to the drunk tank where there were "a batch of Mexicans and colored fellows" and left with them. The tank had two beds. Confined there all of Sunday, he was unable to sleep and during that time photographers took him upstairs "and were trying to take a picture" of him.

Sunday night the questioning continued, said Fox. According to him, "they kept asking me what I knew about it, and if I knew who the thief was and all of that, and I told them I didn't know anything about it, and I said that Mr. Gorberg knew all about it, I understand, and they should ask him * * * I told them my wife * * * was due with a baby any moment, * * * and it was a very dangerous condition, and I asked them to let me out, and they told me they were going to keep me unless I did some talking, and I told them I didn't know any talking to do. * * * Officer Chilson, and Doane and Varela, they were all with me at one time or another, and if I was not with Chilson I was with Doane or Varela. I was always with an officer. * * * It was the same thing over and over again. They would ask me the same questions and I would give them the same answers. * * * They would take me into a room and question me maybe 15 minutes, and then walk away, and I would sit there maybe half an hour and they would question me all over again, and time went slow and went fast."

After considering this and other evidence the jury returned a verdict of guilty upon the charge of grand theft but found Fox not guilty of the offense of receiving stolen property. His appeal from the order denying a new trial and also from the judgment of conviction urges, as the principal ground for reversal, that the evidence is insufficient to support the verdict. In addition, he asserts, the trial court erred in receiving testimony concerning his asserted confessions and in refusing to give to the jury several instructions proposed by him.

In his first brief, the attorney general, in effect, admitted that there is no evidence "from which an inference may be drawn beyond a reasonable doubt, that defendant aided and assisted in the theft and abetted the act with knowledge and intent of aiding the actual perpetrators in stealing the truck of merchandise." In conclusion, he said: "We cannot help but conclude that if the defendant was guilty of any crime, it was for receiving stolen property and * * * it is respondent's sincere belief that defendant should not have been convicted of grand theft on the statements he made. We express the belief that a conviction of receiving stolen property would have been warranted and would have been sustained." But in a supplemental brief, the People vigorously challenge each of the appellant's points and insist that the judgment should be affirmed.

The corpus delicti was proved by testimony showing that the truck was driven away from the System freight dock by an unidentified person who, the witness stated, was not Fox. All of the other evidence tending to show that Fox committed the crime of grand theft is included in his statements to the police. These statements, as related by the witnesses, were given in reply to the questioning of the officers and particularly to Doane when Fox was left alone with him. According to the record, during the forty-eight hours in which Fox was at the police station or at detective headquarters, he said that two days before the System truck was taken he received a telephone call asking him if he could use a large quantity of tobacco; he received a second telephone call twenty minutes before the load was taken; at that time he designated the place where he would meet the truck; he went to that place and the truck, with its driver, was there; after he circled the block twice, the man had disappeared. Fox then drove the truck to the garage in the rear of his store where the merchandise was unloaded. Later he left the truck at the point where it was found by the police. In further explanation of the theft, Fox explained that the job was "set up" by a man on the freight dock and that "a two time loser" had driven the truck from the System building to the appointed rendezvous.

[1] The evidence, aside from the statements of Fox and the testimony establishing that the truck was driven away from the System building by a person other than Fox, relates only to his possession of the cigarettes and the sale of them through Gorberg. It is entirely insufficient to support a conviction of grand theft and, so far as that charge is concerned, shows only corroborating circumstances tending to prove the crime. The judgment may be affirmed, therefore, only if the statements of Fox properly could have been considered by the jury as evidence of his guilt.

As against the assertions of the policemen that all of Fox's statements to them were freely and voluntarily made stands his account of what transpired during the time he was in custody. It appears that he was then twenty-eight years of age and the owner of his own business. He was arrested about 6 or 7 o'clock in the evening and subjected to questioning for the next twelve hours. Meanwhile, he had been taken by the officers to his home where his wife was expecting the birth of a child. He was then put in a "drunk tank" among other prisoners and with neither the facilities nor the opportunity for mental or physical rest. During the day he was taken out of the cell for the purpose of being photographed, and it may be inferred that this was done to add to his humiliation and mental upheaval. The questioning was continued that night and, if his testimony is to be believed, for forty-eight hours he was given no opportunity to sleep.

The court refused to instruct the jury, as requested by Fox, that "before you can consider any alleged confession of the defendant as evidence against him, if you find that the defendant has made a confession, you must believe that such alleged confession was freely and voluntarily made, and was not the result of inducement, coercion, intimidation, threats, violence, promises or duress exercised by any officer of the law, or any other person, upon the defendant. Unless you believe that such alleged confession was freely and voluntarily made by the defendant, with full knowledge of its meaning and effect, then you must disregard such alleged confession entirely from your consideration." Another instruction also proposed by Fox and rejected reads: "In considering whether an alleged confession is freely and voluntarily obtained, it is necessary that you should take into consideration the time, the place, the party to whom, and the circumstances under which the said alleged confessions were made. In doing so you must consider all the conduct of the parties who were present when the alleged confession was made, not only at the time of such conduct, but at all times while the defendant was under their custody, control or dominion or were able to exercise or apparently exercise authority over him." The court also declined to give five other instructions presented by Fox stating, in varying form, that it was the duty of the jurors, if they believed he made any incriminating statements, to consider the circumstances under which he talked with the police officers and to disregard any and every admission which was not his free and voluntary act.

The attorney general argues that no rights of the appellant were transgressed by the police officers. He says: "Appellant states that the court erred in receiving testimony concerning the confession evidence. * * * What one court may consider to be fair play might be considered unfair by another court and vice versa. * * * The record in the instant case is exceptionally free from any of those methods severely criticized by the courts in obtaining a confession from an accused. The evidence shows that appellant was treated fairly and without any abuse of his person or fundamental rights, and that whatever statements he made were of his own volition." But by refusing to submit to the jury the issue as to whether the statements of Fox had been improperly obtained, the court deprived the appellant of a determination in that regard.

[2] Although the question as to the admissibility of a confession is, in the first instance, necessarily one of law for the trial judge (People v. Jones, 24 Cal.2d 601, 150 P.2d 801; People v. Rogers, 22 Cal.2d 787, 141 P.2d 722), if the evidence is received, "it is for the jury to determine whether the confession was freely and voluntarily made and therefore entitled to consideration." People v. Dye, 119 Cal. App. 262, 270, 6 P.2d 313, 316.

[3] Certainly, the testimony of Fox directly contradicted in essential particulars that of the police officers, and it was the duty of the jurors first to determine whether he acknowledged to those witnesses, as claimed by them, the circumstances concerning the theft of the cigarettes and his participation in the crime. If they concluded that he had done so, then Fox was entitled to a determination by the jury upon the issue presented by his testimony relating to the manner in which his confession had been obtained. The fact that statements are made while one is under arrest does not make them involuntary or inadmissible; on the other hand, a confession which is given as the result of either threats or inducement must be entirely disregarded in a court of law. An involuntary confession is no confession. People v. Jones, supra; People v. Rogers, supra; and People v. Williams, 20 Cal.2d 273, 125 P.2d 9.

The judgment is reversed and the cause remanded for a new trial.

CURTIS, CARTER, and TRAYNOR, JJ., concur.

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25 Cal.2d 305

KRELING v. SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 19069.

Supreme Court of California.

Nov. 28, 1944.

1. Judges 🔑49(2)

Expressions of opinion uttered by a judge, in what he conceives to be discharge of his official duties, are not evidence of bias or prejudice. Code Civ.Proc. § 170, subd. 5.

2. Judges 🔑49(1)

When state of mind of trial judge appears to be adverse to one of parties but is based upon actual observance of witnesses and evidence given during trial, it does not amount to prejudice which disqualifies judge in trial of action. Code Civ.Proc. § 170, subd. 5.

3. Judges 🔑49(1)
Venue 🔑49(1)

It is judge's duty to consider and pass upon evidence produced and, when evidence is conflicting, to resolve the conflict in favor of party whose evidence outweighs that of opposing party, and opinion thus formed does not amount to "prejudice" contemplated by statute as basis for change of venue or change of judges. Code Civ.Proc. § 170, subd. 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Prejudice".

4. Judges 🔑49(1)

Where four cases were set for trial at same time before same court to be tried in certain order and all evidence introduced in one case, so far as competent, was to be received in other cases in which there was an identical affirmative defense which, if sustained, would be decisive of all cases, and in trial of first case court sustained such defense, there was no basis for change of judges on ground of bias and prejudice to try the remaining three cases. Code Civ.Proc. § 170, subd. 5.

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In Bank.

Prohibition from Superior Court, Los Angeles County; Myron Westover and Stanley Mosk, Judges.

Proceeding by Mike Kreling in prohibition to restrain the superior court of Los

Angeles County and Myron Westover and another, Judges thereof, from hearing certain actions.

Writ denied.

Prior opinion 147 P.2d 658.

Leo V. Youngworth, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, Douglas De Coster, Deputy Co. Counsel, and Alfred Gitelson, all of Los Angeles, for respondents.

CURTIS, Justice.

The background of the present proceeding involves a controversy arising out of a lease of a gasoline super-service station for the sale of gasoline and other commodities used in the operation of motor vehicles, and upon which there was conducted a going business. The property leased was located at Sixteenth and Main Streets in the city of Los Angeles. The lease was executed by Saul Walsh and Ann Walsh (husband and wife) and Robert Wooltz and Mildred Wooltz (husband and wife), as lessors, to petitioner Mike Kreling, as lessee, and bore date May 10, 1941. Evidently petitioner entered into the possession of the leased premises and was carrying on the business when a dispute arose between him and the lessors, for on March 6, 1942, petitioner brought an action against the lessors alleging that they had falsely and fraudulently misrepresented the net profits of the business which the service station was transacting at the date of the execution of the lease. Said action was numbered 473943, and like others hereinafter mentioned, may frequently be referred to in this opinion by its number.

On April 15, 1942, Walsh and his wife and Wooltz and his wife brought an action in the Municipal Court of the County of Los Angeles against Kreling to recover rent alleged to be due and unpaid under the terms of the lease. This action was subsequently transferred to the superior court and was given the number 476334. By stipulation of the parties it was consolidated for trial with action No. 473943.

In June, 1943, Kreling brought suit against Walsh and his wife and Wooltz and his wife in forcible entry and unlawful detainer of said service station. This action was numbered 483841.

On June 12, 1943, Kreling brought another action against the same parties for the conversion of personal property located in said service station. This action was numbered 486038.

Joint answers were interposed by the defendants in each of the actions. The answers generally denied the allegations of the complaint in which they were filed. In case No. 476334 (brought by Walsh et al. to recover rent) the defendant Kreling, in addition to his answer, interposed a counterclaim embodying the claim for damages for false representations which was the basis of his claim in action No. 473943.

In addition to their answers consisting as we have seen of denials of the allegations of the respective complaints, Walsh and his wife and Wooltz and his wife set up an affirmative defense in each of said actions wherein they alleged that all the parties to the litigation, both the lessors and the lessee, had entered into an oral agreement on the 8th day of January, 1943; "that by the terms of said agreement, the plaintiff and defendants in each of said actions" did compromise all claims existing on the part of Walsh and his wife and Wooltz and his wife as against the petitioner Kreling; and that on the part of Kreling against Walsh and his wife and Wooltz and his wife, Kreling forever released, discharged and acquitted them of and from any obligation or liability claimed by him against them.

These four actions were set for trial before Hon. Stanley Mosk, Superior Judge of the County of Los Angeles. Prior to the day of trial petitioner gave notice for an order of court as follows:

"(1) That the trial of said action No. 483,841 [forcible entry and unlawful detainer] be immediately had.

"(2) That at the conclusion of the trial in said action No. 483,841 that the trial of the said action No. 486,038 [conversion] be had.

"(3) That at the conclusion of the trials in said actions No. 483,841 and No. 486,038 the trial of said action No. 473,943 [fraudulent representation consolidated for trial with No. 476,334 (rent)] be had.

"(4) That the evidence, both oral and documentary, offered and received at the trial of said action No. 483,841 be received and considered in so far as the evidence may be competent, relevant, and material in said actions No. 486,038 [fraudulent representation which was consolidated for trial with action No. 476,334 (rent)] and No. 473,943.

"(5) That the evidence, both oral and documentary, offered and received at the trial of said action No. 486,038 be received and considered in so far as the evidence may be competent, relevant, and material in said action No. 473,943.

"Said motion will be based and heard upon the affidavit of Leo V. Youngworth, a copy of which is hereto attached, and the files and records of said Court in said actions."

On the day of trial the court granted this motion and proceeded to the trial of action No. 483841 (forcible entry and unlawful detainer). Pursuant to the provisions of section 596 of the Code of Civil Procedure, the court directed that in the trial of said action the issue of the affirmative defense pleaded by Walsh and his wife and Wooltz and his wife be first tried. The court then proceeded to try the issue of the affirmative defense. Each party introduced evidence and rested the case insofar as it related to the issue of affirmative defense. On the matter being submitted, the court announced in a written opinion its decision in favor of the defendants in said action (Walsh et al.) and against plaintiff Mike Kreling. In rendering its opinion, the court held that by the oral agreement of January 8, 1943, the parties to said action had compromised and settled all their differences and that each of said parties had discharged and acquitted the other of all existing claims and obligations.

Petitioner herein took exception to certain language used by the court in its statement of the reason for its decision. Embodying the language to which he took exception in an affidavit, petitioner made a motion supported by said affidavit for a change of judges, on the ground that the Hon. Stanley Mosk was disqualified to try the remaining three cases at issue between said parties. Judge Mosk filed a counter-affidavit in opposition to said motion. The question of Judge Mosk's disqualification was tried before Hon. Myron Westover, the presiding judge of the superior court, upon an assignment by the chairman of the judicial council to hear said motion. After a full hearing of the matter Judge Westover denied the motion and held that Judge Mosk was not disqualified to try the remaining three actions. Thereupon the three remaining cases were transferred to Judge Mosk. Not satisfied with the decision of Judge Westover, petitioner instituted a proceeding in the District Court of Appeal, Second District, Division One, to prohibit Judge Mosk from trying the three remaining cases on the ground of Judge Mosk's disqualification. Upon presentation of said petition to the District Court of Appeal, that court issued an order directed to the respondent court to show cause why it should not be restrained and prohibited from assigning the three remaining untried cases to Judge Mosk. On the hearing of said matter the District Court of Appeal held that Judge Mosk was disqualified to hear said three cases and issued a peremptory writ directed to the trial court prohibiting it from assigning said three cases for trial to the "judge of the respondent court whose disqualifications are herein passed upon." Thereafter upon petition of the respondents the proceeding was transferred to this court.

From the record before us, which is unusually full and complete, it appears that Judge Mosk rendered his opinion upon the affirmative defense on November 19, 1943. In this opinion he sustained the affirmative defense interposed by Walsh et al. in the four actions then pending before the court; that is, he held that the oral agreement was entered into by all the parties to said action on January 8, 1943, and was a "full and complete agreement" as to all of their differences. In action No. 483841, the forcible entry and unlawful detainer action then on trial before the court, the agreement provided that "Saul Walsh shall be entitled to possession of said station and all receipts from the sale therefrom subsequent to this date." In construing this provision of the agreement of January 8, Judge Mosk held: "Now, however, I cannot help but feel the agreement provided for possession of Mr. Walsh and his associates at the time they entered escrow proceedings. The escrow was not opened or offered to be opened until the 15th of January." It appears, however, that Walsh took possession of the service station on January 13. The court therefore held: "And, so, I will have to find that while the defendant [Walsh] has completely performed all of his obligations under the agreement, the settlement was not to be effective until the 16th of January, and so, from the 13th to the 16th of January, he was in unlawful possession of the premises." As there had not been any evidence introduced as to the extent of the damage, the court continued the trial of the case for that purpose.

The trial ways resumed on November 29, 1943. After evidence was introduced for the purpose of proving the damage sustained by petitioner for the three days when Walsh was unlawfully in possession of the service station after January 13, the court fixed said damage at "$25 per day or $75 for the three days" and announced its judgment in favor of Walsh et al. on their affirmative defense, except that it gave petitioner judgment for $75 as damages for the three days' unlawful possession of the service station by Walsh. Petitioner Kreling made no objection to the trial by Judge Mosk of this issue of damages. In fact he expressly assented to the court's final disposition of said action No. 483841. Petitioner had theretofore, and probably at the opening of court on November 29, 1943, filed his motion to have another judge assigned in the place of Judge Mosk, but expressly limited his motion to the three remaining cases then before the court: No. 486038 (conversion), No. 473943 (fraudulent representation) consolidated with No. 476334 (rent). These cases were then transferred by Judge Mosk to another department of the superior court for the purpose of hearing petitioner's motion for change of judges. We have already seen that upon the denial of said motion all three of said cases were reassigned to Judge Mosk for trial.

[1] The order of court affecting the three pending actions provided that the evidence in No. 483841 (the forcible entry and unlawful detainer action, which had already been tried and decided by the court) should be received and considered insofar as it might be competent, relevant, and material in said actions (the three remaining cases). As stated above, Walsh et al. had interposed their affirmative defense in each and all of said four actions, and the court had ordered that this affirmative defense be first tried. Following this order the court did try and sustain this defense in the first case tried. In each of the remaining cases petitioner seeks to recover a money judgment based upon certain alleged wrongful acts of Walsh et al. committed long prior to January 8, 1943. The court in its decision in the first case held that any damages sustained by petitioner by reason of these wrongful acts had been settled and satisfied by the oral agreement of January 8. There is therefore nothing actually left to be tried in the three remaining cases. Petitioner makes no claim that he has any further or additional evidence upon said affirmative defense to offer in any of these cases which would change the result reached by Judge Mosk in his decision of the first of these cases. Neither does he make any claim that the evidence received in the case already tried is not as competent, relevant and material in the three cases yet to be tried as it was in the one already tried. His sole claim is that Judge Mosk, after hearing the evidence introduced in the first case, arrived at a state of mind, based upon this evidence, which disqualified him from acting in the other cases. It is well settled in this state that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice. In re Estate of Friedman, 171 Cal. 431, 440, 153 P. 918; McEwen v. Occidental Life Ins. Co., 172 Cal. 6, 11, 155 P. 86; Fishbaugh v. Fishbaugh, 15 Cal.2d 445, 456, 101 P.2d 1084; Evans v. Superior Court, 107 Cal.App. 372, 381, 290 P. 662.

In the McEwen case [172 Cal. 6, 155 P. 87], the trial judge, on the jury rendering a verdict for the plaintiff, stated: "I do not see how the jury could possibly have reached this verdict." He subsequently granted defendant's motion for a new trial. Plaintiff appealed from the order of court granting a new trial and also from an order denying her motion to transfer the motion for a new trial to another judge. In passing upon her appeal from the latter order, this court affirmed the order and in so doing stated its reasons in the following language (172 Cal. at page 11, 155 P. at page 88):

> "The vexation of the judge and his remark that he did not see how the jury could possibly have reached such a verdict does not show prejudice against Mrs. McEwen. These things indicated, perhaps, that he had formed an opinion regarding the legal questions which had been presented in the case and in reference to the sufficiency of plaintiff's proof. Such conviction in the mind of the judge, based upon his actual observation of the witnesses, the hearing of their testimony, and his knowledge of the law applicable to such cases does not amount to that prejudice against a litigant which the statute contemplates as a basis for change of venue. Western Bank of Scotland v. Tallman, 15 Wis. 92 [104]."

In the Fishbaugh case [15 Cal.2d 445, 101 P.2d 1090] recently decided by this court, the trial judge stated at the conclusion of the trial, in directing judgment in favor of the plaintiff, that the appellant (the defendant) "misrepresented his financial condition" to his former wife, and that he "took the law into his own hands." An attempt was made to disqualify him on the ground of his bias and prejudice as evidenced by this statement. Considering the question of the trial court's bias and prejudice, this court said (15 Cal.2d at page 456, 101 P.2d at page 1090): "Concerning the efforts made by the appellant to disqualify Judge Knight, the statement of asserted bias or prejudice does not comply with the requirements fixed by section 170 of the Code of Civil Procedure. According to this statement, the judge said at the conclusion of the trial that appellant 'misrepresented his financial condition' to his former wife and that he 'took the law into his own hands.' But Judge Knight was acting as the finder of the facts, and if the evidence introduced before him was in conflict, he had the right and it was his duty to believe the testimony of the party who it appeared to him was telling the truth. * * * But neither the statements charged to Judge Knight nor his reading of the depositions, if he did so, show bias or prejudice on his part. If a judge in finding facts falls into error by basing his conclusions upon inadmissible evidence, such an action may constitute sufficient ground for a reversal of the judgment upon appeal, but will not support a charge of disqualification under section 170 of the Code of Civil Procedure."

See, also, on this same subject the following authorities: Ex parte American Steel Barrel Co., 230 U.S. 35, 33 S.Ct. 1007, 57 L.Ed. 1379; Benedict v. Seiberling, D.C., 17 F.2d 831; In re Equitable Trust Co. of New York, 9 Cir., 232 F. 836, 147 C.C.A. 30.

[2, 3] From these authorities the rule appears to be that when the state of mind of the trial judge appears to be adverse to one of the parties but is based upon actual observance of the witnesses and the evience given during the trial of an action, it does not amount to that prejudice against a litigant which disqualifies him in the trial of the action. It is his duty to consider and pass upon the evidence produced before him, and when the evidence is in conflict, to resolve that conflict in favor of the party whose evidence outweighs that of the opposing party. The opinion thus formed, being the result of a judicial hearing, does not amount to that bias and prejudice contemplated by section 170, subdivision 5, of the Code of Civil Procedure as a basis for a change of venue or a change of judges. We think that no one will dispute the applicability of this rule to the trial of a single action, where during the progress of the trial the judge decides a question of fact which amounts virtually to a decision of the whole case before him. The question before us is whether this rule may be applied to the situation which was before the court here, when more than one case was to be tried. In our opinion the rule does so apply.

[4] The four cases had all been set for trial at the same time before the same court. By agreement of all the parties, including petitioner, the cases were to be tried in a certain order suggested by petitioner. All the evidence introduced in one case insofar as it was competent, relevant and material to the other cases was to be received and considered in the other cases. Walsh et al. had filed an identical affirmative defense in each of the four cases. This defense if sustained would virtually be decisive of all four cases. At the trial of the first of said four cases, the court ordered this affirmative defense to be first tried. Pursuant to this order the court proceeded to try the issue involved in this affirmative defense and after evidence had been received in support of, and against, said defense, both parties submitted the issue to the court for decision. The court sustained this defense and held that the parties were bound by the agreement of January 8, 1943, whereby they settled and adjusted all the claims and demands of each of said parties against the other. As each of the parties to all four of said actions had expressly agreed that the evidence in this first case tried should be received and considered in the other three cases insofar as it was competent, relevant and material in the other three cases, and no claim is now made that said evidence did not meet these conditions insofar as the three remaining cases were concerned, the only reasonable and fair deduction which can be made under such a factual situation is that the parties agreed and understood, as all four cases were then set for trial before Judge Mosk, that the decision of Judge Mosk in the first case tried upon an issue which was identical in all four cases should be accepted and govern the decision of that same issue in all the other cases.

The case of Evans v. Superior Court, supra, is strongly relied upon by petitioner. That case is distinguishable from the present case upon two grounds. While there were a number of cases between the same parties ready for trial, it does not appear that the facts were similar, or that the decision of one case would necessarily affect any of the others; and furthermore, the court expressly found that there was no stipulation or agreement that the cases should be tried together, or that "the evidence adduced in the McLeod case [the one tried and decided] was to be used in the other twelve or thirteen cases."

The attempt of petitioner to call in another judge to try the other cases is simply an attempt to have another judge pass upon the same question which Judge Mosk has decided. It is obvious that this cannot be done.

The application for a peremptory writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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25 Cal.2d 314

LIBARIAN v. STATE BAR OF CALIFORNIA.

L. A. 19092.

Supreme Court of California.

Nov. 28, 1944.

1. Attorney and client 🔑32

Signs in front of attorney's home in which he maintained law office indicating that attorney was an income tax expert and notary, that office was open from 8 a.m. to 9 p.m., and that free parking was available, constituted prohibited "advertising signs".

See Words and Phrases, Permanent Edition, for all other definitions of "Advertising Sign".

2. Attorney and client 🔑32

The action of attorney in mailing 5,800 postal cards to persons with whom he was unacquainted or acquainted only by virtue of notarial work done for them, giving his address and office hours and suggesting that recipients come for assistance in preparation of federal income tax returns, constituted improper solicitation of employment as an attorney at law.

3. Attorney and client 🔑38, 58

Where attorney's conduct had been criticized in prior opinion of Supreme Court in proceeding in which attorney was suspended for three months, his action thereafter in soliciting employment and advertising contrary to Rules of Professional Conduct constituted a violation of his oath and conduct involving moral turpitude and justified suspension for one year. St.1939, p. 357, §§ 6103, 6106.

In Bank.

Proceeding by M. (Manasse) Stephen Libarian against the State Bar of California to review a recommendation of suspension as an attorney for one year.

Petitioner suspended for one year.

M. Stephen Libarian, of Los Angeles, in pro. per.

Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

This proceeding was brought to review an order of the Board of Governors of the State Bar recommending that petitioner, M. (Manasse) Stephen Libarian, be suspended from the practice of the law in this state for a period of one year. In reaching its conclusion the board adopted the findings of the local administrative committee but rejected the committee's recommendation of disbarment.

The charges against petitioner arose from his persistence in advertising. In July, 1941, a public reprimand was administered to him after he had given a "solemn promise" to stop advertising, but in 1942 continued investigation revealed more flagrant acts and further charges were filed which resulted in the imposition of a three-month period of suspension. Libarian v. State Bar, 21 Cal.2d 862, 136 P.2d 321. The present proceeding was commenced in February, 1944. As ground for review petitioner asserts that the findings are not supported by the evidence and in any event are contrary to the weight of the evidence. An examination of the record shows that this assertion is unfounded. The findings are responsive to the charges made by an amended order to show cause, many material facts are admitted, and the challenged findings and conclusions have substantial evidentiary support.

Since July, 1943, petitioner has maintained a law office in his home at LaBrea Avenue and West Adams Boulevard, Los Angeles. On the west side of the building he erected a sign 17 x 17½ inches reading, "M. Stephen Libarian Lawyer," and in front he erected a signpost with signs thereon reading respectively: 1. "Income Tax Expert" (size 34″ x 10″); 2 "Notary" (size 34″ x 6½″); and 3. "Open 8 A.M.—9 P.M." (size 19″ x 5″). Another sign read: "Free Parking for M. Stephen Libarian Clients While Visiting."

[1] The three signs on the signpost, the Board of Governors found, were "advertising signs." Petitioner argues that they were not erected to procure legal business but merely to identify him and indicate, as any lawyer might, the three lines of work, law, income tax, and notary, while the parking sign was erected merely for the convenience of clients. He refers to alleged conversations and correspondence with officials of the State Bar relative to signs of permissible size and character, and claims that the signs erected were tacitly, if not expressly, within approved specifications. But this entire argument is presented upon matters which are not admitted by the State Bar, and which do not appear in the record. The evidence of record sufficiently supports the board's classification of the signs as advertising signs.

[2] In January, 1944, in the name of "Libarian Tax Service by Stephen Libarian, Director," petitioner mailed approximately 5,800 postal cards, giving his address and office hours, calling attention to the last day for filing of the federal income tax return, suggesting the data necessary for preparing a return, and stating: "We'll appreciate it very much if you kindly come over before February 15, 1944. If you cannot come, your return could be prepared in your absence. * * * We have a staff of competent assistants. We guarantee the payments of the penalty and interest, should we fail to deliver your Return before the 15th day of March, 1944."

A large portion of these cards, the board found, was mailed to persons with whom petitioner was unacquainted otherwise then having previously done notarial work for them at his home and office, in the course of which he made it a practice to record the name and address of the caller. With others he was entirely unacquainted. In response to the sending out of the cards and because of the signs posted, the board further found, petitioner had a great many persons call upon him for the purpose of having their tax returns made out, and petitioner was thus able to "build up a lucrative tax practice whereupon he no longer remained interested in the straight practice of the law nor in the rules governing the professional conduct of lawyers."

Petitioner admits the mailing of the cards, about 4,800 of which bore the salutation "Dear Client:", and were sent, he states, to former clients, persons being classed as such by petitioner regardless of whether they came for notarial work, income tax work, or legal work. The remaining cards, about 1,000, bore the salutation "Dear Friend:", and with few exceptions, were sent to Armenians and Syrians who were former clients, friends, or acquaintances. With respect to this group, petitioner testified: "These dear friends of mine, almost all of them I know in person; if I don't know about a hundred of them, I know of them, I saw them someplace, and most of them are my clients." The reference on the postals to a "staff of competent assistants," petitioner states, meant his wife, who is a notary; himself, and from four to ten secretaries, or girls. By the fictitious name "Libarian Tax Service," for which no fictitious name certificate had been filed as required by law, petitioner referred to the partnership of his wife and himself. The postals, he asserts, were sent out mainly in answer to questions, to give information rather than to advertise, and they related only to income tax work.

Notwithstanding these protestations the board found that by the maintenance of the signs and mailing of the postcards, petitioner "intended to and did solicit employment as an attorney at law," in violation of rule 2 of the Rules of Professional Conduct. This finding and conclusion may reasonably be drawn from the record.

[3] The board also concluded that in carrying out a course of conduct interdicted by this court in Libarian v. State Bar, supra, and in wilfully disobeying and violating the order therein to refrain from the solicitation of employment and ad-

vertising contrary to the Rules of Professional Conduct, petitioner violated section 6103 of article 6 of the State Bar Act, St. 1939, p. 357; also that his acts and conduct violated his oath and duty as an attorney and constituted the commission of acts involving moral turpitude within the meaning of section 6106 of that act. The conduct of petitioner throughout the hearing, it was commented, made manifest to the committee that inasmuch as he had profited and materially advanced his financial position by erecting signs and sending out notices, the methods were not so important; also, his attitude indicated an utter disregard for the canons of ethics governing the subject of solicitation.

Although petitioner denies that he committed any act of moral turpitude or wilful disobedience, or that he ever intended to advertise himself as either an attorney or an income tax expert, or to otherwise violate the Rules of Professional Conduct, the denial cannot stand in the face of his admission that he read the opinion in Libarian v. State Bar, supra, at least once. The standard of conduct there demanded of him, regardless of whether at the moment he might be acting as notary, income tax expert, or lawyer, is set forth in terms too direct to be susceptible of misunderstanding. "If the petitioner should choose to continue as a practitioner at the bar of this state," this court said at page 865 of 21 Cal.2d, at page 323 of 136 P.2d, "he must comply with the standards of the legal profession. He should appreciate that when he is licensed to practice as an attorney at law, the professional services that he thus performs are performed by him as an attorney, whether or not some of the services could also be rendered by one licensed in a different profession. One who is licensed to practice as an attorney in this state must conform to the professional standards in whatever capacity he may be acting in a particular matter. Jacobs v. State Bar, 219 Cal. 59, 25 P.2d 401. As a practicing attorney, he may not solicit employment nor may he advertise contrary to the rules. The restrictions, limitations, and permissible conduct in those respects are familiar both to the lawyer and to the layman. They are published in the Code of Ethics and Rules promulgated by The State Bar, and they do not require reiteration here." See, also, Mayer v. State Bar, 2 Cal.2d 71, 39 P.2d 206.

It is ordered that the petitioner, M. (Manasse) Stephen Libarian, be and he is hereby suspended from the practice of the law in this state for a period of one year, commencing thirty days after the date of the filing of this opinion.

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25 Cal.2d 264

STOCKTON v. DEPARTMENT OF EMPLOYMENT et al.

Sac. 5639.

Supreme Court of California.

Nov. 24, 1944.

Rehearing Denied Dec. 21, 1944.

1. Officers 🔑103

When decision of State Personnel Board becomes final because aggrieved party has failed either to exhaust his administrative remedies or to seek judicial redress, courts will not review merits of controversy, if board acted within its jurisdiction.

2. Officers 🔑69

Under Civil Service Act authorizing lay-off of state employees because of lack of work or funds and providing that State Personnel Board, on employee's appeal, might order reinstatement if lay-off was improper, Board had jurisdiction to determine whether lay-off of Chief of Division of State Employment Agencies on abolition of the Division was improper. Gen. Laws Supp.1941, Act 1404, § 172(a, k); Gen.Laws 1937, Act 1404, § 35.

3. States 🔑67

The California Employment Commission, under Unemployment Insurance Act, had authority to create, abolish or recreate divisions in Department of Employment, and State Personnel Board was without jurisdiction to determine when or under what conditions divisions might be abolished. Gen.Laws 1937, Act 8780d, § 93; Pol.Code, § 350.

4. Officers 🔑69

The abolition of a division or position in state government does not automatically separate employees in division or employee in position from the state service. Gen. Laws 1937, Act 8780d, § 93; Gen.Laws Supp. 1941, Act 1404, § 172.

5. Officers 🔑69
States 🔑44

The creation and abolition of divisions or positions within a department are matters of departmental organization, but employment or lay-off of employees relates to tenure and is governed by State Civil Service Act. Gen.Laws 1937, and Supps. 1939, 1941, Act 1404, §§ 60–63, 110–126, 170–173.

6. Officers 🔑76

The abolition of position of Chief of Division of State Employment Agencies by abolition of the Division did not deprive State Personnel Board of jurisdiction to order reinstatement of holder of position, where duties of position were still being performed, but by persons not entitled to perform those duties. Gen.Laws 1937, Act 1404, §§ 60–63, 114; Gen.Laws Supp.1941, Act 1404, § 172(k).

7. Officers 🔑11

The State Personnel Board has exclusive jurisdiction to classify positions in the state civil service. Gen.Laws 1937, Act 1404, §§ 60–63; Const. art. 24, § 2(c).

8. Officers 🔑26(1)

When specifications of a class in the state civil service are adopted, employee within that class may perform only duties of that class, and an employee not in the class may not perform those duties. Gen. Laws 1937, Act 1404, § 114.

9. Officers 🔑76

Where State Personnel Board had determined that Chief of Division of State Employment Agencies had been improperly laid off and was entitled to reinstatement, and thereafter Division of Employment Agencies and all employees therein were inducted into employment of federal government, Chief of Division was entitled to be certified to federal government for induction into the federal service. Gen.Laws 1937, Act 1404, § 172(k).

10. Mandamus 🔑151(2)

Where Unemployment Act authorized Employment Commission to appoint Director of Department of Employment to perform duties required under Civil Service Act, director was the only "necessary party" to proceeding to compel reinstatement of Chief of Division of State Employment Agencies as directed by State Personnel Board, and it was unnecessary for Employment Commission to be made a party. Gen. Laws 1937, Act 1404, § 234; Act 8780d, § 88.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

11. Officers 🔑99

A civil service employee unlawfully deprived of his position is entitled to recover accrued salary for period he is prevented from performing his duties, less amount received from private or public employment during that period.

12. States 🔑59

On reinstatement of Chief of Division of State Employment Agencies after improper lay-off, amount received from public or private employment during period of lay-off was to be deducted in determining back salary to which he was entitled. Gen. Laws Supp. 1941, Act 1404, § 172(k).

◆

In Bank.

Appeal from Superior Court, Sacramento County; Raymond T. Coughlin, Judge.

Mandamus proceeding by Roy S. Stockton against the Department of Employment of the State of California and others to require the reinstatement of the petitioner to the position of Chief of the Division of State Employment Agencies with back salary. From a judgment for the petitioner, the respondents appeal.

Judgment affirmed in part and reversed in part with directions.

Prior opinion, 140 P.2d 147.

Earl Warren, Atty. Gen., and John J. Dailey, Deputy Atty. Gen., for appellants.

Anthony J. Kennedy and Carl Kuchman, both of Sacramento, for respondent

TRAYNOR, Justice.

From December 13, 1934, until June 14, 1940, petitioner held the position of Chief of the Division of State Employment Agencies, in the classified civil service of the state, with permanent civil service status. This division was originally in the Department of Industrial Relations, but was transferred on July 1, 1936, to the Department of Employment. On June 14, 1940, the California Employment Commission passed a resolution abolishing the division, combining its functions with those of the Director of the Department of Employment, and ordering the lay-off of petitioner. Petitioner's name was retained on the payroll until July 23, 1940, to enable him to receive compensation for his accumulated earned vacation time, and was placed on the lay-off list as of July 23, 1940. The State Personnel Board, on petitioner's appeal to it under section 172(k) of the State Civil Service Act, Stats.1937, p. 2085, as amended, Deering's Gen.Laws, 1941 Supp. p. 1918, Act 1404, held that the lay-off was improper on the ground that respondents failed to comply with section 172, and ordered petitioner's reinstatement with back salary. Respondents' petition for rehearing was denied. They made no attempt to test the validity of the Personnel Board's order in a judicial proceeding but refused to comply with it. A petition for a writ of mandamus was then filed with the Superior Court of Sacramento County to compel compliance with the board's order. Respondents demurred to this petition on the grounds that it did not state a cause of action and that there was a misjoinder of parties. The demurrer was overruled; the respondents answered; and upon the trial the court made findings in favor of petitioner and entered its judgment that a peremptory writ of mandamus issue directing the reinstatement of the petitioner in accord with the order of the Personnel Board. While the case was pending in the superior court, the Division of Employment Agencies and all employees therein were inducted into the employment of the federal government with civil service status. The Director of the Department of Employment refused to perform the acts necessary to effect petitioner's induction. The superior court's judgment included provisions that the director perform such acts. Respondents appeal from the judgment.

[1] Once the decision of the State Personnel Board becomes final because the aggrieved party has failed either to exhaust his administrative remedies or to seek judicial redress, the courts will not review the merits of the controversy, if the board acted within its jurisdiction, for the decision is then immune from objections in a collateral proceeding. Alexander v. State Personnel Board, 22 Cal.2d 198, 137 P.2d 433; Menzel Estate Co. v. City of Redding, 178 Cal. 475, 481, 174 P. 48; Gurtz v. City of San Bruno, 8 Cal.App.2d 399, 401, 48 P.2d 142; Inghram v. Union Stockyards Co., 8 Cir., 64 F.2d 390, 392. The question on this appeal therefore is whether the Personnel Board acted within its jurisdiction.

[2] Section 172(a) of the State Civil Service Act provides: "Whenever it is necessary because of lack of work or lack of funds or whenever it is advisable in the interests of economy to reduce the staff of any State agency, the appointing power may lay off employees according to the procedure set forth in this act and the rules of the board." Section 172 and rule 16, sections 1–14, of the "Rules and Regulations of the State Personnel Board" adopted pursuant to section 35 of the State Civil Service Act, Gen.Laws 1937, Act 1404, and article XXIV of the California Constitution, prescribe the procedure for the lay-off of employees. Section 172(k) of the State Civil Service Act provides: "Any employee may appeal to the board within 30 days of receiving notice of layoff on the grounds that the procedure herein prescribed has not been complied with or that the layoff has not been made in good faith or was otherwise improper. The board shall within 30 days of such appeal hold such hearing or investigation as it may deem necessary. The board may also conduct any such hearing or investigation within 30 days of receiving notice of layoff on its own motion. In rendering a decision as a result of any hearing or investigation held pursuant to this subdivision the board may order the reinstatement of the employee with or without pay if it appears that the proper procedure has not been followed or that the layoff was not made in good faith or was otherwise improper." Under these provisions the State Personnel Board clearly had jurisdiction to determine whether petitioner's layoff was improper.

[3] Respondents contend, however, that the abolition of the Division of Employment Agencies by the California Employment Commission entailed the abolition of petitioner's position, that his lay-off followed of necessity, and that the State Personnel Board had no jurisdiction to order his reinstatement to a position that no longer existed. Section 93 of the California Unemployment Insurance Act, Stats.1935, ch. 352, p. 1243, Deering's Gen.Laws 1937, Act 8780d, provides: "On July 1, 1936, the Division of State Employment Agencies of the Department of Industrial Relations shall become and remain the Division of

State Employment Agencies in the Department of Employment. All persons employed in such division and the records and property thereof shall, upon such change, become the employees, records and property of the Department of Employment. All persons employed in any capacity in such division shall continue and remain in such capacity in such division after the change, subject to the power of the commission as the governing body of the department to abolish such division, change old divisions or create new divisions, change duties and powers of such division, or impose upon it new and additional powers and duties." The resolution adopted by the California Employment Commission on June 14, 1940, provided in part: "The existing Division of State Employment agencies, as such, (otherwise known as the Division of Employment Service) of the Department of Employment is hereby abolished; and it is hereby ordered that lay-offs shall be made forthwith from the positions of offices of Chief and Associate Chief of said Division. The aforementioned lay-offs are hereby expressly declared to be for the purpose of economy and increased efficiency of operations." It is clear that the California Employment Commission had authority under section 93 of the Unemployment Insurance Act to create, abolish, or recreate divisions from time to time. There is nothing exceptional about such a power, for most state statutes creating departments contain provisions similar to section 93. Moreover, section 350 of the Political Code, a general provision applicable to all departments, authorizes the head of each department, with the consent of the Governor, to consolidate, abolish, or create divisions within the department. The State Personnel Board has no jurisdiction to determine when or under what conditions divisions may be abolished, for the State Civil Service Act contains no provision authorizing it to review the action of a state department in abolishing divisions in the department.

[4, 5] The abolition of a division or position, however, does not automatically separate the employees in the division or the employee in the position from the state service. The power of a department head to abolish a position is distinct from his power to lay off an employee, just as the creation of a position is distinct from the employment of a person to fill the position. The creation and abolition of divisions or positions within a department are matters of departmental organization. The employment or lay-off of employees relate to the tenure of employees, the classes of positions in the department, the duties to be performed by the individual employees, and the appropriate division of work between classes. The employment of persons to fill positions and their classification are governed by articles 4 and 7 of the State Civil Service Act, Gen.Laws 1937, Supps. 1939, 1941, Act 1404. The separation of employees from the state service, including their lay-off, is governed by article 9 (§§ 170–173). Section 170 provides that the tenure of a permanent employee holding a position shall be during good behavior and that the employee can be separated from the state service by lay-off, leave of absence, suspension, resignation, removal or retirement. Section 172 covers lay-offs, including lay-offs resulting from the abolition of positions. Subdivision (a) of that section specifically provides for the lay-off of employees whenever it is necessary because of lack of work or funds or whenever it is advisable in the interest of economy to reduce the staff of any state agency "according to the procedure set forth in this act and the rules of the board." Subdivision (b) provides that the duties performed by the employee or employees so laid off may be assigned to any other employee or employees in the state agency holding positions in appropriate classes. Subdivision (d) provides that the lay-off shall be made in accordance with the relative efficiency and seniority of the employee or employees of the class in which the lay-off is to be made as determined by seniority and by performance reports on file with the board. Subdivision (e) provides that in the case of abolition of position the employee or employees in the class under consideration having the lowest combined scores for efficiency and seniority shall be laid off up to the number of positions to be abolished. Subdivision (f) provides that when an employee has previously served the state with permanent status in any class below that of the class under consideration or its equivalent in any previous classification, the employee shall be afforded the option of being demoted to the lower class, in lieu of being laid off, to replace the employee in the lower class having the lowest score for efficiency and seniority if that score is lower than that of the employee being demoted. Subdivision (g)

provides that any employee replaced by such demotion who has previously served the state with permanent status in the class or its equivalent in any previous classification below that in which he was serving at the time of replacement shall have the same option of demotion as though his position were abolished. Subdivision (k), quoted above, provides for the appeal by the employee to the personnel board in the event of his lay-off.

It is plain from the foregoing provisions that the abolition of a position does not automatically result in the lay-off of the employee holding the position. If he is in the appropriate class of employees to which his duties would be assigned upon the abolition of his position, his efficiency and seniority ratings might be such that not he but some other employee in that class would be laid off. Section 172(b) (e). He may elect demotion pursuant to section 172(f), and in any event he is entitled to an appeal to the State Personnel Board to determine whether the prescribed procedure for his lay-off was followed and whether his lay-off was made in good faith and was otherwise proper.

In support of their contention that the abolition of petitioner's position effected his separation from the state service as a matter of law, respondents rely on Livingstone v. MacGilivray, 1 Cal.2d 546, 36 P.2d 622; O'Neill v. Williams, 53 Cal.App. 1, 199 P. 870; Foley v. City of Oakland, 33 Cal.App. 128, 164 P. 419; State v. City of Seattle, 74 Wash. 199, 133 P. 11, 4 A.L.R. 198, and People v. Hayes, 135 App.Div. 19, 119 N.Y.S. 808. None of those cases, however, involved the application of the State Civil Service Act. They all relate to statutes or city charters providing that no employee shall be removed except for cause, which shall be investigated, and that the employee shall be given the reasons for his suspension and an opportunity to answer them. They do not involve statutes or charter provisions, which, like the State Civil Service Act, prescribe a procedure in the case of separations from the service for reasons of economy. See 111 A.L.R. 438 and cases there cited including Kabisius v. Board of Playground and Recreation, 4 Cal. 2d 488, 50 P.2d 1040; Hrabak v. Los Angeles, 10 Cal.App.2d 383, 51 P.2d 1136. In contract to such provisions, the State Civil Service Act has broadened the protection to state employees by including in the statutory plan, distinct from any procedure concerning discipline, a special lay-off procedure in the event the separation of the employee from the service is occasioned by the abolition of positions or other economy measures.

[6-9] Section 172(k) of the State Civil Service Act provides that "in rendering a decision as a result of any hearing or investigation held pursuant to this subdivision the board may order the reinstatement of the employee with or without pay if it appears that the proper procedure has not been followed or that the layoff was not made in good faith or was otherwise improper." The abolition of a position by the respondents does not affect the State Personnel Board's power to order the reinstatement of the former holder of the position where the duties of his position are still performed but by persons who, according to the classifications made by the board under the State Civil Service Act, are not entitled to perform those duties. The State Personnel Board has exclusive jurisdiction to classify positions in the state civil service. Cal.Const. art. XXIV, § 2(c); State Civil Service Act, §§ 60–63. When specifications of a class are adopted, the employee within that class may perform the duties of that class; he may not perform the duties of a different class; nor may an employee who is not in that class perform those duties. State Civil Service Act, § 114. In the memorandum of points and authorities filed by the board as amicus curiae at the request of the trial court, the board has set forth that petitioner's position was in a class that required the performance of certain specified duties listed in the complaint. The board takes the position that no other employee could perform those duties and that after the abolition of petitioner's position the duties were illegally performed by other persons, making it necessary for the board to order the reinstatement of petitioner. Whatever the merits of the board's decision, which we do not pass upon in this attack upon its order, it is clear that the abolition of the position did not deprive the board of jurisdiction to order petitioner's reinstatement under section 172(k) of the State Civil Service Act. The board has determined that petitioner's lay-off was improper and that his employment in the state service was not terminated. Since the branch of the service in which he was employed has meanwhile become part of the federal service, petitioner is entitled under the board's order to be

certified to the federal government for induction into the federal service on the basis of his former position.

[10] Respondents contend that petitioner cannot have relief by mandamus against the Department of Employment, its executive director, and the other respondents, on the ground that the California Employment Commission, which abolished petitioner's position and instructed the Director of the Department of Employment to order the lay-off, is an indispensable party to the action. Pursuant to section 88 of the Unemployment Act the Employment Commission appointed a Director of the Department of Employment and authorized him "to perform or supervise the performance of all duties required under the Civil Service Act and the rules and regulations of the State Personnel Board with the assistance of the departmental personnel officer." Such an authorization is recognized for the purposes of the Civil Service Act by section 234 thereof providing: "Whenever, by the provisions of this act, a power is granted or a duty imposed upon an appointing power, the power may be exercised or the duty performed by a deputy of the appointing power or by a person authorized pursuant to law by him, unless it is expressly otherwise provided." Under the appointment of the Employment Commission, the director was the head of the Department of Employment vested with all duties relating to the state civil service and was therefore the only necessary party defendant to carry out the order of the State Personnel Board and the order of the court. See Barber v. Mulford, 117 Cal. 356, 49 P. 206; City and County of San Francisco v. Linares, 16 Cal.2d 441, 106 P.2d 369; Taylor v. Burks, 6 Cal.App. 225, 91 P. 814; Tape v. Hurley, 66 Cal. 473, 6 P. 129. See, also, California Securities Co. v. State, 111 Cal.App. 258, 261, 295 P. 583.

[11, 12] The trial court ordered the allowance of petitioner's full salary from July 20, 1940, with no deduction of remuneration from private or public employment that he may have received since that date. It is settled that a civil service employee who has been unlawfully deprived of his position is entitled to recover the amount of his accrued salary during the period he is prevented from performing his duties, less the amount he has received from private or public employment during that period. State Board of Equalization v. Superior Court, 20 Cal.2d 467, 474, 127 P.2d 4; Wiles v. State Personnel Board, 19 Cal.2d 344, 121 P.2d 673; Kelly v. State Personnel Board, 31 Cal.App.2d 443, 88 P.2d 264. The order of the State Personnel Board that petitioner "be granted his salary" from and after July 20, 1940, must be interpreted in the light of this rule. That part of the judgment of the trial court determining the amount of salary due petitioner for the period since July 20, 1940, is reversed, and the trial court is directed to take evidence as to the remuneration received by petitioner from private or public employment after July 20, 1940, and to deduct any amount so received from the monthly salary for the period covered by such employment, and to enter judgment for petitioner for any balance. In all other respects the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, and SCHAUER, JJ., concur.

Rehearing denied; EDMONDS, J., dissenting.

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25 Cal.2d 353

UNIVERSAL CONSOL. OIL CO. et al. v. BYRAM, County Tax Collector.

LONG BEACH HARBOR OIL CO. v. SAME.

L. A. 18121, 18122.

Supreme Court of California.

Dec. 5, 1944.

Rehearing Denied Dec. 28, 1944.

1. Taxation 🔑453

The county board of equalization, and not courts, has duty to determine property value for assessment purposes. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

2. Taxation 🔑468

Value of property for assessment purposes is to be determined by county board of equalization upon basis used with other property so as to make all assessments as equal and fair as is practicable. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

3. Taxation 🔑490

A county board of equalization's determination of assessment value is conclusive, unless board has proceeded arbitrarily, or unless there is something equivalent to fraud. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

4. Taxation ⚿490

Where a county board of equalization acted without regard for evidence and denied applications for reduction of valuations on ground applications presented a legal question for court's determination, board did not perform its duty to equalize valuation of taxable property. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

5. Taxation ⚿480

A determination by two, rather than three, members of a five-member county board of equalization, to deny applications for reduction of valuations of oil leases, was not valid under statute requiring a majority of board to act. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

6. Taxation ⚿486

The constitutional right to an equalization hearing by a county board on an application for reduction of valuation for any ad valorem tax includes a decision, in light of evidence introduced, to make determination final and prevent recourse to courts. St. 1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

7. Taxation ⚿480

Each step of a tax proceeding, which is in invitum in nature, including a proceeding on an application before a county equalization board for reduction of valuations, must be taken in compliance with law or the proceeding is void. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

8. Taxation ⚿486

Compliance with constitutional requirement for an equalization hearing by county board is not met unless substance as well as form of hearing is granted. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

9. Taxation ⚿490, 493(8, 9), 543(9)

A county board of equalization's failure, in denying application for reduction of value of oil leasehold interests, to determine application in view of evidence, did not authorize court to determine the conflicting issues of fact relating to value, and proceedings were remanded to the board. St.1939, p. 1301, § 1601 et seq.; Const. art. 13, § 9.

10. Taxation ⚿608(4)

Where a county board of equalization denied applications for reductions of valuations of oil leasehold interests on erroneous ground, owners of leases could enjoin collection of the taxes until board had properly determined applications. St.1939, p. 1301, § 1601 et seq.

11. Taxation ⚿452

The statute limiting life of a county board of equalization is directory only and does not prohibit board from passing upon matters within its jurisdiction in completion of its work after expiration of prescribed time. St.1939, p. 1302, § 1603.

12. Taxation ⚿610

Where oil leasehold interest owners deposited in court money as a condition of their applications for injunctions to restrain collection of taxes pending final determination of applications to a county equalization board for reduction of valuations, court, after proceedings were remanded to board, was authorized to retain money pending determination of the proceedings.

TRAYNOR, J., dissenting in part.

In Bank.

Appeals from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Actions by the Universal Consolidated Oil Company and the Long Beach Harbor Oil Company against H. L. Byram, as County Tax Collector, etc., to enjoin collection of taxes and have court revalue plaintiffs' leasehold interests for assessment purposes, wherein estimated sums due as taxes were deposited in court, the actions were consolidated for trial, and stipulations were made at trial. From separate judgments for plaintiffs, defendant appeals.

Judgment reversed with directions.

Prior opinion 139 P.2d 54.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and A. Curtis Smith and Gordon Boller, Deputy Co. Counsels, all of Los Angeles, for appellant.

Faries & McDowell, Holbrook & Tarr, C. E. McDowell, and W. Sumner Holbrook, Jr., all of Los Angeles, for respondents.

CURTIS, Justice.

Universal Consolidated Oil Company and Long Beach Harbor Oil Company duly filed with the Board of Supervisors of the County of Los Angeles, sitting as the board of equalization for said county, applications for reduction of the valuations placed by the assessor for the year 1940–1941 upon certain of their oil leases in the Long Beach Harbor-Wilmington Field. The applications were denied by the board, and the oil companies thereupon commenced these actions to enjoin collection of the taxes and to have the court revalue the leasehold interests for assessment purposes. As the premise of their respective claims to relief, the plaintiffs charged that the particular method of assessment used in relation to their leases produced valuations which were unfair, unjust and excessive as compared with other property holdings of substantially the same character and value and similarly situated in the county, and so imposed an unequal burden upon the complainants; that the clear purport of the testimony presented at the hearing before the board established these matters as proper cases for equalization, but that the board, in its summary denial of the applications for reduction, intentionally failed and refused to consider the evidence before it and, in disregard thereof, expressly, deliberately, and wilfully withheld decision of the questions of fact in issue; and that their constitutional rights to due process and equal protection of the laws have thereby been invaded. In their individual complaints the plaintiffs also recited their tender to the tax collector, and his rejection, of certain amounts which they estimated as properly representative of the taxes due for the year in question under a fair valuation of their leases, and such sums, together with the respective balances purportedly owing upon the basis of the assessed values, were deposited in court as a condition to the issuance of temporary injunctions in restraint of the collection of the challenged taxes pending the final determination of these matters. County of Los Angeles v. Ballerino, 99 Cal. 593, 597, 32 P. 581, 34 P. 329; County of Los Angeles v. Ransohoff, 24 Cal.App.2d 238, 245, 74 P.2d 828. The defendant tax collector in his respective answers denied the material charges of the complaints as to the illegality of the method of computing the taxes in question and the failure of the board to determine the points in controversy upon the merits.

The actions were consolidated for trial, and there was introduced in evidence the applications for reduced valuations as mentioned, the reporter's transcript of the testimony at the hearing before the board, and certain exhibits there presented. In addition, further evidence was introduced, over the objection of the defendant, as to the assessor's method of assessment of the leases in question and as to the relative value of the plaintiffs' and adjacent leasehold interests. It was stipulated at the trial that it was the general method of assessment in Los Angeles County in 1940 to assess leasehold interests as here involved "at not to exceed 50 per cent of their market value." Counsel for the parties also agreed by stipulation as to the then prevailing tax rate for such property holdings. After a full hearing in these cases, the trial court found in favor of the plaintiffs on all material issues in dispute and made considerable reductions in the challenged valuations. The taxes on the leasehold interests were then computed at the stipulated rate, and the clerk of the court, from the moneys previously deposited with him by the plaintiffs, was directed to pay the amounts so calculated as a full discharge of the disputed tax claims and to refund to the plaintiffs the respective segregable balances remaining. From the separate judgments so entered in favor of the plaintiffs, the defendant has appealed. As heretofore consolidated, the cases are presented on appeal upon one record and involve identical questions.

[1-3] The principal point in controversy between the parties concerns the propriety of the plaintiffs' recourse to the court for relief from the adverse determination of the county board of equalization. It must be conceded, of course, that it is well settled in this state that to the authorized county board of equalization has been confided the duty of determining "the value of the property under consideration for assessment purposes upon such basis as is used in regard to other property, so as to make all the assessments as equal and fair as is practicable"; that in discharging this duty, "the board is exercising judicial functions, and its decision as to the value of the property and the fairness of the assessment, so far as amount is concerned, constitutes an independent and conclusive judgment of the tribunal created by law for the determination of that question," adjudicating necessarily that "the property is assessed at the same value proportionately as all the other property in the county"; that such adjudication "cannot be avoided, unless the board has proceeded 'arbitrarily and in willful disregard of the law intended for

their guidance and control, with the evident purpose of imposing unequal burdens upon certain of the taxpayers' * * * or unless there be something equivalent to fraud in the action of the board"; and that "Mere errors in honest judgment as to the value of the property will not obviate the binding effect of the conclusion of the board." Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 169, 170, 121 P. 384, 386, 9 A.L.R. 1277; see, also, Southern Pac. Land Co. v. San Diego County, 183 Cal. 543, 546, 191 P. 931; Birch v. County of Orange, 186 Cal. 736, 741, 200 P. 647; Wild Goose Country Club v. County of Butte, 60 Cal. App. 339, 342, 212 P. 711; Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 477, 478, 284 P. 1072; Montgomery Ward & Co. v. Welch, 17 Cal.App.2d 127, 132, 61 P.2d 790; Southern California Tel. Co. v. Los Angeles County, 45 Cal.App.2d 111, 116, 117, 113 P.2d 773. While not classifiable with any aspect of fraud or bad faith, the lack of due process distinguishing the procedural phase of these equalization matters as submitted to the board furnishes an equally appropriate basis for the court's intervention in protection of the plaintiffs' constitutional rights.

From the transcript of the proceedings before the board, which was in evidence at the trial, it appears that on July 18, 1940, testimony in these cases was presented before three members: Supervisors Jessup, Hauge and McDonough; that at the termination of the oral hearing the matters were taken under advisement; and that a final ruling on the applications was made on August 1, 1940, at a formal meeting of the board, when, in addition to the above-named members, Supervisors Ford and Smith were also present, neither of whom had attended the previous hearing nor heard the testimony. Two other applications were before the board at the same time for disposition; namely, those of Signal Oil & Gas Company, No. 268, and Long Beach Oil Development Company, No. 269. At this final meeting, when neither the complainants nor their counsel were present, the following colloquy incident to the denial of the applications in question took place:

"Chairman Jessup: Signal Oil & Gas Company, No. 268, and Long Beach Oil Development Company, No. 269.

"Mr. McDonough: This is a possessory interest?

"Mr. Ford: I was not in on this.

"Mr. Smith: 1–2 and 5.

"Mr. McDonough: This is in the same situation as Signal.

"Mr. Smith: Yes.

"Mr. McDonough: They are both alike.

"Mr. Smith: Signal Oil & Gas Company and the Universal Oil Company and Long Beach Oil Company.

"Mr. McDonough: There is a legal question involved here.

"Mr. Smith: I think they appeared only to protect their rights in court and made very little showing and I think we should deny it.

"Mr. McDonough: Well, I still think we should have an opinion of the County Counsel attached to the application for the advice of the Board and also in the event it is pursued in court.

"Mr. Smith: It is in court right now.

"Mr. McDonough: Let's set it aside for a moment.

"Mr. Smith: I made a statement during the hearing. * * *

"Chairman Jessup: Now, on the Signal Oil & Gas Company, No. 268, Long Beach Oil Development Company, No. 269, Universal Oil Company, No. 1020, and Long Beach Harbor Oil Company, No. 1021.

"Mr. McDonough: Mr. Boller [Deputy County Counsel] is here.

"Mr. Boller: Yes.

"Mr. McDonough: Now, these oil applications that we heard, they indicated that the applications show a contractor's lease with the land owners for the purpose of drilling of wells.

"Mr. Boller: Yes, on Signal Oil & Gas and Long Beach Oil Development Company.

"Mr. Smith: Universal and Long Beach Harbor Oil Company were similar.

"Mr. Boller I think the two were the only ones Mr. Holmes handled.

"Mr. McDonough: Holmes appeared for—

"Mr. Boller: For Signal Oil & Gas Company and the Long Beach Oil Development Company.

"Mr. Smith: Didn't you make a statement at the time of the hearing that they were here appearing in regard to protecting their rights?

"Mr. Boller: That was as to the Signal Oil & Gas and the Long Beach Oil Development Company only.

"Mr. Smith: The other two would be the same.

Mr. Boller: There is no question but what that is so on the two cases Mr. Holmes presented.

"Mr. Smith: I move that the Long Beach Oil Development Company—

"Mr. McDonough: Wait a minute, I want to ask Mr. Boller would it help the case any if it was referred to the County Counsel.

"Mr. Boller: No.

"Mr. Smith: Move that it be denied.

"Mr. Boller: On the Long Beach Oil Development Company the application was for cancellation and was heard in the same hearing and is to be acted upon by the Board of Supervisors.

"Mr. McDonough: That is another application on a case coming to us.

"Mr. Boller: You have answered on that.

"Mr. Smith: I move that the Signal Oil & Gas Company be denied.

"Chairman Jessup: So ordered.

"Mr. Smith: I move that the Long Beach Harbor Oil Company be denied and Universal Oil Company No. 1020 be denied.

"Chairman Jessup: So ordered.

"Mr. Smith: That these four be denied.

"Chairman Jessup: So ordered.

"Mr. McDonough: *On these matters it is a legal question to be determined by the Court rather than a matter of equalization.*

"Mr. Boller: It is essentially so in the Signal Oil & Gas Company and the Long Beach Oil Development Company cases. It seems to me the others were factual in their showing.

"Mr. Smith: It is the same thing, they have a lease and are being assessed on their interests. They have a contract and are being assessed as though it were a lease. They are protecting their interest and in case the Long Beach Oil Development Company and the other one should win in court, these people are in the same position.

"Mr. Boller: Their agreement is not as carefully drawn up with the thought of not being taxable as a lease.

"Mr. Smith: Yes, the résumé they attach is exactly the same.

"Mr. Boller: I didn't look at them.

"Mr. McDonough: *The basis is the determination of a legal question rather than an appeal on a question of equalization.*

"Mr. Boller: It is so as to Signal and the Long Beach Oil Development Company." (Italics added.)

[4, 5] From this quoted portion of the record of the board proceedings, it is clear that two members (McDonough and Smith), one of whom had neither heard nor been advised as to the evidence adduced with regard to the two matters here in question, expressed their distinct understanding that they were passing upon four applications which presented wholly a point of law to be settled by the court rather than matters of equalization. Despite the advice of the deputy county counsel herein concerned that the plaintiffs' applications raised factual issues before the board, the said members adhered to the belief that all four oil companies were urging like objections to the assessed valuations of their respective properties and that if the complainants Signal Oil & Gas Company and Long Beach Oil Development Company should prevail in court upon the legal proposition which they advanced in their equalization hearing, the plaintiffs also would be sustained upon the same premise, which apparently rested on the claim that the particular form of contract employed would render them entirely exempt from taxation on their holdings. No such argument had ever been made by the plaintiffs; rather, they had conceded from the outset that their leasehold interests were taxable, query simply having been raised as to the legality of the method of assessment followed in their cases. The plaintiffs had not been notified that their applications were to be considered at this final meeting, their counsel accordingly were not present, and they had no opportunity to clarify the evident confusion in the minds of the board members as to the issues involved. While three of the board members, as above noted, had heard extensive testimony as to valuation bases with respect to the plaintiffs' leases, apparently at the subsequent formal meeting of the board they did not correlate this prior hearing of factual evidence with the plaintiffs' applications. Thus, at the final meeting Supervisor Ford did not participate; Supervisors Smith and McDonough expressed their mistaken views as above recited; and Supervisors Jessup and Hauge, in failing to deny any of the incorrect statements made incident to the adverse ruling upon the plaintiffs' applications, manifestly acquiesced therein upon the same erroneous premise. Such affirmative showing in the record that

the board acted without regard for the evidence before it overcomes the presumption that it performed its official duty "to equalize the valuation of taxable property in the county." Humboldt County v. Dinsmore, 75 Cal. 604, 607, 608, 17 P. 710; Hagenmeyer v. Board of Equalization, 82 Cal. 214, 218, 23 P. 14; Rancho Santa Margarita v. San Diego County, 135 Cal.App. 134, 143, 26 P.2d 716. But even if it were reasonable to assume that the silence of Supervisors Jessup and Hauge at the final meeting on these matters did not demonstrate their acquiescence in the confused views of their associates but that, on the contrary, they, as the result of attendance at the first hearing, had the character of the plaintiffs' applications firmly in mind when they joined in the adverse decision thereon, still such determination by *two* rather than three qualified members (McDonough, Jessup and Hauge) of the tribunal authorized to equalize assessments would not satisfy the statutory requirement that at least a *majority* of the board must act upon the evidence presented. Bandini Estate Co. v. Los Angeles County, 28 Cal.App.2d 224, 229, 230, 82 P.2d 185.

[6-8] The fundamental premise of the plaintiffs' recourse to the court for relief rests upon the proposition that, as with any ad valorem tax, their constitutional right to an equalization hearing comprehends a decision *in the light of the evidence there introduced* before any determination becomes final as to them. Bandini Estate Co. v. Los Angeles County, supra, 28 Cal.App. 2d page 230. 82 P.2d 185, Londoner v. Denver, 210 U.S. 373, 386, 28 S.Ct. 708, 52 L.Ed. 1103. As any tax proceeding is in invitum in nature, each step must be taken in compliance with law or the proceeding is void. The equalization stage is no exception to this rule. Compliance with the constitutional requirement for an equalization hearing is not met unless the substance as well as the form of the hearing is granted to the complaining taxpayer. Bandini Estate Co. v. Los Angeles County, supra, 28 Cal.App.2d page 227, 82 P.2d 185. Typical illustrations of the denial of procedural due process which have been held to invalidate purported equalization determinations are: One man hearings (Bandini Estate Co. v. Los Angeles County, supra, 28 Cal.App.2d pages 228–230, 82 P.2d 185); the taking of evidence without the presence of the taxpayer or his representative (Carstens v. Pillsbury, 172 Cal. 572, 577, 158 P. 218; Bandini Estate Co. v. Los Angeles County, supra, 28 Cal.App.2d page 231, 82 P.2d 185); the refusal to allow reasonable opportunity for cross-examination (Interstate Commerce Comm. v. Louisville & Nash. R. R., 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431); the refusal to permit reasonable argument (Londoner v. Denver, 210 U.S. 373, 386, 28 S.Ct. 708, 52 L.Ed. 1103); reliance in the concluding steps upon the advice of the assessor or the assessor's attorney, particularly if done secretly (Morgan v. United States, 304 U.S. 1, 19, 20, 58 S.Ct. 773, 82 L.Ed. 1129); and the attempted determination of a case by members of the board who did not hear the evidence, if their vote be necessary to the determination (Hawkins v. Grand Rapids Common Council, 192 Mich. 276, 291, 292, 158 N.W. 953, Ann.Cas.1917E, 700).

In line with these instances of the denial of procedural due process are the present cases. The *concluding steps* of the equalization proceeding are many times the most essential to the preservation of the taxpayer's rights. Thus, in Morgan v. United States, supra, it is pertinently said in this regard (304 U.S. 20, 58 S.Ct. page 777, 82 L.Ed. 1129): "The requirements of fairness are not exhausted in the taking or consideration of evidence, but extend to the *concluding parts* of the procedure as well as to the beginning and intermediate steps." (Italics added.) Adverting to the above recited conduct of the board at its final meeting with respect to the plaintiffs' applications, it is plain that there was *no adjudication as to the facts in issue* and no consideration of the evidence or the merits of the objections raised. The decision of the board was simply that it had nothing to decide, and it accordingly failed to function as an equalization tribunal. In the light of its mistaken understanding as to the factual background of the applications before it for appropriate disposition, the consequences of the board's omission to act upon the evidence presented were just as disastrous to the plaintiffs' cases as would have been the board's refusal to take jurisdiction of the proceedings or to accord the plaintiffs a hearing.

[9-11] But the mistake of the board in the respect noted does not sanction the court's undertaking to resolve the conflicting issues of fact bearing upon the taxable value of the plaintiffs' leasehold interests. As appears from the numerous authorities cited in the forepart of this opinion, the respective county board of equalization is the fact-finding body designated by law to remedy excessive assessments (Cal.Const. art. XIII, § 9), and when that tribunal, after due hearing and within the limits of reasonable discretion, makes its *findings on the facts,* such decision is final and conclusive. The present cases involve a dispute as to the proper method of assessment of plaintiffs' property interests, there was a conflict in the evidence on that issue as presented to the board, and that tribunal should decide the merits or demerits of the complaint before it. It is essential to the performance of governmental functions that an orderly system of assessment and collection of taxes shall be maintained, and that the amounts of the assessments be fixed with certainty in a prescribed manner. The prevailing statutory scheme in this state on equalization matters provides for a method of reviewing the values fixed by the assessor and a tribunal to pass upon any claims of overvaluation. Rev. & Tax.Code, § 1601 et seq., St. 1939, p. 1301. While considerations of procedural due process here nullify the force of the authorized tribunal's ruling and sustain its avoidance by the court in response to the plaintiffs' applications for relief therefrom, the intent of the law governing equalization proceedings would require that these cases be remanded to the board for completion upon the basis of the evidence submitted at the hearing before it. True, the life of a board of equalization is limited by statute (Rev. & Tax.Code, § 1603), but that provision is directory only and does not deflect from the statutory scheme that the authorized tribunal pass upon matters properly within its jurisdiction though in the *completion* of its work it must act at a time beyond the prescribed period. Buswell v. Board of Supervisors of Alameda County, 116 Cal. 351, 354, 48 P. 226; Whiting Finance Co. v. Hopkins, 199 Cal. 428, 436, 249 P. 853. While in the case of Bandini Estate Co. v. Los Angeles County, supra, upon establishment of the invalidity of the equalization proceeding by reason of defects in the composition of the board and in the conduct of the hearing amounting to a lack of procedural due process, "it [was] ordered that the judgment [against the taxpayer] be reversed, and the cause remanded to the trial court to ascertain the proper values of the various parcels in question, and determine the amount of the taxes due thereon" (28 Cal.App.2d page 232, 82 P.2d page 190), it does not appear from the opinion, with but such passing treatment of the point, that the question of the proper tribunal to which valuation issues for purposes of assessment should first be submitted was there raised or received considered judgment. Insofar as the quoted language is contrary to the views herein expressed, it must be disapproved.

The foregoing discussion renders it unnecessary to consider other propositions presented on these appeals relative to the conduct of the trial incident to the court's determination of the merits of plaintiffs' equalization claims.

[12] The judgment is reversed with directions to the trial court to remand these matters to the Los Angeles County Board of Equalization for further consideration and action in accordance with due process of law. It is also ordered that the money placed on deposit herein by the plaintiffs as representative of their tax liability under the assessed valuations of their property interests and as a condition of their application for equitable relief, be retained by the court pending the determination of these equalization matters by the board. While on this point the present cases present a peculiar question of procedure, "There is nothing particularly unusual or contrary to good practice for the court, in the exercise of its equity powers, to retain jurisdiction of the parties and the subject-matter of the action, when the circumstances of the case warrant the same, until the appropriate remedy may be finally accorded by the judgment in the action" (Murphy v. Bucke's Department Store, 199 Cal. 194, 198, 248 P. 668, 669), and upon analogous reasoning a like principle should prevail here to assure justice to all parties concerned. Accordingly, the final disposition of these cases must await the board's ruling on the merits of the plaintiffs' claims and the court's disbursement of the fund on deposit herein in conformity with the terms thereof.

SHENK, SCHAUER, and EDMONDS, JJ., concurred.

CARTER, J., concurred in the judgment of reversal.

TRAYNOR, Justice (concurring and dissenting).

I concur in the first six paragraphs of the majority opinion and in the conclusion that a taxpayer has no right to a trial de novo in the superior court to resolve the conflicting issues of fact as to the taxable value of his property. In my opinion, however, the record of the board of equalization proceedings discloses nothing to indicate that plaintiffs were denied due process of law.

In their complaint to the county board of equalization plaintiffs contended that the assessments of their properties were excessive because the assessor had used a discriminatory method of determining value. On July 18, 1940, they had a hearing before three members of the board of equalization. Their expert testified that the assessed value should have been arrived at by a volumetric method applied on an acreage basis. The assessor's method was based on production value of existing wells, which was explained by his oil valuation engineer. The board of equalization accepted the latter's testimony and denied relief to plaintiffs. Constructive fraud cannot be predicated on that acceptance. Los Angeles, etc., Co. v. County of Los Angeles, 162 Cal. 164, 169, 170, 121 P. 384, 9 A.L.R. 1277; Birch v. County of Orange, 186 Cal. 736, 741, 200 P. 647.

The majority opinion is based, not on what occurred at the hearing on July 18th, but on what occurred when the matters came up for decision at the formal meeting of the board of August 1, 1940. Equalization matters in Los Angeles County are customarily heard by three board members, different groups of three sitting on different days. Many cases are taken under submission and called up for decision when all five members of the board are present so that all submitted matters ready for decision can be passed upon at one time. If a fourth or fifth member should vote upon an application that he did not hear, his vote must be disregarded, but that would not invalidate the proceeding. The transcript of the board proceedings shows that when the two applications in these cases were called up for decision, there were two other applications involving other oil properties heard by different board members, one of whom was Supervisor Smith. The record discloses that he made no remarks designed to influence the three board members who heard the evidence in the present cases and voted to deny the applications.

There was nothing improper in the attendance at the board meeting of the deputy county counsel who represented the assessor. The record discloses that he did nothing to influence the vote of any member of the board.

There is no merit in the contention that the board intentionally withheld any judgment for the purpose of submitting the matter later in court. According to the record Supervisor McDonough was simply not convinced that plaintiff's property had been improperly assessed and was of the opinion that whatever remedy the taxpayer might have must be through the courts. Even if his reasoning was erroneous, and the decision in which he joined was based on it, the decision would not violate due process any more than would an erroneous judgment of any court. Gray v. Hall, 203 Cal. 306, 317, 265 P. 246; Patterson v. Colorado, 205 U.S. 454, 461, 27 S.Ct. 556, 51 L.Ed. 879, 10 Ann.Cas. 689; Abbott v. National Bank of Commerce, 175 U.S. 409, 414, 20 S.Ct. 153, 44 L.Ed. 217; Jones v. Buffalo Creek, etc., Co., 245 U.S. 328, 329, 38 S.Ct. 121, 62 L.Ed. 325; Central Land Co. v. Laidley, 159 U.S. 103, 110, 112, 16 S.Ct. 80, 40 L.Ed. 91; Worcester County Trust Co. v. Riley, 302 U.S. 292, 299, 58 S.Ct. 185, 82 L.Ed. 268.

The majority opinion declares that "while three of the board members, as above noted, had heard extensive testimony as to valuation bases with respect to plaintiffs' leases, * * * they did not correlate this prior hearing of factual evidence with the plaintiffs' applications." There is nothing in the record to indicate that the three members who heard the evidence did not correlate it with the plaintiffs' applications. Having no special insight into the mental processes of the board members this court cannot determine that they failed to correlate plaintiffs' applications and the evidence heard in the previous hearing. Indeed, the presumption is that they did. Utah Construction Co. v. Richardson, 187 Cal. 649, 654, 203 P. 401; Savings & Loan Soc. v. San Francisco, 146 Cal. 673, 678, 80 P. 1086; Hannon v. Madden, 214 Cal. 251, 267, 5 P.2d 4; Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 342, 212 P. 711; Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 478, 284 P. 1072; Great Northern R. R. Co. v. Weeks, 297 U.S. 135, 56 S.Ct. 426, 80 L.Ed. 532, 536. It must therefore be concluded that the evidence failed to convince them that the assessments were improper. There is no requirement that the board members give written opinions in the cases before them or set forth orally the mental processes that prompted their conclusions. Indeed, there can be no inquiry into those processes to impeach their decision. Chicago, B. & O. Ry. Co. v. Babcock, 204 U.S. 585, 593, 27 S.Ct. 326, 51 L.Ed. 636. Nor can their written or oral expression of opinion be used for that purpose. "To hold that oral or written opinions or expressions of judges of trial courts may be resorted to to overturn judgments would be opening the door to mischievous and vexatious practices." De Cou v. Howell, 190 Cal. 741, 751, 214 P. 444, 448.

Moreover, the decision of the board was made by three members. Only one member's expression of opinion is attacked. There is nothing in the record to indicate that the majority shared his view. The prevailing opinion states that "Supervisors Jessup and Hauge, in failing to deny any of the incorrect statements made incident to the adverse ruling upon the plaintiffs' applications, manifestly acquiesced therein upon the same erroneous premise." Supervisor McDonough was speaking for himself, and his statement was no more binding on the other members of the board than statements from the bench by one member of this court would be on the other members, in ruling on motions or during oral arguments. Each member may have his own reasons for his vote and may not only disagree with the statements of the others but interpret them differently. Otherwise members of any judicial body would be constrained to deny all statements of their colleagues with which they disagreed, and the consequence would be interminable hearings.

There is no question in this case that plaintiffs had a fair hearing before an appropriate tribunal, as required by the due process clause. None of the charges is sufficient ground to set aside a judgment of a superior court or any other court. There is no reason why they should suffice to set aside the decision of a quasi judicial body like the local board in this case. See Laisne v. California State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457.

CARTER, Justice (concurring).

I concur in the judgment of reversal but there is much in the majority opinion with which I do not agree. In my opinion the plaintiffs have not pursued the proper remedy to obtain the relief which they are seeking, assuming that they are entitled to such relief. The proper remedy for a taxpayer to pursue where he asserts that there has been a gross and discriminatory overvaluation of his property after seeking relief from the board of supervisors sitting as a board of equalization, or where he claims that he has been denied procedural due process of law by the board, as in the instant case, is to apply for certiorari to the superior court to review the board's action. As stated in the majority opinion the board is a local one exercising judicial functions and therefore its action should be subject to review the same as other local boards or commissions exercising judicial functions. The appropriate remedy to question the action of such boards is certiorari. See Bayside Land Co. v. Dolley, 103 Cal.App. 253, 284 P. 479; Huntley v. Board of Trustees, 165 Cal. 298, 131 P. 859; Birch v. Board of Supervisors, 191 Cal. 235, 215 P. 903; Imperial Water Co. No. 1 v. Board of Supervisors, 162 Cal. 14, 120 P. 780; Miller & Lux v. Board of Supervisors, 189 Cal. 254, 208 P. 304; Drummey v. State Board of Funeral Directors & Embalmers, 13 Cal.2d 75, 87 P.2d 848; Standard Oil Co. v. State Board of Equalization, 6 Cal.2d 557, 59 P.2d 119; Laisne v. State Bd. of Optometry, 19 Cal.2d 831, 123 P.2d 457. There is nothing in Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072, County of Los Angeles v. Ballerino, 99 Cal. 593, 32 P. 581, 34 P. 329, or County of Los Angeles v. Ransohoff, 24 Cal.App. 2d 238, 74 P.2d 828, contrary to the propriety of certiorari in such cases. In the Hopkins case it was merely assumed without discussion that an action for an injunction was the proper remedy. In the other two cases the court merely held that the assessment could be questioned by way of defense to an action by the county for the taxes. In Pacific Postal, etc., Cable Co. v. Dalton, 119 Cal. 604, 51 P. 1072, the court was really concerned with whether or not the complaint stated sufficient facts and not whether injunction was a proper remedy. By way of dictum it quotes from County of Los Angeles v. Ballerino, supra, which was also dictum. In Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194, the statement was made in the concurring opinion and even so was dictum inasmuch as the proceeding was for prohibition.

In Las Animas, etc., Land Co. v. Preciado, 167 Cal. 580, 140 P. 239, the court was concerned with a wholly unauthorized tax and not a review of the decision of the board of equalization. The same is true of Esterbrook v. O'Brien, 98 Cal. 671, 673, 33 P. 765, 766, where the court brings out the distinction in the character of the relief sought. The court said:

"Courts of equity *do not review the proceedings of officers intrusted with the assessment of property.* If proceedings taken by them are void, no title will pass by a sale of the real estate, and the party claiming to be injured must litigate his rights in an action at law for the possession of the premises. Of course, there are exceptions to the rule,—as where it is shown that the lands are *not at all subject to taxation, or that there is no law authorizing any proceedings therefor,* but that is not the case here." (Italics added.)

In Crocker v. Scott, 149 Cal. 575, 87 P. 102; Bradford v. San Francisco, 112 Cal. 537, 44 P. 912; Central Pac. R. R. Co. v. Corcoran, 48 Cal. 65; Savings & Loan Soc. v. Austin, 46 Cal. 415, and like cases the court was only concerned with whether there was an adequate legal remedy. Certiorari was not discussed.

To the end that some order and clarity be preserved in the field of judicial review of judicial action by a local administrative agency, it is suggested that certiorari be accepted as the proper remedy.

Where taxes become delinquent during the pendency of the proceeding for review or after or during a further consideration by the board after remand, the taxpayer must pay the taxes levied under protest and await the outcome of the proceedings to recover a refund if any. That is in furtherance of the policy that the public should not be deprived of the revenue necessary to perform the governmental functions. Such policy is indicated in sections 5136 to 5143 of the Revenue & Taxation Code, St.1939, p. 1372, St.1941, p. 2112.

But passing the procedural question it seems clear to me, that under well settled rules of law, plaintiffs have not made out a case entitling them to relief in these actions.

It is not questioned in these cases that the taxpayers had proper notice and a hearing before the board of equalization on their application to have the assessed value of their property reduced. Both they and the county assessor produced evidence and the *sole* issue involved was whether or not the valuation method adopted and used by the assessor was proper. It is not claimed that the board was guilty of actual fraud. The judgment of the board on conflicting evidence is final and may not be upset by a court. It is said in 24 California Jurisprudence 243:

"In the absence of fraud or malicious abuse of its powers, a board of equalization is the sole judge of questions of fact and of the value of property, and its determination—based on evidence—with reference to all matters within its jurisdiction is conclusive, and is not subject to collateral attack. Thus a decision, based on evidence, as to the value of property and the fairness of an assessment so far as amount is concerned, or a decision raising an assessment or that property has escaped assessment, is conclusive in the absence of fraud, regardless of errors committed in the assessment. The fact recited in the order that evidence was taken forecloses discussion as to the sufficiency of the evidence. Indeed, when the record does not show affirmatively that the board did not act upon evidence before it, its order is conclusive that it did so act." There is no showing that there was constructive fraud. The majority opinion implicitly admits that. No showing of discrimination in respect to other property was made, the sole issue being the correctness of the method adopted by the assessor for valuing the property. Hence, the only point made is that procedural due process was denied. The majority opinion is predicated on the occurrences that transpired *after* the hearing and when the matter came up for decision by the board. At the original hearing there were present three of the five members of the board; Jessup, McDonough and Hauge. After evidence was introduced, the matter was submitted to the board for decision. Thereafter it came up for decision before the full board, the other two members, Ford and Smith being present, and it is solely by reason of the matters that there transpired from which it is determined that procedural due process was denied. At that time four cases were considered, the two involved in the instant action and two others. The deputy county assessor was present and stated as to the two others that a legal question was involved. *He made no comment whatsoever concerning the two instant cases.* The only statement made to the contrary was by board member Smith who said: "The other two (the cases here involved) would be the same." To which the deputy county assessor stated: "There is no question but what that is so on the two cases (not here involved) Mr. Holmes presented." The applications in all four cases were then denied unanimously. It was not until *after* that denial that member McDonough remarked: "On these matters it is a legal question to be determined by the court rather than a matter of equalization," and the following occurred:

"Mr. Boller: It is essentially so in the Signal Oil & Gas Company and the Long Beach Oil Development Company cases. It seems to me the others were factual in their showing.

"Mr. Smith: It is the same thing, they have a lease and are being assessed on their interests. They have a contract and are being assessed as though it were a lease. They are protecting their interest and in case the Long Beach Oil Development Company and the other one should win in court, these people are in the same position.

"Mr. Boller: Their agreement is not as carefully drawn up with the thought of not being taxable as a lease.

"Mr. Smith: Yes the résumé they attach is exactly the same.

"Mr. Boller: I didn't look at them.

"Mr. McDonough: The basis is the determination of a legal question rather than an appeal on a question of equalization.

"Mr. Boller: It is so as to Signal and the Long Beach Oil Development Company."

"Assuming that the foregoing language is susceptible of the construction that no decision on the *facts* of the case was made by the board and ignoring the circumstance that the remarks were made after the decision, it is also susceptible of the interpretation that reference was made only to the two cases not here involved. Moreover, it was merely an expression of one of the members of the board. To conclude that such vague and indefinite language was sufficient to impeach the integrity of the board to the point that due process of law was lacking is to disregard all presumptions and render every decision by a board of equalization subject to attack upon the slightest provocation. It is the declared statutory law of this state that public officers are presumed to have regularly and properly performed their duties. Code Civ. Proc. § 1963(15). The most that may be said here is that the language used by the board members was susceptible of two constructions, that is, the board had not made an adjudication on the facts or that it had ignored the facts and passed the matter on to the courts on a question of law. Under those circumstances the presumption is particularly applicable. In Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593, 27 S.Ct. 326, 327, 51 L.Ed. 636, the court in refusing to annul an order fixing the assessed valuation of property by a state board of equalization, stated:

"When we turn to the evidence there is equal ground for criticism. The members of the board were called, including the governor of the state, and submitted to an elaborate cross-examination with regard to the operation of their minds in valuing and taxing the roads. This was wholly improper. In this respect the case does not differ from that of a jury or an umpire, if we assume that the members of the board were not entitled to the possibly higher immunities of a judge. [Duke of] Buccleuch v. Metropolitan Board of Works, L.R., 5 H.L. 418, 433. Jurymen cannot be called, even on a motion for a new trial in the same case, to testify to the motives and influences that led to their verdict. Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917. So, as to arbitrators. [Duke of] Buccleuch v. Metropolian Board of Works, L.R., 5 H.L. 418, 457, 462. Similar reasoning was applied to a judge in Fayerweather v. Ritch, 195 U.S. 276, 306, 307, 25 S.Ct. 58, 49 L.Ed. 193, 213, 214. A multitude of cases will be found collected in 4 Wigmore on Evidence, §§ 2348, 2349. All the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law. See Coulter v. Louisville & Nashville R. R. Co., 196 U.S. 599, 610, 25 S.Ct. 342, 49 L. Ed. 615, 618; Central Pacific R. R. Co. v. California, 162 U.S. 91, 107, 108, 117, 16 S.Ct. 766, 40 L.Ed. 903, 908, 909; [People of California v. Central Pac. R. Co.], 105 Cal. 576, 594, 38 P. 905; State Railroad Tax cases, 92 U.S. 575, 23 L.Ed. 663; Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 133 Ind. 513, 542, 33 N.E. 421, 18 L.R.A. 729. In Fargo v. Hart, 193 U.S. 490, 496, 497, 24 S.Ct. 498, 48 L.Ed. 761, 764, there was no serious dispute as to what was the principle adopted. * * * Exactly what weighed in each mind, and even what elements they purported to consider in their debates, is little more than a guess. * * * Evidently, also, the members or some of them, used their own judgment and their own knowledge, of which they could give no very good account on cross-examination, but which they had a right to use, if honest, however inarticulate the premises. It would seem from the testimony, as might have been expected, that the valuations fixed were a compromise and were believed by some members to be too low, as they seemed to one too high. It is argued to us, on expert testimony, that they are too low. The result of the evidence manifests the *fruitlessness of inquiries, which, as we have said, should not have been gone into at all.*" (Italics added.)

In fixing the valuation of the property in this case the trial court disregarded the rule that in the absence of statute a court has no authority to substitute its judgment for that of the board of equalization in a matter within the jurisdiction of the board. See Federal Power Commission v. Pacific Power & L. Co., 307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180; Central Kentucky Natural Gas Co. v. Railroad Commission, 290 U.S. 264, 54 S.Ct. 154, 78 L.Ed. 307; Reagan v. Farmers' Loan & T. Co., 154 U.S. 362, 14 S.Ct. 1047, 38 S.Ct. 1014. The county tax assessor has exclusive jurisdiction to fix the value of property for assessment purposes, subject to the exclusive power of the board of supervisors sitting as a board of equalization to equalize the assessment. Cal.Const. art. XIII, § 9; Rev. & Tax. Code, § 601 et seq., § 1601 et seq., St.1939, pp. 1291, 1301; La Grange, etc., Co. v. Carter, 142 Cal. 560, 565, 76 P. 241; Los Angeles Gas & Elec. Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277.

On the main issue, that is, whether the assessment was so out of line that the refusal to reduce it was equivalent to fraud, consideration should first be given to what the powers of the board of equalization are in this respect. We have heretofore seen that finality is accorded its determination. It cannot be doubted that a taxpayer must first resort to the board of equalization when he complains that an assessment is excessive. The only grounds, other than procedural due process, upon which the board's decision may be questioned are actual fraud or that which is equivalent to fraud or constructive fraud. The later ground usually consists of a gross over-valuation resulting in a discrimination as between the taxpayer involved and others similarly situated. But all of those matters must be brought before the board of equalization, and if not presented, will not be considered by a reviewing court. In the instant case, assuming that a determination by the board of equalization may be set aside where the valuation is so grossly excessive as compared to other property as to be equivalent of fraud, because the board has exceeded its statutory authority, or failed to perform its duty, still the court on review is confined to the evidence before the board and if there is a conflict therein the court is bound by the board's decision. While a trial de novo, with some procedural limitations (Dare v. Board of Medical Examiners, 21 Cal.2d 790, 136 P.2d 304), is appropriate in reviewing the action of a statewide agency, it is not available in the review of a local board exercising judicial functions. Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457. The valuation is first made by the county assessor and the board of equalization sits as a reviewing board of his determination. Los Angeles Gas & Elec. Co. v. County of Los Angeles, 162 Cal. 164, 121 P. 384, 9 A.L.R. 1277. Where the claim of the taxpayer is, as it is here, that the valuation was grossly out of line with that of similar properties, as distinguished from situations where the charge of fraud consists of matters outside the record, we have a matter squarely within the board's jurisdiction and upon which the board should pass. The taxpayer should therefore present any evidence he has to the board, and only in the event that upon that evidence alone the only reasonable conclusion is that the board was motivated by actual or constructive fraud in arriving at the valuation, may the court disturb the board's conclusion. That the taxpayer must present his claim of over-valuation and discrimination to the board and that on review the court may examine only the evidence before the board is clearly indicated in Hammond L. Co. v. County of Los Angeles, 104 Cal.App. 235, 241, 285 P. 896, 899, where it is said:

"In case a taxpayer feels aggrieved by reason of the assessor's valuation, the law provides for a determination of the facts by a tribunal sitting as a county board of equalization. When the assessment is not *wholly void,* it is to this tribunal that the taxpayer must first apply for relief, and the decision of the board, made after due hearing and within the limits of reasonable discretion, is final and conclusive. La Grange Co. v. Carter, 142 Cal. 560, 565, 76 P. 241; California Domestic Water Co.

v. County of Los Angeles, 10 Cal.App. 185, 191, 101 P. 547; Pierce v. County of Santa Barbara, 40 Cal.App. 302, 304, 180 P. 641; Globe G. & M. Co. v. County of Los Angeles, 62 Cal.App. 297, 299, 216 P. 631.

"The decision of the board constitutes an independent and conclusive judgment which abrogates and takes the place of the judgment of the assessor, and even though there be mistake or error, the decision of the board will not be rejected upon review by the court, unless there is proof of actual fraud, or such arbitrary unreasonable, or grossly oppressive action, in willful disregard of the law, as amounts to constructive fraud. * * *

"Plaintiff followed the requisite procedure in applying to the board of equalization for reduction of the assessor's valuation, but met with no success. No charge is made of any actual fraud or malicious abuse of power on the part of either the assessor or the board of equalization, but it is earnestly contended that the assessment is so grossly excessive and discriminatory as constructively to constitute fraud. *The assessment not being wholly void, this action, though cast in the form of an action to recover a tax paid under protest, is properly a proceeding to review the decision of the board of equalization. The function of the trial court, therefore, was to determine whether a correct method of valuing the usufructuary interest was pursued, and whether there was substantial evidence before the board in justification of the assessment made.*" (Italics added.) And again at page 246 of 104 Cal.App. at page 901 of 285 P.:

"In the proceeding before the board the burden of proof was on the plaintiff, and the decision of the board upon the evidence adduced *cannot be collaterally assailed by new evidence on the point in a different tribunal.* Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 341, 212 P. 711.

"What has just been said applies with *equal force* to the contention that there was such *gross inequality and arbitrary discrimination as to invalidate the assessment.* At the hearing before the board it was admitted by the assessor that leasehold interests in land held in private ownership were not separately assessed, a single assessment in such case being made of the freehold with all lesser interests." (Italics added.)

In my opinion the judgments should be reversed with direction to the trial court to dismiss the actions.

Rehearing denied; CARTER and SCHAUER, JJ., dissenting.

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PEOPLE v. CLAPP.

Cr. 3832.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1944.

1. Indictment and Information 🔑114

"Conviction" is the ascertainment of guilt by the jury, or by the court where jury is waived, and does not mean the judgment based upon the verdict, but it is the verdict itself. Pen.Code, §§ 689, 1157.

See Words and Phrases, Permanent Edition, for all other definitions of "Conviction".

2. Indictment and Information 🔑114

A person has been "convicted" even though the judgment should be suspended during appeal or while the convict is on probation.

See Words and Phrases, Permanent Edition, for all other definitions of "Convicted".

3. Indictment and Information 🔑114

Under statute requiring former conviction to be alleged, so as to impose the greater punishment, former conviction must be alleged although appeal is pending from judgment of conviction. Pen.Code, §§ 969, 969a.

4. Criminal law 🔑372(1)

Where felonious intent is an essential ingredient of the crime and accused claims that his act was accidentally, mistakenly or innocently done, or where the circumstances might support an inference that the act was lawful, it is proper to rebut such claim by evidence of other criminal acts in which defendant used similar means and which produced the same result. Pen.Code, §§ 969, 969a.

5. Criminal law ⚷372(1)

Evidence of another crime is admissible where the act charged is not in itself proof of the required criminal intent and other evidence of intent is necessary to complete the proof.

6. Criminal law ⚷371(4)

In prosecution for murder resulting from an abortion, evidence as to defendant's prior conviction of abortion was not rendered inadmissible merely because operation performed by defendant in prior case was with instruments and the abortion in present case followed the injection of a fluid. Pen.Code, §§ 969, 969a.

7. Abortion ⚷1

The word "instrument" in abortion statute was not intended to apply only to scissors, forceps and speculum, but also to a catheter and any means which might be used to effect a miscarriage.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument".

8. Homicide ⚷235

Evidence as to an operation performed by defendant to bring about an abortion which resulted in death, sustained defendant's conviction of murder in the second degree.

Appeal from the Superior Court, Los Angeles County; Leslie E. Still, Judge.

Amos Franklin Clapp was convicted of murder in the second degree, and he appeals.

Affirmed.

A. H. McConnell, of Long Beach, for appellant.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., and Jere J. Sullivan and Robert Wheeler, Deputy Dist. Attys., all of Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from a conviction of murder in the second degree and from the order denying a motion for a new trial.

The victim of appellant's crime was Doris Jean Branch, eighteen years of age. She had been married to Harvey Branch on November 21, 1943. Pursuant to an appointment made by her father she called at the office of appellant, a chiropractor of Long Beach. She employed him to effect an abortion. He had told Doris' father that a miscarriage could be produced either by force or by curettement. She was in good health, did all of her household work, danced and engaged in other sports. At the time of her first call upon appellant he made a vaginal examination, told her that she was pregnant and advised a forced miscarriage because of her age and physical condition. He demanded a fee of $75 and designated the following day for the operation. On January 6 at his office he placed her on a table, dilated her vagina with a speculum, and ostensibly inserted a brown liquid into her vagina. At once she suffered vomiting and cramps in the stomach. He told her that everything would pass within 24 to 36 hours and to exercise in the meantime. On the following day she suffered a miscarriage at the home of her parents in Wilmington. From that day she steadily declined. On the ninth, finding her with chills, Clapp advised that "a little piece" did not pass; he would have to "go in and clean it all out." Although not licensed to practice surgery or to prescribe drugs, with a scissors-like instrument he removed portions of the placenta and clots of blood. On the 10th with a rising temperature she was vomiting. He announced that she had a new kind of "flu" and gave her sulfa pills. On the 11th, after appellant had administered a hypodermic injection in her arm, her father called in a physician who promptly ordered the girl to a hospital where she died on January 20th.

The sufficiency of the evidence to support the conviction is not questioned. Only three assignments of error at the trial are presented as bases for a reversal, namely: (1) refusal to strike the allegation of a prior conviction of an abortion, a felony; (2) admitting the evidence of that crime; (3) denying appellant's motion to strike such proof.

The district attorney was required to allege the former conviction. Penal Code, §§ 969, 969a; In re Boatwright, 119 Cal. App. 420, 424, 6 P.2d 972. Section 969 declares "all known previous convictions whether in this state or elsewhere must be charged." Section 969a provides that when it is discovered that a pending indictment or information does not charge all prior felonies of which the defendant has been convicted "said indictment or information shall be forthwith amended to charge such prior conviction or convictions."

[1-3] Appellant contends that at the time of the filing of the information and at the time of the trial he had not been convicted because his judgment of conviction in the former case was on appeal. This contention has been disposed of repeatedly. People v. Ward, 134 Cal. 301, 66 P. 372; Ex parte Brown, 68 Cal. 176, 8 P. 829; People v. Acosta, 115 Cal.App. 103, 1 P.2d 43. The jury, or the court where a jury has been waived, convicts the accused. Penal Code, §§ 689, 1157. Conviction does not mean the judgment based upon the verdict, but it is the verdict itself. People v. Ward, supra, 134 Cal. at page 308, 66 P. 372. It is the ascertainment of guilt by the trial court. People v. Acosta, supra. A person has been convicted even though the judgment should be suspended during appeal, Ex parte Brown, supra, or while the convict is on probation. People v. Christman, 41 Cal.App.2d 158, 106 P.2d 32. In the case of People v. Braun, 14 Cal.2d 1, 92 P.2d 402, it was held that although an adverse judgment in a former case was on appeal a prior conviction might be shown for the purpose of impeachment. A judgment though not final may be proved for any purpose for which it is effectual. People v. Braun, supra; McKannay v. Horton, 151 Cal. 711, 721, 91 P. 598, 132 L.R.A.,N.S., 661, 121 Am.St.Rep. 146. The courts of other jurisdictions have likewise upheld the practice of alleging the prior conviction even though the judgment based thereon was on appeal at the time of the trial for the second offence. State v. Eisminger, 124 Kan. 464, 260 P. 661; State v. Smith, 128 Or. 515, 273 P. 323; People v. Morlock, 234 Mich. 683, 209 N.W. 110; Shaffer v. State, 124 Neb. 7, 244 N.W. 921.

There was no error in receiving evidence of the former felony because the "testimony fails to show any similarity in the means used to produce" the two miscarriages. The defendant's contention and testimony were that he treated the deceased for gonorrhea by injecting a "caroid solution" into the vagina and that her miscarriage was the result of a number of contributing factors including his "use of the speculum" and a cervical infection of the uterus. To rebut such testimony and the inference of innocency fairly deducible therefrom, the prosecution properly undertook to show his means and method employed in causing one Mrs. Huntley to miscarry in 1943, for which very act he had already been convicted. According to the testimony of Mrs. Thurman, who witnessed that operation, his conduct in causing the Huntley abortion closely parallels his behavior in dealing with Doris Branch. He called at Mrs. Huntley's country home where that lady was in good health and was attending to her household duties. He improvised a place for the operation by using the dinette table. He went into the kitchen and boiled his instruments. They were identical in appearance with those employed on Mrs. Branch. She identified the speculum and the curette as two of the devices used on Mrs. Huntley; also one like a scissors, one that was curved with teeth, and one with holes in the end. He began with Mrs. Huntley by inserting the speculum and used the others in the course of the operation. He told Mrs. Thurman that his patient was "about 11 weeks along." He wrapped the "spongy-looking stuff" and "bloody mess" in the papers on the table and carried them away to be destroyed. He asked for and received $50 and told her not to call a doctor or "anybody else."

[4, 5] But for the Thurman testimony defendant might have created a reasonable doubt in the minds of the jury by urging the inference that his treatment of deceased was for a lawful purpose. People v. Hickok, 56 Cal.App. 13, 204 P. 555. Where a felonious intent is an essential ingredient of the crime and the accused claims that his act was accidentally, mistakenly or innocently done, or where the circumstances might support an inference that the act was lawful, it is proper practice to rebut such claim or inference by evidence of other criminal acts done by the accused, in which he used similar means and which produced the same result, in order to prove the criminal purpose that actuated the deed for which the prisoner is on trial. People v. Darby, 64 Cal.App.2d 25, 148 P.2d 28; People v. Hickok, supra, 56 Cal.App. at page 19, 204 P. 555. In such circumstances evidence of another crime is relevant if it logically tends to prove the intent of defendant in the offense under investigation although it might prove a distinct crime and prejudice the defendant before the jury. People v. Williams, 6 Cal.2d 500, 502, 58 P.2d 917. Such proof is especially permissible where the act charged is not in itself proof of the required criminal intent and other evidence of intent is necessary to complete the proof. People v. Coltrin, 5 Cal.2d 649, 656, 55 P.2d 1161.

[6] The contention that the Thurman testimony was inadmissible because the abortion of Mrs. Branch followed the injection of a fluid while the Huntley operation was with "instruments", and therefore was not accomplished by the same means, would lead us into error. It is not necessary to prove that the prior crime was, in the manner of its accomplishment, identical in every detail with that on trial. In both instances the defendant requested secrecy and that no other doctor be called. Both women were pregnant and in good health prior to his interference. From each he removed the placenta, blood and foetal remains. Because he inserted the corrosive fluid into the uterus of Doris to dissolve its contents does not make the two acts so dissimilar as to render evidence of the prior crime incompetent as proof of his felonious intent in the subsequent operation. The use of the chemical for dissolving the foetal contents is of recent origin.

[7, 8] In appellant's incipient act he employed instruments on Doris: the speculum to dilate her vagina, the catheter to conduct the "caustic drug" from a glass jar to the uterine cavity. Although defendant testified that he merely put the solution into her vagina, from expert testimony it was established that the chemical was poured in upon the foetus. The autopsy disclosed that the uterus was rotted; that the canal and cervix had been burned by the malignant fluid; that steel implements also had been used on the unfortunate girl. The word "instrument" was not intended to apply only to scissors, forceps and speculum, but also to any means which might be used to effect a miscarriage. Wilson v. State, 36 Okl.Cr. 148, 252 P. 1106. The speculum and the catheter are comprehended within the term. Appellant's free use of instruments on Doris in completing the abortion is indicated by his further explorations after concluding that a part of the placenta had not been expelled. He opened the organ and with uterine forceps extracted the dead tissue and with ring forceps removed clots of blood. He thereby finished an incomplete abortion (see Lee's "The Principles and Practice of Obstetrics", 4th Ed., p. 451) which he had clumsily attempted by injecting drugs. Every act done in furtherance of his unlawful purpose was an integral part of the whole unlawful transaction. State v. Tippie, 89 Ohio St. 35, 105 N.E. 75. Since his felonious purpose in using the chemical and the instruments on Mrs. Branch was proved by Mrs. Thurman's experience, her testimony was properly received. People v. Albertson, 23 Cal.2d 550, 145 P.2d 7; People v. Darby, 64 Cal.App.2d 25, 148 P.2d 28.

Inasmuch as the Thurman testimony was competent and bore upon the primary issue of intent, the court correctly denied the motion to strike it from the record.

The judgment and the order denying the motion for a new trial are affirmed.

W. J. WOOD and McCOMB, JJ., concur.

LORD v. GARLAND, Director of Motor Vehicle Department, et al.

Civ. 14423.

District Court of Appeal, Second District, Division 1, California.

Dec. 1, 1944.

Hearing Granted Jan. 29, 1945.

1. Pleading 🔑106(2)

At common law, a plea of another action pending between the same parties for the same cause was a dilatory plea generally raised by answer.

2. Abatement and revival 🔑17

Where complaint shows another action is pending between the same parties with substantially the same issues, a demurrer will be sustained. Code Civ.Proc. § 430, subd. 3.

3. Pleading 🔑193(5), 216(2)

A demurrer may be interposed to the whole complaint and the complaint as a whole considered for the purpose of passing upon its sufficiency. Code Civ.Proc. § 431.

4. Pleading 🔑53(1)

When a cause of action is set up in separate counts, each numbered as a separate paragraph, all of the counts may be considered together as a narrative of the facts relied upon for recovery.

5. Abatement and revival ⇨8(1)
Action ⇨53(1)

A plaintiff may not split a single cause of action represented in his complaint in a former action to avoid abatement on ground of action pending between same parties for the same cause. Code Civ. Proc. § 430, subd. 3; § 431.

6. Abatement and revival ⇨9

The fact that prior complaint, in action relating to taxes paid the state under the caravan act, wherein it was stipulated that a fund would be deposited pending decision on validity of statute named as defendant the then holder of office of Director of Motor Vehicle Department, and that complaint in later action seeking to enjoin the disposal of the fund and return of money named the present holder of the office of Director of Motor Vehicle Department, did not represent a sufficient change in parties to avoid abatement of the action on ground of an action pending for the same cause between the same parties. Code Civ.Proc. § 430, subd. 3; § 431; St.1937, p. 2253.

7. Abatement and revival ⇨15

Where plaintiff in former action relating to taxes due state under the caravan act, wherein it was stipulated that plaintiff would deposit in Motor Vehicle Department a sum of money to be returned in case act was declared unconstitutional thereafter waited five years without bringing his action to trial with result that action was dismissed, he could not in later action to enjoin the disposal of the fund and seeking return of money complain of hardship that would result on account of dismissal of present action on ground of former action pending between the same parties for the same cause. Code Civ. Proc. § 430, subd. 3; § 431; St.1937, p. 2253.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Harry A. Lord against Gordon H. Garland, as Director of the Motor Vehicle Department of the State of California, and another, seeking to enjoin defendants from disposing of a fund created by stipulation in a former action and for return to plaintiff of the money deposited in such fund. Judgment sustaining a demurrer to the complaint, and plaintiff appeals.

Affirmed.

Warren E. Libby, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondents.

DRAPEAU, Justice pro tem.

Judgment of dismissal following sustaining of demurrer without leave to amend. The demurrer was sustained upon several grounds, the first being that upon the face of the complaint it appears there was another action pending between the parties for the same cause.

The complaint contains three counts. The first count seeks to enjoin defendant from disposing of a fund created by stipulation in a former action in the superior court. The money in the fund was paid by plaintiff to the Motor Vehicle Department for taxes due the State under the California caravan act. Stats.1937, Chap. 788, p. 2253. It was stipulated that the money would be returned to the plaintiff if the act was declared to be unconstitutional, or would go to the State if the act was declared constitutional. The former action was pending at the time of filing the complaint, but has since been adjudicated. Lord v. Ingels, 64 Cal.App.2d 559, 149 P.2d 72. The second count undertakes to test the constitutionality of the caravan act. The third count asks for the return to the plaintiff of the money deposited in the fund referred to in the first count.

The complaint alleges that on July 19, 1937, plaintiff commenced the former action "to secure against the said defendant a permanent injunction against the enforcement of said chapter 788 of the Statutes of 1937"; that a preliminary injunction was granted in that action restraining the enforcement of said Statute as against the plaintiff; that thereafter the parties to said former action entered into a stipulation, whereby, pending the final disposition thereof, certain monies would be paid to the Motor Vehicle Department by the plaintiff and there impounded; (copies of the stipulation and order of the court made pursuant thereto are attached as exhibits to the complaint;) that the former action was dismissed for failure to bring it to trial, from which plaintiff appealed. The stipulation further in part provided: "* * * in the event that the said statute shall be determined to be unconstitutional the sums so paid and heretofore paid as recited in this stipulation shall be returned upon application to the plaintiff herein by the defendants or their successors in office, and in the event that the said statute shall be determined to be constitutional the said sums heretofore and hereafter paid shall be retained by the Department of Motor Vehicles and shall be applied according to the provisions of said Chapter 788 of the California Statutes of 1937 and that the above entitled Court specifically reserves continuing jurisdiction until final disposition of said moneys as aforesaid to make orders in regard to such final disposition and particularly to make such Order as is meet and proper in the event that such statute is finally held to be partially valid and partially invalid".

The demurrer was sustained because it appeared from the complaint itself that the parties were the same, and all of the matters alleged therein were in issue in Lord v. Ingels, supra, then pending and undetermined.

[1, 2] Sec. 430, sub. 3, of the Code of Civil Procedure provides that a demurrer may be interposed upon the ground that there is another action pending between the same parties for the same cause. At common law this was a dilatory plea generally raised by answer. Under California practice where the complaint shows another action is pending between the same parties, with substantially the same issues, demurrer will be sustained.

Cases applying the rule, in accordance with the facts of each case, are as follows: Fisk v. Atkinson, 71 Cal. 452, 10 P. 374, 12 P. 498; Conner v. Bank of Bakersfield, 174 Cal. 400, 163 P. 353; Collins v. Ramish, 182 Cal. 360, 188 P. 550; Wulfjen v. Dolton, 24 Cal.2d 891, 151 P.2d 846; Fresno Inv. Co. v. Russell, 55 Cal.App. 496, 203 P. 815; Dodge v. Superior Court, 139 Cal.App. 178, 33 P.2d 695; Brainard v. Whitman, 11 Cal.App.2d 32, 52 P.2d 564; McMullen v. Glenn-Colusa Irr. Dist., 17 Cal.App.2d 696, 62 P.2d 1083; Hamm v. San Joaquin, etc. Canal Co., 44 Cal.App. 2d 47, 111 P.2d 940; Rilcoff v. Superior Court, 50 Cal.App.2d 503, 123 P.2d 540; Keating v. Preston, 42 Cal.App.2d 110, 108 P.2d 479; National Automobile Ins. Co. v. Winter, 58 Cal.App.2d 11, 136 P.2d 22.

The very early case of Fisk v. Atkinson, 71 Cal. 452, 10 P. 374, 12 P. 498, held that an action commenced during pendency of appeal in a prior action between the same parties and for the same cause of action must be abated. This was followed in Collins v. Ramish, 182 Cal. 360, 188 P. 550, and in Rilcoff v. Superior Court, 50 Cal. App.2d 503, 123 P.2d 540.

In Dodge v. Superior Court, 139 Cal. App. 178, 33 P.2d 695, a second case was filed in California while there was a proceeding between the same parties and involving the same cause of action pending in the Supreme Court of another state. Our District Court of Appeal held that under such circumstances it was proper to stay the California action. And the comment is made that a final adjudication in the first case would be a bar to trying the same issues in the second case, and that this is one of the tests to determine whether or not the identity of the matters involved in both actions is the same.

In Wulfjen v. Dolton, 24 Cal.2d 891, 151 P.2d 846, 848, a case in our own Supreme Court, decided September 15, 1944, it is said: "It is clearly established that a party may not split up a single cause of action and make it the basis of separate suits, and in such case the first action may be pleaded in abatement of any subsequent suit on the same claim. 1 C.J.S., Actions, § 102, p. 1306; Quirk v. Rooney, 130 Cal. 505, 62 P. 825; Bingham v. Kearney, 136 Cal. 175, 68 P. 597; Paladini v. Municipal Markets Co., 185 Cal. 672, 200 P. 415. The rule against splitting a cause of action is based upon two reasons: (1) That the defendant should be protected against vexatious litigation; and (2) that it is against public policy to permit litigants to consume the time of the courts by relitigating matters already judicially determined, or by asserting claims which properly should have been settled in some prior action. Thus, it is said in Bingham v. Kearney, supra, 136 Cal. at page 177, 68 P. at page 597: 'It is not the policy of the law to allow a new and different suit between the same parties, concerning the same subject-matter, that has already been litigated. Neither will the law allow the parties to trifle with the courts by piecemeal litigation.'"

Applying the law to the present case, it is evident that: (a) There was another action pending; (b) it was between the same parties; and (c) it was for the same cause.

[3-5] Appellant contends that the demurrer was not applicable to the second count of his complaint, because that count sought an injunction against the defendant's enforcing the caravan act, no specific reference being made in that count to the former action. The answer to this contention is that under the provisions of C.C.P. § 431, demurrer may be interposed to the whole complaint, and the complaint as a whole considered for the purpose of passing upon its sufficiency. When a cause of action is set up in separate counts, each numbered as a separate paragraph, all of the counts may be considered together as a narrative of the facts relied upon for recovery. 21 Cal.Jur. 64; Kyle v. Craig, 125 Cal. 107, 57 P. 791. Moreover, the plaintiff may not in any event split the single cause of action represented in his complaint in the former action and in this case. To do so "would upset all legal principles for avoiding multiple litigation in settlement of but one fundamental claim for appropriate redress." Wulfjen v. Dolton, supra.

[6] Appellant next suggests that the parties in the two cases are not the same in that while they were holders of the office of Director of the Department of Motor Vehicles, it was at different times. A somewhat similar situation presented itself in McMullen v. Glenn-Colusa Irr. Dist., 17 Cal.App.2d 696, 62 P.2d 1083, wherein it was decided that a discrepancy between plaintiffs or defendants in a representative capacity does not affect the right of a defendant to have his demurrer sustained when the two complaints contain essentially the same subject-matter. And in any event, the fact that the prior complaint named as defendant the then holder of the office of Director of the Motor Vehicle Department of the State of California, and the complaint in this action names another gentleman who in the meantime succeeded to that office, does not represent a sufficient change in the parties to avoid abatement of the present action.

In Weadon v. Shahen, 50 Cal.App.2d 254, at page 260, 123 P.2d 88, at page 91, the court said: "* * * The office of Superintendent of Banks is a continuing state office without regard to the individual who may fill it. The Superintendent of Banks, as an individual divorced from his office, had no interest in the action. The judgment, therefore, was an incident of the office and not of the individual. The action was brought to perform a duty pertaining to the office which was especially enjoined by statute. Such an action does not abate by reason of the termination of the term of office of the incumbent (1 Am.Jur. p. 49) and we can see no good reason why it may not be continued by the successor in the name of his predecessor in office. Sec. 385, Code. Civ.Proc."

[7] A reading of the opinion in Lord v. Ingels, supra, and consideration of the effect of the decision in this case would seem to imply that the plaintiff's action in the former case, having been dismissed, and the demurrer in the present case having been sustained, he is left without remedy. But, in the interim between the filing of the first complaint and its dismissal five years thereafter for failure to bring it to trial, the federal courts upheld the constitutionality of the statute involved. Clark v. Paul Gray, Inc., 306 U.S. 583, 59 S.Ct. 744, 83 L.Ed. 1001. Thus it follows that the plaintiff having elected to wait five years without bringing his action to trial may not now complain of the hardship, if any, involved in the dismissal of his present action. And if there were any hardship, the fundamental rules here involved may not be abrogated. Wulfjen v. Dolton, supra.

Having come to the conclusion that the demurrer was properly sustained upon the first ground thereof, it is unnecessary to discuss further and additional grounds argued in the briefs.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 183

WARD v. AUCTIONEERS ASS'N OF SOUTHERN CALIFORNIA et al.

Civ. 14520.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1944.

Hearing Denied Feb. 1, 1945.

1. Constitutional law ⚿258
Monopolies ⚿10

Cartwright Act, prohibiting certain trusts and then declaring that combinations otherwise unlawful shall be lawful if purpose is to obtain reasonable profit on products which cannot otherwise be marketed for a reasonable profit except through such combinations, and declaring that violation of act is a crime, is invalid as denying due process. St.1941, pp. 1834, 1835, 1836, §§ 16700 et seq., 16720, 16723, 16724; U.S.C.A. Const. Amend. 14.

2. Constitutional law ⚿253

The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience has application in civil as well as in criminal legislation. U.S.C.A.Const. Amend. 14.

3. Statutes ⚿47, 64(6)

Section 16720, listing prohibited restraints on competition, is not severable from sections 16723 and 16724, which purport to limit the various subdivisions of section 16720 but which are invalid as so indefinite that no standard is left by which guilt or innocence of those accused of violations of act can be determined, and all three sections must fall. St.1941, pp. 1835, 1836, §§ 16720, 16723, 16724.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by I. M. Ward against Auctioneers Association of Southern California and others to recover damages under the Cartwright Act for unlawful monopoly. From a judgment for defendants, after their demurrer to amended complaint was sustained without leave to amend, plaintiff appeals.

Affirmed.

Bertram H. Ross, of Los Angeles, for appellant.

Charles J. Katz, of Los Angeles (Samuel W. Blum, of Los Angeles, of counsel), for respondents.

W. J. WOOD, Justice.

The nature of this action is indicated from the title given by plaintiff, "Complaint for Damages For Unlawful Monopoly under the Cartwright Act $100,000." Plaintiff has appealed from a judgment in favor of defendants after their demurrer to the amended complaint was sustained without leave to amend.

In his amended complaint plaintiff named as defendants Auctioneer Association of Southern California, a corporation, an association bearing the same name as the corporation, and the individual members of the association. He alleged that plaintiff was a licensed auctioneer; that plaintiff and defendants were engaged in the business of conducting auction sales, and that defendants owned and controlled 98% of the auction business; that prior to March 15, 1943, the auction business was open and competitive and that plaintiff and defendants had free access to advise the public that they were engaged in the auction business and of the times and places of sales and merchandise to be sold; that beginning March 15, 1943, defendants conspired, confederated and combined to carry out restrictions in said trade, business and commerce, and in furtherance thereof formed Auctioneers Association of Southern California and excluded plaintiff therefrom; that for many years prior to the formation of the association all auctioneers had used as their method of advising the public of auction sales to be conducted by them and for soliciting auction business, the auction pages of the Sunday editions of the Los Angeles Times and the Los Angeles Examiner, and that prior to March 15, 1943, these newspapers had printed all auction advertising on the same pages; that in furtherance of the conspiracy defendants obtained agreements from the publishers to reserve all advertising space on said pages to the members of the association and that the newspapers thereafter refused to accept or print any advertising of plaintiff on the pages referred to, although plaintiff had written contracts with the papers to do so. Plaintiff further alleged that the acts and conduct of defendants prevented competition in the auction business and that as a result he was damaged, for which he seeks a money judgment.

The Cartwright Act, which was enacted in 1907, is now a part of the Business and Profession Code and is to be found in the sections beginning with section 16700, St. 1941, p. 1834. Plaintiff asserts that the facts alleged in his complaint constitute a violation of section 16720 of the Code. This section provides in part: "A trust is a combination of capital, skill or acts by two or more persons for any of the following purposes: (a) To create or carry out restrictions in trade or commerce." Subdivision "a" is followed by a number of other subdivisions containing statements of other purposes, all of which are declared to be illegal by the act.

Sections 16723 and 16724 of the Business and Professions Code are as follows: (16723) "No agreement, combination or association is unlawful or within the provisions of this chapter, the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed." (16724) "It is not unlawful, or within the provisions of this chapter, for persons engaged in the business of selling or manufacturing commodities of a similar or like character, to employ, form, organize or own any interest in any association, firm or corporation which has as its object or purpose the transportation, marketing or delivery of such commodity."

[1] In sustaining the demurrer the trial court properly held that the Cartwright Act is so vague and uncertain in its description of what constitutes violations of the act that it is invalid under the 14th amendment to the Constitution of the United States. In Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146, the court reviewed the Colorado Anti-trust Statute, which is almost identical with the Cartwright Act of California. The Supreme Court of California, in the Matter of Battelle, 207 Cal. 227, 251, 277 P. 725, 734, 65 A.L.R. 1497, referred to the Colorado Anti-trust Statute as "a replica of the Cartwright Act." The Colorado statute, like the California statute, prohibits combinations of persons for the purpose of doing a number of listed acts similar to those prohibited by section 16720 of the Business and Professions Code. The Colorado statute contains this provision: "And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own an interest in any association, firm or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; * * *." Laws 1913, p. 613, § 1. Both the Colorado statute and the California statute contain provisions making violations criminal offenses.

[2] In adjudging the Colorado statute unconstitutional in the case referred to, the Supreme Court of the United States held that the exception in the statute (almost identical with sections 16723 and 16724) "leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused." [274 U.S. 445, 47 S.Ct. 684, 71 L.Ed. 1146.] The court held that the principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience has application in civil as well as in criminal legislation. In concluding its opinion the court stated: "When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A Legislature must fix the standard more simply and more definitely before a person must conform or a jury can act. We conclude that the anti-trust statute of Colorado is void, in that those who are prosecuted and convicted under it will be denied due process of law."

[3] The decision in Cline v. Frink, supra, is controlling and on the authority of that decision it must be held that the Cartwright Act is unconstitutional. Plaintiff contends, however, that his action comes within the provisions of section 16720 and that sections 16723 and 16724 are separate and independent of section 16720. We find no merit in this contention. Sections 16723

and 16724 unquestionably refer to all the subdivisions of section 16720. By their enactment the legislature attempted to limit the various subdivisions of section 16720 but in doing so made the limitations so indefinite that no standard was left in the statute by which a court can determine the guilt or innocence of those accused of its violations. Section 16720 is not independent of or severable from the other two sections.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

67 Cal.App.2d 187

BROWN et ux. v. CARDOZA et al.

Civ. 12678.

District Court of Appeal, First District, Division 1, California.

Dec. 5, 1944.

Rehearing Denied Jan. 4, 1945.

1. Constitutional law 🔑24

Usury 🔑8

Constitutional provision relating to interest rate in so far as inconsistent with Usury Law is supreme, but, so far as they are consistent, the provisions of the Usury Law, including the penalties, remain in effect. Usury Law, Gen.Laws 1937, Act 3757, §§ 1, 2; Const. art. 20, § 22.

2. Usury 🔑52

Where there is a loan of money to be compensated for by a share in earnings, income or profits, in lieu of or in addition to interest, in determining whether the transaction is usurious the share of earnings, income or profits must be considered as interest. Usury Law, Gen.Laws 1937, Act 3757, §§ 1, 2; Const. art. 20, § 22.

3. Usury 🔑52

Where lenders agreed to loan only on condition that borrower split profits on sale of real estate covered by deed of trust securing loan, the amount received by lenders as share of profits must be considered as a bonus for the loan and therefore "interest," in determining whether transaction was usurious. Usury Law, Gen.Laws 1937, Act 3757, §§ 1, 2; Const. art. 20, § 22.

4. Usury 🔑42

Where amount received by lenders as a bonus for making loan did not when added to amount received in addition as interest on the loan total more than lenders could legally have charged as interest, the transaction was not usurious. Usury Law, Gen.Laws 1937, Act 3757, §§ 1, 2; Const. art. 20, § 22.

5. Interest 🔑6

Transaction whereby lender received a share of profits on sale of property on which deed of trust securing loan was given was not in violation of statute requiring that an agreement to pay interest must be clearly expressed in writing and signed by party to be charged therewith where papers disclosed that a stated rate of interest was to be paid plus the additional amount to be received as share of profits. Usury Law, Gen.Laws 1937, Act 3757, §§ 1, 2.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Frank S. Brown and wife against Joseph S. Cardoza and others seeking recovery on a certain promissory note secured by deed of trust. Judgment for plaintiffs, and defendants appeal.

Affirmed.

W. H. Morrissey, of Redwood City, and John J. Taheny, of San Francisco, for appellants.

Henry F. Boyen and Frank J. Fontes, both of San Francisco, for respondents.

PETERS, Presiding Justice.

This appeal is by the defendants from a judgment determining that they owe plaintiffs $2,099.98 principal and $136.49 interest on a certain promissory note, and owe plaintiffs $350 attorneys' fees; that all of said sums are secured by a deed of trust on certain real property in San Mateo County; and decreeing a foreclosure of the deed of trust. Defendants' defense at the trial was that the promissory note involved provides for an usurious rate of interest. The trial court found contrary to this contention.

There are three couples, with divergent interests, who were actors in the transaction here involved. First, there are the plaintiffs, Frank S. and Ella Brown, husband and wife. They loaned money and took a promissory note secured by a deed of trust. It is claimed that this note provides for an usurious rate of interest. Secondly, there are defendants Harry H. and Cecelia M. Weiner, husband and wife. Mr. Weiner is a real estate broker. Mrs. Weiner owned the real property upon which the deed of trust was placed. The Weiners negotiated the loan of the money from the Browns, and it is the Weiners who stand to benefit if the transaction is usurious. Thirdly, there are the defendants Joseph S. and Mary I. Cardoza, husband and wife. They purchased the real property owned by Mrs. Weiner.

In September, 1939, Mrs. Weiner owned the house and lot in question, which is located in San Mateo County. The Weiners were trying to sell the property but needed some money to clear off some liens. In that month the Weiners tried to borrow $2,200 from the Browns for this purpose. Mr. Brown did not have that sum available, but did lend the Weiners $1,200. He told the Weiners that his wife would be home in several weeks and that she might be willing to lend the balance. A promissory note payable to Brown and signed by the Weiners in the sum of $1,200 was executed as evidence of this loan, and apparently a deed of trust executed. Mr. Brown denied ever receiving the $1,200 note or the deed of trust. A title insurance policy in favor of the Browns in the sum of $2,500 was executed by a title company, but according to Brown, was never delivered to him. When Mrs. Brown returned she flatly refused to lend any further sums on the property. In the meantime, the Weiners had arranged to sell the property to the Cardozas for $2,700, $200 in cash and $2,500 by promissory note drawing 6½% interest and payable at the rate of $25 per month. Unless the Weiners could raise the balance of the $2,200, apparently this sale would fall through. Weiner pleaded with the Browns for a loan in this amount, but they refused to lend any more money on the property. Finally Mr. Weiner told the Browns that he stood to make a profit on the deal if he sold the property for $2,700, and offered to split this profit with the Browns if they would make the loan. The Browns agreed then to make the loan. The original promissory note for $1,200 was canceled and, upon the Browns advancing another $1,000, the Weiners closed the deal with the Cardozas. The Cardozas were given a contract of sale. They paid the Weiners $200 in cash and signed a promissory note payable to the Browns for $2,500, the balance of the purchase price. This note was also signed by the Weiners, as makers, and was secured by a deed of trust on the property executed by the Weiners. The note called for interest at the rate of 6½% per annum, and payments of $25 per month. Thus, when the deal was consummated, the Browns held the Cardoza-Weiner note for $2,500 for their $2,200 loan, secured by a deed of trust. The Cardozas had a contract of sale subject to the $2,500 note. The Weiners held the title subject to the deed of trust and contract of sale, they were co-makers of the $2,500 note and they had received $2,400 ($2,200 from the Browns and $200 from the Cardozas) for the property.

The Cardozas made regular $25 monthly payments on the $2,500 note until July of 1942. These payments were made to the Weiners and by them paid over to the Browns. During the early part of 1942 the Browns and the Weiners had several disputes over these payments, the Browns charging that the Weiners were slow in turning these payments over to them. The Browns finally arranged with the Cardozas for the Cardozas to refinance the loan so that the Browns could get out of the transaction. At that time there was a little over $2,100 due on the principal of the $2,500 note. The Cardozas arranged for a loan of $2,200 from the Bank of America, and the money was deposited in escrow. The Browns deposited their $2,500 note, the deed of trust, and a reconveyance, with a title company in escrow. Inasmuch as title stood in the name of the Weiners, a deed from them was necessary to complete the escrow. The title company requested the deed from the Weiners and they refused to execute it. They demanded $2,112.50 from the Cardozas for the deed, that being about the balance owing on the purchase price, and tendered $1,480 to the Browns in full payment of the $2,500 note. This $1,480 was the amount due on the note if the $300 be deducted, and if all the $25 payments made be applied to principal. This demand was refused, and this litigation resulted. The trial court determined that the transaction was not usurious, that $2,099.98 was due on principal on the note and $136.49 interest, that plaintiffs were entitled to $350 attorneys' fees, and costs of suit. The court gave judgment in these sums and decreed foreclosure.

The Weiners contend the transaction was usurious, and this is the only point involved on this appeal.

[1] The Usury Law, Stats. of 1919, p. lxxxiii, Deering's Gen.Laws, Act 3757, was adopted as an initiative act in 1919. Under § 1 of that act parties were permitted to contract for an interest rate not to exceed 12% per annum. Under § 2 any contract to pay more than 12% per annum rendered the entire interest provision null and void. In 1934 Art. XX, § 22, of the Constitution was amended so as to reduce the maximum permissible rate from 12 to 10 per cent, to exempt certain enumerated classes of lenders from certain of the interest provisions, and to place in the Legislature a limited control over the fixing of interest and other charges made by the exempted groups. The constitutional provision does not contain the many sanctions set forth in the Usury Law. It is now well settled, however, that the adoption of the constitutional provision did not repeal all of the provisions of the Usury Law. Insofar as the constitutional provision is inconsistent with the statute, it is of course supreme, but, insofar as they are consistent, the provisions of the Usury Law, including the penalties, are still in effect. Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252; Layport v. Rieder, 37 Cal.App.2d Supp. 742, 94 P.2d 96.

[2, 3] The first question to be determined is whether or not the $300 exacted by the Browns in excess of the $2,200 loaned should be considered interest. The Browns argue that the real essence of the transaction was that the Cardozas made a note payable to the Weiners who then discounted it with the Browns for $300 less than its face value, and contend that the usury laws do not apply to such a transaction, citing such cases as Vaughan v. Peoples' Mortgage Co., 130 Cal.App. 632, 20 P.2d 335; McCarty v. Mellinkoff, 118 Cal.App. 11, 4 P.2d 595; Baker v. Butcher, 106 Cal.App. 358, 289 P. 236; O. A. Graybeal Co. v. Cook, 111 Cal.App. 518, 295 P. 1088. This is not what the trial court found, nor what the actual transaction was. The court found that as one transaction the Browns agreed to lend $2,200 to the Weiners and that the profits from the sale of the property were to be split. The evidence shows without contradiction that the "splitting of profits" was the amount offered by the Weiners and accepted by the Browns for making the loan, plus 6½% interest. The Constitution, Art. XX, § 22, prohibits any device whereby the lender by charging a "fee, bonus, commission, discount or other compensation" will receive more than 10% per annum for any loan of money. See, also, § 2 of the Usury Act. A plan whereby the lender refuses to make a loan unless the borrower will "split" profits is obviously a device whereby the lender demands for the loan a consideration in addition to interest. The so-called "split" in profits is nothing more nor less than a bonus for the loan. The law is well settled in most jurisdictions, including California, that where there is a loan of money to be compensated for by a share in earnings, income or profits, in lieu of or in addition to interest, in determining whether the transaction is usurious the share of earnings, income or profits must be considered as interest. Jameson v. Warren, 91 Cal.App. 590, 267 P. 372; Rice v. Dunlap, 205 Cal. 133, 270 P. 196; Richlin v. Schleimer, 120 Cal.App. 40, 7 P.2d 711; Wilbur v. Griffins, 56 Cal.App. 668, 206 P. 112; see annotation, 51 A.L.R. 552. For this reason we are of the opinion that the $300 added to the amount loaned by the Browns must be considered as a bonus for the loan and therefore, interest.

This does not necessarily determine that the transaction was usurious. The Browns, under Art. XX, § 22, of the Constitution, lawfully could have charged 10% on $2,200, the amount actually loaned. If the note had provided for 10% interest, and if it had further provided for $25 a month payments on the $2,200 loaned, according to the tables furnished by appellants, it would take 160 months to pay the full indebtedness, during which time $1,781.61 would have been paid in interest and $2,200 on principal. Thus, according to this table, the Browns lawfully could have charged $1,781.61 interest. The actual transaction was a note for $2,500, of which $300 was interest, at 6½% interest, payable at $25 a month. According to appellants' tables, it would take 145 months to pay off such a note, during which time $1,110.24 would be paid as interest and $2,500 on the principal. If the $300 bonus be added to the interest payments, it will be seen that the total interests paid on the transaction would have been $1,410.24, which is $371.37 less than lawfully could have been charged. It is thus apparent that the transaction, viewed in this light, even with the $300 considered as interest, was not usurious.

Appellants, while now recognizing that the transaction was not usurious if considered as a loan of $2,200, contend that it should not be so considered, but should be treated as two separate loans—one for $1,200, the so-called first loan, and one for $1,000 calling for 6½% interest and a $300 bonus. The appellants contend that if the transaction be so considered the interest exacted on the $1,000 loan exceeded by $67.50 the amount that could lawfully have been charged. This conclusion is arrived at by treating each $25 payment as a payment pro tanto on the interest and principal of the "two" obligations.

[4] The difficulty with this argument is that it is contrary to the facts. The transaction that is under attack is one in which the Browns loaned $2,200 and exacted a $300 bonus. The original $1,200 note was executed by the Weiners alone. The note here involved was for $2,500, and was executed by the Cardozas and the Weiners. The original note for $1,200 was canceled. Upon such cancellation it disappeared from the case. The new note completely superseded the first note. It is quite significant that the Weiners when they made their tender of $1,480 did not treat the transaction as if it were two transactions. They did not tender the interest on the "first" note. They treated the transaction as one transaction, and contended that all interest was void and should be considered as applied to principal. We are of the opinion that the question under consideration is whether the loan of $2,200 was usurious, and that such loan must be considered as one transaction. So considered, the Browns did not exact more than 10% interest, and the transaction was not usurious.

Independently of the arguments in relation to the rate of interest, appellants urge that the transaction violated both §§ 1 and 2 of the Usury Act.

[5] Section 1 provides that the rate of interest for the loan or forbearance of money shall be 7%, but that it shall be competent for the parties to contract for 12%, "in which case such rate exceeding seven dollars on one hundred dollars shall be clearly expressed in writing." It is contended that it was not so expressed. Section 2 of the Usury Act prohibits the taking or receiving of more than 12% interest for the loan or forbearance of money, and it is further provided that "nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest * * *." It is urged that the promissory note provided for a $300 bonus, which must be considered as interest, and that the appellants were required to pay interest on interest in violation of the quoted section. We have been referred to no cases that held that, where not more than 10% interest is charged, the portions of the two sections quoted apply so as to render the entire interest provisions void if they violate the quoted portions of the sections, but do not violate the interest rate provisions. We have grave doubts that, if a transaction is not usurious, so far as the interest charge is concerned, the portions of §§ 1 and 2 above quoted were ever intended to render void all interest provisions if perchance the agreement to pay more than 7% is not clearly expressed, or if interest is charged on interest without a clear agreement to that effect. The two portions of the sections quoted seem to embody a rule of construing ambiguous documents, rather than compelling a court to void all interest simply because the contract may be ambiguous. However that may be, this transaction violated neither of these provisions. It is the Weiners who are complaining of the alleged usury. The Cardozas simply bought property for $2,700 and gave a note for $2,500 and cash of $200. They got exactly what they bargained for. As between the Weiners and the Browns, the transaction consisted of two checks—one for $1,200 and one for $1,000 given by the Browns to the Weiners, and the promissory note evidencing the debt for $2,500. The Weiners knew, as anyone examining the papers constituting the contract would know, that they were paying 6½% interest, plus $300 interest. Those papers disclosed that the Weiners were paying interest on the $300 interest. The papers constituting the entire transaction disclosed these facts clearly and without ambiguity. For this reason the two sections in question were not violated.

The judgment appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

67 Cal.App.2d 210

PEOPLE v. GRAYBEHL.

Cr. 3822.

District Court of Appeal, Second District, Division 3, California.

Dec. 7, 1944.

1. Automobiles ⚷355(6)

In prosecution for causing bodily injuries to another while driving while intoxicated, evidence supported implied findings that defendant's automobile struck and injured pedestrian and that defendant was intoxicated at the time. Vehicle Code § 501, St.1935, p. 174.

2. Automobiles ⚷355(6)

In prosecution for causing bodily injury to another while driving while intoxicated, evidence justified finding that windshield of defendant's automobile, because of dust and rain spots, was in such a defective condition as to impair defendant's vision. Vehicle Code, §§ 501, 677, St.1935, pp. 174, 224.

3. Automobiles ⚷332

In driving automobile with windshield in defective condition because of dust and rain spots, defendant committed an act forbidden by law and neglected duty imposed by law within statute covering offense of causing bodily injury to another as proximate result of neglecting duty imposed by law or doing acts forbidden by law while driving while intoxicated. Vehicle Code, §§ 501, 677, St.1935, pp. 174, 224.

4. Automobiles ⚷356

In prosecution for causing bodily injury to another while driving while intoxicated, whether defendant's failure to see person struck by automobile was caused by her intoxication, by dirty windshield, or by some other thing, was a question of fact for jury. Vehicle Code, §§ 501, 677, St. 1935, pp. 174, 224.

5. Automobiles ⚷355(6)

In prosecution for causing bodily injury to another while driving while intoxicated, evidence supported implied finding that impaired vision of defendant resulting from dust and rain spots on windshield was proximate cause of injury to person struck by defendant's automobile. Vehicle Code, §§ 501, 677, St.1935, pp. 174, 224.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Isabelle Graybehl was convicted of driving an automobile while intoxicated and causing bodily injuries to another, and she appeals from an order denying her motion for a new trial.

Order affirmed.

Hahn, Graf & Ross, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was accused of the crime of violation of Section 501 of the Vehicle Code, St.1935, p. 174, a felony. It was alleged that on or about July 5, 1943, she did unlawfully drive an automobile, while under the influence of intoxicating liquor, and in an unlawful manner, proximately causing bodily injury to Emily Yakimowich, a human being. She was accused further in a second count of the crime of negligent homicide, a felony. It was alleged in that count that she did unlawfully drive a motor vehicle thereby causing the death of said Emily Yakimowich. The second count was dismissed on motion of the defendant. In a trial by jury the defendant was found guilty as charged in the first count. Probation was granted for five years upon condition that she serve 6 months in the county jail, reimburse the family of deceased for funeral expenses, refrain from the use of intoxicating liquor, and not operate a motor vehicle. The imposing of sentence was suspended. Defendant appeals from the order denying her motion for a new trial.

Section 501 of the Vehicle Code provides in part: "Any person who, while under the influence of intoxicating liquor, drives a vehicle and when so driving does any act forbidden by law or neglects any duty imposed by law in the driving of such vehicle, which act or neglect proximately causes bodily injury to any person, is guilty of a felony * * *."

Defendant contends that the verdict was contrary to the evidence. Her argument is that she was not under the influence of intoxicating liquor; that while driving a vehicle she did not do any act forbidden by law, nor neglect to do any duty imposed by law; and that the bodily injury suffered was not a proximate result of an alleged dirty windshield.

On July 5, 1943, the defendant and Madeline Groendyke went in defendant's automobile to a picnic near Sunland. While they were there, from 11:00 a. m. to 4:30 p. m., defendant drank "about one or two beers." After leaving the picnic they went to defendant's home at Roscoe, then to Mrs. Groendyke's home at North Hollywood, and then to a cafe "to have a beer." While they were in the cafe, from 6:00 p. m. to 6:45 p. m., defendant drank some beer, and had an altercation with Mrs. Groendyke while trying to get Mrs. Groendyke to go home. The amount of beer which defendant drank will be referred to hereinafter. After leaving that place they were intending to go to Mrs. Groendyke's home and were proceeding north on Laurel Canyon Boulevard (north of Ventura Boulevard) about 8:10 p. m. when, according to the testimony of defendant, the defendant saw the body of Emily Yakimowich lying in the street, and defendant "went around the side and pulled up a ways," stopped, and "tried to pick her up."

Emily Yakimowich, a woman about 35 years of age, died on July 5, 1944, on Laurel Canyon Boulevard at the place hereinafter described as the scene of the accident. She died as a result of a right basal skull fracture.

Robert Holroyd, a witness called by the people, testified that on July 5, 1943, "a little after 9 o'clock" when "it was getting dark," he was driving his automobile in a northerly direction on Laurel Canyon Boulevard and he saw defendant and Mrs. Groendyke standing over the body of Emily Yakimowich, which was lying on the concrete part of the street; that he stopped his automobile, and before he got out of it, defendant said, "My God, I have run over this woman, help me do something"; that he jumped out of his automobile, looked at the woman who was lying in the street, saw blood running from her head, and he ran to a nearby house and asked a man to call an ambulance; that he remained at the scene until the ambulance had taken the body away—about 20 minutes; that he did not see defendant's automobile while he was there; that the body was lying about 10 feet from the curbing; that he had just turned his automobile lights on when he was about a quarter of a mile from the place where the body was lying; that his wife and daughter were with him; that he did not communicate with the police that night, but when he read in the newspaper the next morning that the defendant had denied "running over the woman" he telephoned to the police department and reported what he had seen and heard.

A police officer testified that when he arrived at the scene of the accident about 8:40 p. m. the body was not there; that he went into a nearby house and there he saw the defendant and Mrs. Groendyke; that he caused the defendant to walk to her automobile and get in it; that he asked her when she first saw the injured person, and she said, "The first I seen of the woman was when she was on my front fender; I thought she was riding a bicycle, she was so high"; that defendant's breath was alcoholic; that he observed her as she walked, and she "was weaving all around and throwing her arms and crying," and was hysterical; that a pool of blood was on Laurel Canyon Boulevard about 20 feet and 2 inches west of the easterly curb and "almost in the center of the block," i. e., about midway between two street intersections; that adjoining the concrete portion of the boulevard there was a macadam shoulder which was 19 feet and 7 inches in width; that the pool of blood was on the concrete portion of the highway about 8 or 9 inches from the edge of the macadam; that the front of defendant's automobile was about 135 feet north of the pool of blood and was close to the curb; that the right front fender had a bulge in the middle of its right side, which bulge appeared to be fresh; that there was a spot about the size of a penny on the front part of the right front fender, which spot appeared to be blood; that the windshield on defendant's automobile "was very dirty," and "was full of dust and rain spots," and the visibility through it "was very poor"; that the surface of the pavement was dry, and the weather was clear; that he did not see any skid marks; and that he took defendant from her car to a police car.

Another police officer, who went to the scene with the officer just mentioned, testified the same as that officer testified concerning the measurements and the blood on the pavement; that he did not see any skid marks; and that the windshield "was very dirty and had water spots on it," and the visibility through it "was pretty poor."

Another police officer, who arrived at the scene about 9 p. m., testified that he saw the defendant walk to the police automobile;

that he talked with her in the police automobile when they were taking her to the receiving hospital for a sobriety test; that her breath was alcoholic; that he was present when the physician examined her for sobriety; that in his opinion she was under the influence of intoxicating liquor; that she said that after she had returned from an outing she had drunk 3 glasses of beer, that she was driving the automobile when the accident happened, that she did not see the woman before she hit her, and that her attention was attracted to the fact that something was wrong when her passenger, Mrs. Groendyke, said: "Stop, you have hit a person"; and that she also said that when she saw the girl in front of her it appeared to her as if the girl were riding a bicycle.

The proprietor of the cafe, where defendant and Mrs. Groendyke had been before the accident, testified that Emily Yakimowich was an employee at his cafe and it was expected that she would arrive there that evening; that she lived about 1½ miles southwest of the cafe and in order to get to the cafe from her home she would travel north on Laurel Canyon Boulevard; that he saw defendant and Mrs. Groendyke at his cafe on July 5th and they were there from 6:00 p. m. until 6:45 p. m.; that in his opinion defendant was intoxicated; and that she was served one drink in his place, but he did not know what kind of drink it was.

The physician at the receiving hospital, who examined defendant for sobriety at 9:45 p. m., testified that defendant was intoxicated.

Another police officer testified that he examined defendant's automobile on July 7th at her home; that the front bumper brackets, which extended from the bumper to the frame of the car, were bent and the bumper had been moved back 4 inches toward the car; that the left bumper guard on the front bumper had been moved to the left about ¾ of an inch; that in the dust on the apron of a front fender (it does not appear which one) there were "ribbed marks of clothing" about 19 inches in length; and that the windshield "was very dusty," and "had water spots on it and it was very hard to see through in daylight."

The husband of defendant testified that he went to the scene of the accident on July 5th, and that one of the officers, the defendant and he looked carefully at the automobile (referred to herein as the defendant's automobile), and the officer "admitted" that "he could not see a thing with the exception of some old dents"; that the dents in the car, including the bent fender, the bent bumper and the "moved" bumper-bracket, were caused in 1941 when he was using the car to push his brother's car; that those damaged parts of the car had never been repaired. In response to a question as to whether defendant was intoxicated, he said: "I don't believe so—no, she was not." He testified further that he drove the car home from the scene of the accident, after having been told by the police that he could drive it; that there was no blood spot on the car; and that there were no "brush marks" or any marks on the car indicating that something had slid over the surface of it.

The brother of defendant's husband testified the same as defendant's husband had testified concerning the dents in the car.

The defendant testified that she drank "about one or two beers" while she was at the picnic; that she drank a beer in the cafe; that she was not intoxicated; that the windshield was clear to her; that when she first saw the injured person the person was lying in the street with her face down, "and I saw this person *over* my left fender (italics added)." In response to a question as to whether she told an officer that she saw the injured person *on* the fender, she said, "I told * * * [the officer] I saw her over my left fender." Defendant testified further that her car did not strike the injured person; that she stopped her car "before reaching the body"; that she "went around the side and pulled up a ways, and then tried to pick her up"; that she was going "around twenty miles an hour"; that the first time she saw the witness Holroyd, who testified that he arrived at the scene when defendant and Mrs. Groendyke were standing over the body, was when he was a witness in the trial court; that a man came up behind her and told her he would not touch the injured person; that she did not tell anyone that she had run over the person; that she went to a nearby house to call an ambulance, and a man there called the ambulance; that while she was in the house she washed blood off her hands and arms; that she was in the house when the officer came there; that there were no dents in the car that had not been there before the officer arrived; that she did not tell an officer that Mrs. Groendyke said, "Stop, you have hit a person"; and that she did not say to an officer that "I thought she was riding a bicycle, she was so high."

[1] It was conceded that defendant was driving the automobile. The evidence was sufficient to support the implied findings of the jury that the automobile, driven by defendant, struck and injured Emily Yakimowich; and that defendant was under the influence of intoxicating liquor when the injury occurred.

[2, 3] As above noted, in order to constitute the offense of which appellant was convicted under Section 501 of the Vehicle Code, there must be an unlawful act or neglect of legal duty in addition to the unlawful act of driving an automobile while under the influence of intoxicating liquor, and that such additional unlawful act or neglect must be a proximate cause of the bodily injury. Section 677 of the Vehicle Code provides in part: "It shall be unlawful to operate any motor vehicle upon a highway when the windshield is in such a defective condition as to impair the driver's vision." The evidence was sufficient to justify a finding that the windshield of defendant's automobile at the time of the injury was in such a defective condition as to impair the driver's vision. In driving the automobile when the windshield was in such condition, defendant committed an act forbidden by law; and she neglected a duty imposed upon her by law, namely, the duty of removing such condition of the windshield before operating the automobile upon a highway.

The remaining question is whether said unlawful act or neglect of legal duty in operating the automobile was a proximate cause of the injury. In the case of Jones v. Barion, 1930, 103 Cal.App. 59, 283 P. 885, which was an action for damages for personal injuries sustained by a pedestrian who was struck by an automobile, the atmospheric visibility at the time of the accident was good, but the "windshield was hazy" as a result of moisture thereon which had accumulated when defendant's automobile was on a ferry shortly before the accident. The court therein said at page 61 of 103 Cal.App., at page 885 of 283 P.: "Under the evidence outlined, the jury would have been warranted in finding the appellant negligent for the condition of his windshield and his failure to see respondent * * *." In Norton v. Puter, 1934, 138 Cal.App. 253, 32 P.2d 172, which was an action for damages for personal injuries sustained by a guest in an automobile as a result of the overturning of the automobile, the action was based upon the wilful misconduct of the driver. In that case the driver's view of the highway was obscured by rain which had accumulated on the windshield, the automatic windshield-wiper having ceased to operate. In holding therein that defendant was guilty of wilful misconduct which proximately contributed to the happening of the accident, and in reciting various parts of the evidence which indicated the wilful misconduct, the court said in part at page 257 of 138 Cal.App., at page 174 of 32 P.2d:

"The defendant knew the pavement was wet and slippery; his vision was obscured by the falling rain and the water on his windshield; the windshield wiper was not operating * * *." Those cases are referred to for the purpose of showing that it has been held that evidence that a windshield obscured a driver's vision was material evidence upon the question of negligence in operating an automobile, and upon the question of proximate cause of an injury.

[4, 5] The matter of visibility was one of the important questions in the trial. The evidence, in the light favorable to the people, established that defendant did not see the injured person before the automobile struck her, and that defendant's attention was first attracted to the injured person when defendant's passenger told her she had hit a person. The ability of the defendant to see the injured person before the automobile struck her was impaired undoubtedly by reason of defendant's intoxication. Also her ability to see the injured person before the automobile struck her was impaired undoubtedly by reason of the dirty windshield, especially since the accident occurred at nightfall. Defendant's failure to see the injured person before the accident might have been by reason of her intoxication, or by reason of the dirty windshield, or both, or various other things. It was a question of fact for the jury as to what was the proximate cause of the injury. The evidence was sufficient to support the implied finding of the jury that the impaired vision of the defendant by reason of such condition of the windshield was a proximate cause of the bodily injury to Emily Yakimowich.

The order denying the motion for a new trial is affirmed.

DESMOND, P. J., and FOX, Justice pro tem., concur.

67 Cal.App.2d 238

OBERLACK v. TRUSAS.

Civ. 7073.

District Court of Appeal, Third District, California.

Dec. 8, 1944.

Hearing Denied Feb. 1, 1945.

1. Executors and administrators ⚷226

Inadvertence in referring in affidavit of publication of notice to creditors of deceased's estate to name of owner of newspaper instead of giving name of the paper did not invalidate the affidavit or continue the time for filing claim, since notice need not give name of newspaper, no one was misled, and since statutes with respect to publication and proof of due notice to creditors were fully complied with. Probate Code, §§ 700, 702.

2. Executors and administrators ⚷226

Published notice to creditors of a deceased person's estate is constructive notice binding on all creditors, even though they may not have actual notice thereof. Probate Code, §§ 700, 702.

3. Executors and administrators ⚷226

Strict compliance with statute in respect to publication of notice to creditors of deceased person's estate is required in order to bar claimant after expiration of six months from first publication. Probate Code, §§ 700, 702.

4. Statutes ⚷231

The sections of the Probate Code should be read together to determine whether due notice to creditors of deceased person's estate has been established as required by law. Probate Code, §§ 700, 702.

5. Executors and administrators ⚷226

An immaterial error in statement of facts, not misleading, is deemed surplusage which does not invalidate due notice to creditors or have effect of extending time within which to file claims against the estate. Probate Code, §§ 700, 702.

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by Rudolph Oberlack against John D. Trusas, as administrator of the estate of William Denis Trusas, deceased, on promissory notes. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

L. C. Smith and Chenoweth & Leininger, all of Redding, for appellant.

Daniel S. Carlton, of Redding, for respondent.

THOMPSON, Justice.

The administrator of the estate of William Denis Trusas, deceased, has appealed from a judgment of $2,771.37, in favor of the plaintiff for the unpaid principal and interest on two promissory notes, together with attorney's fees. The creditor's claim, upon which the action was founded, was not filed within six months "after the first publication of the notice," as required by Section 700 of the Probate Code. The trial court held that the time for filing claims was extended under Section 702 of that Code because the affidavit required by the last mentioned section inadvertently stated that the notice was published in "Redding Record Inc., a daily newspaper of general circulation printed and published at Redding, in the County of Shasta," when in fact it was published in the "Redding Record-Searchlight and Courier-Free Press," a newspaper of general circulation published in that county. The Redding Record, Inc., is the name of the corporation owning the newspaper in which the notice was published as required by law.

The sole question to be determined on this appeal is whether the inadvertence in referring in the affidavit to the name of the owner of the newspaper instead of giving the name of the paper in which the notice was published, resulted in an extension of the statutory time for filing creditor's claims under the provisions of Section 702 of the Probate Code. This appears to be a decision of first impression on that issue. No California cases are cited upon that direct subject.

The plaintiff owns two unsecured unpaid promissory notes aggregating the sum of $2,000, at 6% interest per annum, executed by William Denis Trusas in his lifetime. Mr. Trusas died in Shasta County, February 4, 1942. Upon proceedings duly had in the Probate Court of Shasta County, John D. Trusas was appointed and qualified as administrator of the estate. Chenoweth & Leininger are the attorneys who represented the administrator, with offices at 1607

Market Street, in Redding. On February 26, 1942, the administrator published notice to creditors of said estate in the "Redding Record-Searchlight and Courier-Free Press", a newspaper of general circulation printed and published in that county, in strict compliance with the provisions of Section 700 of the Probate Code. On March 30, 1942, the sworn affidavit of publication of notice to creditors was filed in the estate. That affidavit contained a copy of the printed notice which stated that claims against the estate must be filed "in the office of the clerk of the Superior Court of the State of California, in and for the County of Shasta," or that they must be presented "with the necessary vouchers, within six months after the first publication" to the "Administrator at the offices of Chenoweth & Leininger, Attorneys-at-Law, 1607 Market Street, Redding, Shasta County, the same being his place of business in all matters connected with said estate of William Denis Trusas, * * * deceased." The affidavit also stated that the first publication of notice was on February 26th, and the last one on March 26, 1942. That affidavit was in full compliance with Section 702 of the Probate Code, which requires only that it shall "state the date of its first publication," and contain "a copy of the notice." The six months' period for filing claims expired August 26, 1942. The plaintiff failed to file his claim until November 19, 1942. The claim was rejected by the administrator on November 24, 1942.

The court found that plaintiff resided in San Francisco and had no actual knowledge of the publication of notice to creditors until September 27, 1942; that the notice was published February 26, 1942, as required by law, in the Redding Record-Searchlight and Courier-Free Press, a newspaper of general circulation published in Shasta County, but that the affidavit of publication erroneously recited that it was published in the "Redding Record Inc." and that "the time to file claims * * * has not commenced to run" on that account. Judgment was thereupon rendered in favor of plaintiff as above stated. From that judgment this appeal was perfected.

[1] We are of the opinion the affidavit of publication of notice to creditors in said estate was not invalid because it inadvertently named the owner of the newspaper in Shasta County in which the notice was actually published, which that statute does not require, instead of naming the newspaper, or otherwise. Nor did that error have the effect of continuing the time for filing claims.

All that Section 702 of the Probate Code requires that affidavit to contain is the date of the first publication and "contain a copy of the notice." The copy of the notice included in the affidavit contained all of the facts and information required by Sections 700, 701 and 702 of that code. The statutes with respect to the publication and proof of notice thereof were strictly complied with. The statutes do not require the notice or the affidavit to state the name of the newspaper in which the notice is published. The creditors gain no necessary information for filing their claims from the mere knowledge of the name of the newspaper. All the information that they need, and all that the statute requires to enable them to file their claims in due time, is that they shall be furnished the date of the first publication from which they may determine when the six months' limitation for filing claims shall expire, and the "residence or place of business" of the representative of the estate, with whom they may file their claims. That was done in the present case. The plaintiff in this case could not have been prejudiced by the erroneous mentioning of the corporation owning the newspaper in which the notice was published. That was surplusage and could not have misled the plaintiff with respect to the time or place of presenting his claim. If he had gone to the county clerk's office and examined the affidavit he would have ascertained when the first publication occurred. That was correctly stated in the affidavit. If he had seen the printed notice in the newspaper, or examined the affidavit in the clerk's office, he would have known that he must file his claim within six months after February 26th with either the county clerk or the administrator at his stated "place of business" for administering the estate "at the office of Chenoweth & Leininger, Attorneys-at-Law, 1607 Market Street, Redding, Shasta County." It has been held that claimants must exercise due diligence in locating the representative of an estate against which they hold claims. 11A Cal. Jur. 723, § 514.

Section 700 of the Probate Code provides that: "The executor or administrator, promptly after letters are issued, must cause to be published in some newspaper published in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against the decedent to file them, with the necessary vouchers, in the office of the clerk of the court from which letters issued, or to present them, with the necessary vouchers, to the executor or administrator, at his residence or place of business, to be specified in the notice, within six months after the first publication of the notice."

Section 702 provides that: "An affidavit showing due publication of the notice must be filed with the clerk within thirty days after the completion of the publication. *The affidavit shall contain a copy of the notice and shall state the date of its first publication.* Final distribution shall not be decreed unless it is shown that notice to creditors has been duly given. If the affidavit is not filed until after such thirty-day period, the time to file or present claims shall be extended for a period equal to the period of default in such filing." (Italics added.)

[2] The publication of notice to creditors is for the purpose of giving the creditors of the decedent notice of the place where and the period within which they may file their claims. It is in the nature of a statute of limitations. Since the proceeding is in rem, that notice is binding upon all the world. It is constructive notice which is intended to bind all creditors even though they may not have actual notice thereof. 11A Cal.Jur. 721, § 513.

The notice must be directed to creditors of the decedent, naming the decedent, and must call for the filing of claims with vouchers with the county clerk of the county where the estate is pending, or with the representative of the estate at his designated place of business. It must also state that the claims must be filed within six months from the first date of the notice. 11A Cal.Jur. 722, § 514. All that was done in this case.

[3, 4] Strict compliance with the statute is required with respect to the publication of notice to creditors to bar a claimant after the expiration of six months from the first publication. Burr v. Goodwin, 126 Cal.App. 539, 542, 14 P.2d 808; Hawkins v. Superior Court, 165 Cal. 743, 134 P. 327. Sections 700, 701 and 702 of the Probate Code should be read together to determine whether due notice to creditors has been established as required by law. Hawkins v. Superior Court, supra. When the statutory requirements have been complied with a claimant is deemed to have had due notice thereof and his claim is barred after six months from the first publication unless it appears that "the claimant had not received notice, by reason of being out of the state." Sec. 707, Probate Code. Section 1491a of the Code of Civil Procedure formerly required the administrator to file in the estate within thirty days after the first publication "a printed copy of said notice to creditors accompanied by a statement, setting forth the date of the first publication thereof *and the name of the newspaper in which the same is printed,*" upon proof of which the court was required to render its decree establishing due notice to creditors, pursuant to the following section of the code. But those sections were repealed. Sec. 1700, Probate Code. Section 702 of the Probate Code, which was enacted in 1931, no longer requires the name of the newspaper to be given in the affidavit in proof of due publication of notice. Under the law requiring a decree establishing due notice to creditors, as it formerly existed, it was held that when Sections 1491a and 1492 of the Code of Civil Procedure had been complied with, the court was bound to render its decree establishing due notice, and that upon refusal to do so, mandamus would lie to compel that decree to be entered. Hensley v. Superior Court, 111 Cal. 541, 44 P. 232.

[5] In the present case, since the statutes with respect to the publication and proof of due notice to creditors were fully complied with, and the plaintiff was not prejudiced or misled by the inadvertence of mentioning in the affidavit the name of the owner of the newspaper, the court erred in determining that the time for filing plaintiff's claim was extended under Section 702 of the Probate Code. Plaintiff's claim was barred. An immaterial error in the statement of facts, not prejudicial or misleading, may be deemed to be surplusage which will not invalidate due notice to creditors or have the effect of extending the time within which to file claims. It could not reasonably be said that, if the affidavit had inadvertently mentioned the name of the newspaper as "Red-

ding Searchlight Press" or "Redding Courier-Free Press" instead of the "Redding Record-Searchlight and Courier-Free Press", that it would render the publication and proof thereof ineffectual or void, or that the time for filing claims would thereby be extended.

The judgment is reversed, and the court is directed to render judgment in favor of the defendant.

ADAMS, P. J., and PEEK, J., concur.

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67 Cal.App.2d 203

PEOPLE v. WISECARVER.

Cr. 3845.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1944.

As Corrected Dec. 18, 1944.

1. Criminal law 🔑240

An information alleging a felony should be tried before the tribunal created for purpose of determining guilt or innocence of a person so accused, if the examining trial developed evidence which might be reasonably interpreted as proof of guilt. Pen.Code, §§ 872, 995.

2. Criminal law 🔑238

Evidence at examining trial showed a reasonable cause for holding that defendant, a woman 21 years of age, maliciously or fraudulently enticed a boy 14 years of age away with intent to detain and conceal him from his parents, notwithstanding defendant's offer of marriage and that the boy accompanied her willingly. Pen.Code, §§ 278, 995.

3. Kidnapping 🔑1

The statute does not confine the act of child stealing to a forcible taking away. Pen.Code, § 278.

4. Kidnapping 🔑1

Under statute providing punishment for any person who maliciously, forcibly or fraudulently takes or entices away any minor child with intent to detain and conceal the child from its parents, the word "fraudulently" includes surprise, trick, cunning, dissembling, and unfair ways by which another is deceived. Pen.Code, § 278.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraudulently".

5. Fraud 🔑9, 14, 16

"Fraud" may be committed by declaring to be true that which declarant does not believe to be true, by suppressing a fact which he is bound to disclose, or by making a promise without any intention of performing it. Civ.Code, § 1572.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

6. Kidnapping 🔑5

As proof of the fraud of defendant in enticing a child away from its parents, the court should consider the conduct of the parties together with all the circumstances before and after the act complained of. Pen.Code, § 278.

7. Kidnapping 🔑1

In determining whether evidence at examining trial was sufficient to establish probable cause for holding defendant on a charge of child stealing in enticing a 14 year old boy away from his parents, that the boy may have accompanied defendant of his own volition is immaterial, since the purpose in the mind of defendant is the factor determining moral turpitude. Pen. Code, § 278.

8. Criminal law 🔑240

"Probable cause" is a state of facts which inclines a man of ordinary prudence conscientiously to entertain a strong suspicion that a prisoner is guilty of the offense charged. Pen.Code, § 995.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

9. Indictment and Information 🔑10

Upon a hearing on motion to dismiss accusation of child stealing, the court was not required to determine whether the evidence was sufficient to convict, but only whether the prisoner should stand trial. Pen.Code, §§ 278, 995.

10. Criminal law 🔑1024(1)

In a criminal action the sovereign has the right to have the truth of its accusation determined by a trial court to the same extent and in the same degree as the accused. Pen.Code, §§ 872, 995.

11. Criminal law ⚷1024(1)

An appeal by the people lies from an order dismissing an information. Pen.Code, §§ 995, 1238.

Appeal from Superior Court, of Los Angeles County; Clement D. Nye, Judge.

Proceeding by the People of the State of California against Elaine Wisecarver, charging the offense of child stealing. The accusation was dismissed, and the State appeals.

Judgment reversed with instructions to deny motion.

Robert W. Kenny, Atty. Gen., Fred N. Howser, Dist. Atty., and Jere Sullivan, Deputy Dist. Atty., both of Los Angeles, for appellant.

David C. Marcus, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question posed by this appeal is whether the defendant was held without probable cause for the offense of child stealing. Having been committed by the justice court of Compton township June 1, 1944, she was duly accused by the district attorney under information filed in the superior court. Pursuant to motion under section 995, Penal Code, the accusation was dismissed on the ground that the transcript of the evidence taken before the justice of the peace did not contain evidence or inferences that defendant had violated the code section under which she was accused.

The statute which denounces child stealing reads as follows: "Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having lawful charge of such child, is punishable by imprisonment in the state prison not exceeding twenty years." Penal Code, § 278.

[1, 2] While concededly no force was employed by defendant to take away the boy of 14 years, yet a careful scrutiny of the unfolded record exposes substantial evidence that she was activated by malice or moved by fraudulent design in enticing him away with intent to detain and conceal him. Such proof required determination by a trial on the facts. This decision is not intended as a holding that the young woman is guilty as alleged but rather to uphold the thesis that an information alleging a felony should be tried before the tribunal created for the purpose of determining the guilt or innocence of a person so accused, if the examining trial developed evidence which might be reasonably interpreted as proof of guilt. That an analysis of the evidence fairly shows that there was reasonable cause for holding that defendant maliciously or fraudulently enticed the boy away with intent to detain and conceal him from his parents, should readily appear.

Defendant is twenty-one years of age. Prior to April 28, 1944, she resided in Compton, some ten miles south of Los Angeles, where she was known as Elaine Ludlam. She had two children, ages two years and eight months, respectively, by different fathers. She had never been married but was living with a man in her home. Some three months prior to April 28 she formed the acquaintance of Ellsworth Wisecarver, fourteen years of age, who lived at Compton with his parents. During that period he frequented her abode. About April 21 Ellsworth confided to his mother that he desired to marry defendant; that he did not love Elaine but that if he married her he would not have to attend school. His mother expressed astonishment at his suggestion that he wished to marry an illegitimate mother. She urged the folly of a boy of fourteen entering into a matrimonial alliance and promised that he might visit his relatives at Oroville at the expiration of the school term. Immediately following her conversation with Ellsworth, in company with her daughter, age nineteen, Mrs. Wisecarver called upon defendant and demanded to know of her why she was running around with "Sonny," as her child was familiarly known. She virtually accused the woman of having the boy in hiding and admonished her to send him home immediately. His arrival at the homestead was not then delayed.

Subsequent happenings were without the knowledge of Mrs. Mildred Wisecarver, who appears to have exercised the parental authority. On the evening of April 28 defendant left her two children at the home of her mother, Mrs. McEntee, in Los Angeles, and in her own automobile accompanied by Ellsworth and one Fred Adams called at the home of one Loella, a sixteen-year-old girl of Compton, and the four departed for Yuma, Arizona. Ellsworth was penniless. Although Elaine was practically without funds on arrival at their destination she financed the journey. On the way to and at Yuma she wired her mother of her need of funds and of her intention to marry Ellsworth. Also, she advised her friends Loella and Fred Adams that she and the boy were going to be married. She thereupon wrote a letter to the clerk consenting to the marriage of Ellsworth Wisecarver to Elaine Ludlam and signed the name of Mildred Wisecarver. Upon arrival at Yuma on the evening of the 29th both couples procured licenses from the clerk of the court and both were married before the same justice of the peace. The Adams couple returned by bus to Los Angeles after defendant had notified them that she and Ellsworth were going to "Delaware."

For two weeks following April 28 the Wisecarver parents had no knowledge of the whereabouts of their child. At no time had they consented to his marriage or to his departure from the state. Although Elaine communicated her plans and movements to her own mother and by letter advised her friend, Martha Lambert of Compton, admonishing the latter not to say anything to "you know who," yet she did not communicate with Mildred Wisecarver, who had forbidden the marriage. She furnished transportation, paid all expenses on the way to Yuma, purchased the license and paid all bills at hotel and cafe. Following the marriage she procured a loan on her automobile and, financed with the funds thus acquired, with the child she proceeded on her way to Denver. At no time did Ellsworth communicate with his parents, and a jury might readily infer that his failure to keep them aware of his whereabouts was due to the directions of Elaine. Their trip to Denver was Elaine's choice. Her father resided there.

[3] It was defendant's contention before the court below, and evidently the theory of the trial judge, that because Ellsworth proposed marriage to defendant and willingly accompanied her to Arizona defendant could not be guilty of the offense charged. But the statute does not confine the act of child stealing to a forcible taking away. From the reproving words of Mildred Wisecarver, spoken to Elaine on April 21, it would not violate the rules of logic for a jury to infer that malice had envenomed the heart of the rebuked woman and inspired her to seek retribution.

[4-6] However, the fraud feature of the statute affords a richer reservoir of fact from which reasonable inferences might warrant a verdict of guilty. The word "fraudulently" as used in the statute is all-encompassing. It includes all surprise, trick, cunning, dissembling and unfair ways by which another is deceived. People v. Simmons, 12 Cal.App.2d 329, 55 P.2d 297. Fraud may be committed by declaring to be true that which the declarant does not believe to be true; by suppressing a fact which he is bound to disclose; or by making a promise without any intention of performing it. Civil Code, § 1710; Wells v. Zenz, 83 Cal.App. 137, 140, 256 P. 484. Moreover, any act fitted to deceive is actual fraud. Civil Code, § 1572. As proof of the fraud on the part of the accused the court should consider the conduct of the parties together with all the circumstances before and after the act complained of. People v. Annunzio, 120 Cal.App. 89, 94, 7 P.2d 739.

When Mrs. Wisecarver remonstrated with Elaine against the latter's encouraging Ellsworth in the thought of marriage, defendant disclaimed such intention and, probably, in order to mislead and deceive the mother, stated to Mrs. Wisecarver that she was provoked at the things the boy had said about her. Neither did she offer to bid his mother farewell nor suggest that the boy do so. On the contrary she chose the darkness of night to envelop her movements as she hastily sought security from detection in another jurisdiction. Also, her preparation and forgery of the note of consent; her placing it in the hand of Ellsworth to be used; her suggesting that he present it to the clerk as a genuine document: these acts are the insignia of fraud. Indeed, they are a fraud. They were conceived for the purpose of enabling defendant to conceal and detain the child away from his home and from the nurture and protection of his natural guardians. Her failure to do any of them would have frustrated the accomplishment of her reprehensible act to which she was committed. She knew that the lad could not be married in California because of legal barriers. She knew that he could not wed in Arizona unless she committed a felony to procure a license. She did not hesitate at an act involving moral turpitude to achieve her unworthy aim.

Defendant's argument proceeds upon the theory that the accusation is groundless because of the testimony of Ellsworth Wisecarver that he had proposed the marriage and that he had suggested the flight to Arizona. But his word does not spell finality. There is no halo about the head of an infant who rebels at normal discipline, hates his school, defies parental authority, prefers the society of a wayward woman, scorns public opinion and moral law, and finally utters a forged instrument to gain his ends. No reason appears why a jury should believe his story as against reasonable inferences that might be drawn from other evidence.

[7, 8] That he may have accompanied defendant of his own volition is immaterial. People v. Munos, 84 Cal.App. 6, 9, 257 P. 549; People v. Torres, 48 Cal.App. 606, 608, 192 P. 175. The purpose in the mind of defendant is the factor that determines her moral turpitude, if any. The crime of child stealing might be found to have been complete the moment defendant transported Ellsworth from the environs of his home with intent to detain and conceal him from his parents. People v. Casagranda, 43 Cal.App.2d 818, 111 P.2d 672; People v. Mohr, 24 Cal.App.2d 580, 75 P.2d 616; People v. Smith, 17 Cal.App.2d 468, 62 P.2d 436; People v. Palmer, 50 Cal.App. 2d 697, 123 P.2d 882. The situation of defendant is not unlike that of one Gillispie who was accused under similar circumstances. People v. Gillispie 104 Cal.App. 765, 286 P. 502. The fifteen year old daughter of the complainant there willingly left her mother's home about 7 o'clock in the evening. Having pretended that he was accompanying the girl to a party at a neighboring home, the man drove her to Nevada where they were married, thence to the state of Utah. They subsequently made their home in Oregon until the girl was returned to her mother and defendant was convicted of having fraudulently enticed her away with intent to detain and conceal her from her parent. That case demonstrates that there was good cause for denying the motion under Section 995 to dismiss the information by reason of the fact that there was probable cause for her commitment. If there was reasonable cause for her commitment the motion should have been denied. "Probable cause" is a state of facts which inclines a man of ordinary prudence conscientiously to entertain a strong suspicion that a prisoner is guilty. People v. Novell, 54 Cal.App.2d 621, 129 P.2d 453; In re Lottie McCarty, 140 Cal.App. 473, 35 P.2d 568.

[9, 10] It follows that upon the hearing of the motion to dismiss, the court was not required to determine whether the evidence is sufficient to convict, but only whether the prisoner should stand trial. In a criminal action the sovereign has the same right to have the truth of its accusation against the defendant determined by a trial court to the same extent and in the same degree as is the accused. People v. Stoll, 143 Cal. 689, 696, 77 P. 818; People v. Pruitt, 55 Cal.App.2d 272, 275, 130 P.2d 767; People v. Borrego, 211 Cal. 759, 765, 297 P. 17. It is as much a technical breach of the rules of procedure to deny the People a trial upon an information based upon such facts as might reasonably convince a jury of defendant's guilt as it would be to convict a defendant upon the mere filing of an indictment. It is the duty of the magistrate to commit the accused "if it appears from the examination that a public offense has been committed." The question of guilt is utterly one for the determination of the superior court. Penal Code, § 872.

[11] The contention that there is no appeal by the People from an order dismissing an information under Section 995 is without support. Penal Code, § 1238, was amended in 1935 in order to allow such appeal. Its language is clear and concise in declaring: "An appeal may be taken by the people: 1. From an order setting aside the indictment, information, or complaint; * * *." This statute is not inconsistent with a number of decisions by the Supreme Court of the United States in holding valid a similar statute by the Congress. United States v. Bitty, 208 U. S. 393, 28 S.Ct. 396, 52 L.Ed. 543; United States v. Heinze, 218 U.S. 532, 31 S.Ct. 98, 54 L.Ed. 1139, 21 Ann.Cas. 884; Taylor v. United States, 207 U.S. 120, 28 S.Ct. 53, 52 L.Ed. 130.

Judgment reversed with instructions to deny the motion.

W. J. WOOD and McCOMB, JJ., concur.

67 Cal.App.2d 111

In re EWAN'S ESTATE.

TALLEY v. EHRMANN et al.

Civ. 14551.

District Court of Appeal, Second District,
Division 2, California.
Nov. 30, 1944.

1. Wills ⚷52(1), 55(1)

There is a presumption that testator is sane and had testamentary capacity, and contestant has burden of showing affirmatively, by preponderance of evidence, that testator was of unsound mind at the very time of execution of will.

2. Wills ⚷155(1)

However much a will may be at variance with testator's expressions, it will not be held invalid for undue influence unless there is a showing of some sort of pressure which overpowered the mind and mastered the volition of testator at the very moment of execution of will.

3. Wills ⚷55(1), 166(1)

Evidence did not warrant revocation of probate of holographic will on ground of undue influence or lack of testamentary capacity.

4. Wills ⚷163(4)

A proponent of will who was not active in procuring execution thereof, but merely followed instructions of testatrix in calling on lawyer and conveying lawyer's message to testatrix, did not have burden of showing absence of undue influence.

5. Wills ⚷302(1)

Evidence did not warrant revocation of probate of holographic will as not properly executed, especially where such ground of contest was expressly abandoned.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Proceedings in the matter of the estate of Catherine Ewan, deceased, wherein Florence Marie Talley offered a holographic will for probate, contested by Fritz Ehrmann and others. From a judgment revoking the admission of the will to probate, the proponent appeals.

Reversed.

MacDonald, Wallace, Cashin & Arrington, of Los Angeles, for appellant.

H. Y. Gibson, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment revoking admission to probate of an holographic will of Catherine Ewan, deceased, after trial before the court without a jury, proponent of the will appeals.

The essential facts are:

Catherine Ewan died testate on April 16, 1943. She left an holographic will which read thus:

"April 9, 1943

"I, Catherine Ewan, hereby will all of my property real and personal, to my niece, Florence Marie Talley, and appoint her my executor without bond.

"(Signed) Mrs. Catherine Ewan."

Surviving decedent were three sisters and four brothers. After the will was admitted to probate, the brothers and two sisters filed a petition for revocation of the will on the grounds that:

1) Decedent was not of sound and disposing mind and memory at the time of the execution of the will;

2) The will was procured by the undue influence of the beneficiary, Florence Marie Talley; and

3) The will was not executed in the manner and form required by law.

The trial court found in favor of respondents (contestants in the trial court) on each of the three grounds of contest and made findings accordingly.

Appellant (proponent of the will in the trial court) urges reversal of the judgment on this proposition:

There is not any substantial evidence to sustain the trial court's finding that:

1) Decedent was not of sound and disposing mind and memory at the time she executed her will;

2) Decedent was acting under the undue influence of the beneficiary, Florence Marie Talley, at the time she executed the will; and

3) The will was not executed in the manner and form required by law.

This proposition is tenable and is governed by the following pertinent rules of law:

[1] 1) There is a presumption that a testator is sane and has testamentary capacity, and the burden is upon the contestant to show affirmatively by a preponderance of evidence that the testator was of unsound mind at the *very time* of the execution of the will. (In re Estate of Fisher, 202 Cal. 205, 208, 259 P. 755; In re Estate of Perkins, 195 Cal. 699, 703, 235 P. 45. See also cases cited in 26 Cal. Jur. (1926) p. 635, § 10, note 4; and 11 Cal.Jur.Supp. (1936) p. 500, § 10, note 4.)

[2] 2) However much a will may be at variance with expressions by the testator, it will not be held invalid on the ground of undue influence unless there is a showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the *very moment* of the execution of the will. (In re Estate of Clark, 170 Cal. 418, 424, 149 P. 828; In re Estate of Rabinowitz, 58 Cal. App.2d 106, 111, 135 P.2d 579; In re Estate of Clark, 55 Cal.App.2d 85, 91, 129 P. 2d 969; In re Estate of Grant, 8 Cal.App. 2d 232, 242, 47 P.2d 508; In re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25.)

[3] Applying the foregoing rules to the facts in the instant case, the record discloses that decedent, an elderly widow, lived alone in North Hollywood, California, and that Florence Marie Talley, decedent's niece, employed by the Bureau of Power & Light in Los Angeles, visited her aunt, Mrs. Ewan, about once a month; that when Mrs. Ewan became ill she visited her two or three times a week. On April 5, 1943, Mrs. Poulton telephoned Mrs. Talley stating that Mrs. Ewan was quite ill. Mrs. Talley shortly thereafter visited her aunt; found her ill and at her aunt's request tried to get a doctor for her. She also arranged to, and did take Mrs. Ewan to the California Lutheran Hospital in Los Angeles.

On April 5, 1943, Dr. Chaffin visited Mrs. Ewan at the hospital and prescribed for her. Dr. Chaffin testified that there was not any indication at any time that decedent's mind was affected by her illness and that, in his opinion, she was competent to make a last will and testament. When taken to the hospital decedent had a bank account in a branch of the First National Bank of Los Angeles. Mrs. Ewan instructed Mrs. Talley to draw the money from her bank account and use it for the purpose of paying bills in connection with her illness. Pursuant to this instruction, Mrs. Talley took the money from Mrs. Ewan's account and deposited it in her own account. On July 20, 1940, decedent had executed an holographic will by the terms of which she willed all of her property to her nephew, C. W. Ault. On February 8, 1943, Mrs. Ewan asked Mrs. Talley to telephone her attorney, Philip Lyons, and ask him to come and see her, stating that she wanted to change her will. Mr. Lyons inquired why Mrs. Ewan wanted to see him and when informed he said, "Well, I can't come over today. I am busy. You tell your Aunt Kate if she wants to change her will, just to write it out the way she wants it and be sure she has the date on it and have her sign it." When told what Mr. Lyons stated, Mrs. Ewan said, "Florence, I want you to go by and see Mr. Lyons. You tell him that I want him to make out my will putting your name in; I am leaving everything to you." Mrs. Talley went to see Mr. Lyons, stating to him that Mrs. Ewan wanted to make a will by which she left everything to Mrs. Talley. Mr. Lyons then prepared a form of will which he handed to Mrs. Talley, stating, "Tell your Aunt Kate, if she wants to leave everything to you, if she will just copy this will it will be sufficient." Mrs. Talley then took the form of will to Mrs. Ewan and told her, "Mr. Lyons said this is what you want, copy it." Mrs. Ewan then copied the document, signed and dated it.

April 10, 1943, Mr. Lyons talked with Mrs. Ewan in private, during which conversation decedent showed him the holographic will which she had executed. He thereupon made the following notation on the copy of the holographic will that he had given to Mrs. Talley, "I visited Mrs. Ewan at the hospital, 4/10/43, Florence Talley and two nurses were there, Mrs. Ewan wants Rose Miller to have house for life and then it should go to Wendell Miller."

On April 5, 1943, Mrs. Talley did not telephone any of the brothers or sisters of Mrs. Ewan relative to her aunt's illness. On April 6, 1943, Mrs. Talley informed Mrs. Ewan's brothers and sisters of her aunt's condition and told them that the doctor had said "no visitors", and on subsequent occasions she told them that Mrs. Ewan was full of dope and would not recognize them and that there were to be no visitors. Mrs. Talley was present at all times that the brothers and sisters of Mrs. Ewan visited her while she was in the hospital and in a rest home.

Mrs. Poulton testified relative to Mrs. Ewan thus:

"Well, when I die, I never want to be in a hospital, I never want to be in a hospital when I make a Will because she wasn't in the state of mind to make a Will."

Decedent on one occasion said:

"I have a crippled relative and that is who I made it out to and I have a house in town and I want my sister to have that," and on another occasion she said:

"She pays me a little now and then when she has the money, but if she hasn't the money, that is all right and when I die, she will get it."

The fact is she did not own the property referred to but was the holder of a mortgage which was a lien on the property mentioned.

As to the first and second questioned findings the evidence is totally devoid of any fact which would show, or which would support, an inference that the testatrix at the time she executed her will was not of sound and disposing mind and memory, or was acting under undue influence of Mrs. Talley.

[4] Respondents contend that where it is shown that the proponent of a will (a) unduly profits by it, (b) sustains a confidential relationship to the testator, and (c) actively participates in procuring the execution of the will, the burden is shifted to the proponent to show that he did not use undue influence, citing In re Estate of Johnson, 31 Cal.App.2d 251, 257, 87 P.2d 900. The presumption therein referred to is not operative here. Proponent was not active in *procuring* the execution of decedent's will. She merely followed her aunt's instructions in calling on the lawyer and in conveying the latter's message to the testatrix.

[5] As to the third finding of fact, such finding finds absolutely no support in the evidence. The testimony discloses that the will was written entirely in decedent's handwriting, was signed, and dated by her. Particularly is such finding erroneous in view of the fact that contestants at the time of the trial, and before the case was submitted to the court for decision, expressly abandoned as a ground of contest the issue that the holographic will of decedent was not executed in the manner and form required by law.

For the foregoing reasons the judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concur.

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67 Cal.App.2d 195

PEOPLE v. JOHNSON.

Cr. 490.

District Court of Appeal, Fourth District, California.

Dec. 6, 1944.

1. Criminal law 🔑1028

No question of the guilt or innocence of defendant could be injected into case on appeal where if a plea of guilty was ever interposed it was expressly abandoned and withdrawn during the trial in which the defendant relied solely on his pleas of former conviction and once in jeopardy.

2. Indictment and information 🔑191(4)

Neither burglary nor attempted robbery is an included offense in murder.

3. Criminal law 🔑200(1)

Pleas of former conviction and once in jeopardy because of conviction for first degree murder are not available to a defendant charged with burglary and attempted robbery in the course of which offense the homicide took place, since the crimes of burglary and attempted robbery were complete before the crime of murder occurred. Pen.Code, §§ 211, 459, 664.

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Lee A. Johnson was convicted of burglary and attempted robbery, and he appeals.

Affirmed.

Lee A. Johnson, in pro. per.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

MARKS, Justice

[1] This is an appeal from a judgment of conviction of defendant of the crimes of burglary and attempted robbery. No question of the guilt or innocence of defendant can now be injected into the case, because, if a plea of not guilty was ever interposed (which does not appear from the record), it was expressly abandoned and withdrawn during the trial, the defendant relying solely on his pleas of former conviction and once in jeopardy. These pleas were based on a former conviction of defendant of murder of the first degree.

Defendant and one Comstock armed themselves with a loaded revolver and went to the house occupied by John Yoklavich. They opened the door, entered the house and found Yoklavich and his family seated at a table eating their dinner. Comstock, who had the revolver, pointed it at Yoklavich and demanded $300 which Comstock stated had been brought to the house from a store. Yoklavich denied having the money, saying he had not brought it from the store. Comstock gave the revolver to Johnson with instructions to keep the family covered and he proceeded to search the house for the money. Not finding it, he returned to the dining room, took the revolver from Johnson and ordered Yoklavich, and a girl whom he addressed as "Blondie", to accompany them to the store for the money. Yoklavich and the girl arose from their seats at the table and Yoklavich grappled with Comstock, who shot him twice, killing him. During the struggle between the two men, Johnson threw a box at the young girl and ran out the front door followed by Comstock. The two were charged with murder of the first degree, were convicted and sentenced to life imprisonment.

Defendant now claims that his conviction for murder sustains his pleas of prior conviction and once in jeopardy because the killing grew out of the same transaction, and in the murder case the trial judge instructed the jury that if the killing was committed in an attempted armed robbery it was murder of the first degree.

[2, 3] This contention is entirely without merit. Neither burglary nor attempted robbery is an included offense in murder. The elements of the three offenses are entirely different. When Comstock and Johnson opened the door of the house and entered it with the intent to commit a felony the crime of burglary was complete. Sec. 459, Penal Code. When they demanded money from Yoklavich, and attempted to obtain it by means of force and fear produced by pointing a loaded revolver at him, the crime of attempted robbery was complete. Secs. 211 and 664, Penal Code. The crime of murder followed. Under the authority of People v. Hoyt, 20 Cal.2d 306, 125 P.2d 29, and People v. Coltrin, 5 Cal.2d 649, 55 P.2d 1161, the pleas of former conviction and once in jeopardy are not available to a defendant under these circumstances.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

VANCIEL et al. v. KUMLE et al.

Civ. 7088.

District Court of Appeal, Third District,
California.

Dec. 8, 1944.

Hearing Granted Feb. 1, 1945.

1. Appeal and error 🔑931(1)

The appellate court must assume truth of facts found by trial court on conflicting evidence.

2. Principal and agent 🔑148(4)

Actual notice of limitation of agent's authority negatives assumption of his ostensible authority. Civ.Code, § 2318.

3. Banks and banking 🔑102

The statute authorizing agent to do everything necessary or proper and usual, in ordinary course of business, to effect purpose of agency, does not authorize agent, though he be bank manager, empowered to negotiate loan, procure execution of documents incident thereto, and collect money due in accordance with terms of assigned mineral lease, to waive payments, dispose of principal's property or materially change contract terms. Civ.Code, § 2319, subd. 1.

4. Principal and agent 🔑99

An agent cannot go beyond power, delegated to him by statute, to do everything necessary or proper and usual, in ordinary course of business, to effect purpose of agency, though he may perform all subordinate acts usually incident to or necessary to effectuate object expressed. Civ.Code, § 2319, subd. 1.

5. Principal and agent ⚷101(1)

Agent's power to cancel or vary agreement cannot be inferred from his general power to make it, nor has he implied power to waive or give up rights or interests for his principal, unless principal knows or approves of agent's modification of contract. Civ.Code, § 2319, subd. 1.

6. Banks and banking ⚷102

A manager of branch bank, loaning money to mineral lessees with approval of parent bank, to which lease was assigned as security, had no authority to consent to subsequent payment of monthly installments of royalties under lease to lessors, instead of bank, contrary to terms of assignment, of which lessors had written notice.

7. Banks and banking ⚷102

A bank officer may not release parties to contract with bank from liability thereunder, nullify contract, or dispose of bank's property without consideration.

8. Banks and banking ⚷33

Branch banks, for most purposes, are not regarded as separate institutions, but relationship between parent bank and its branches is that of principal and agent.

9. Principal and agent ⚷158

A principal, putting agent in position enabling him, while apparently acting within his authority, to commit fraud on third person, is liable to such person for agent's fraud.

10. Pleading ⚷237(1)

In lessors' action for accounting of royalties due plaintiffs under mining lease, assigned by defendant lessees to co-defendant bank as security for loan, trial court did not abuse its discretion in granting bank permission to amend its pleading at close of evidence to conform to proof that lessees wrongfully paid royalties to lessors, without bank's knowledge or consent, after such assignment. Code Civ.Proc. § 442.

11. Pleading ⚷237(1)

The trial court has sound discretion, in furtherance of justice, to permit a party to action to amend any pleading to conform to proof adduced at trial, if amendment does not change scope or nature of action. Code Civ.Proc. §§ 470, 473.

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Charles F. Vanciel and another against Hubert G. Kumle and others, a partnership, doing business under the firm name and style of Placer Properties Company, such company, and the Bank of America National Trust & Savings Association, a corporation, for royalties due under a mining lease assigned to defendant bank, which filed a plea for moneys unlawfully paid to plaintiffs after the assignment. From part of a judgment for defendant bank against defendant partners, such partners appeal.

Affirmed.

Bush & Ackley, of Oakdale, for appellants.

H. A. Savage, of Fresno, and T. B. Scott, of Modesto, for respondent.

THOMPSON, Justice.

The plaintiffs, as lessors of a mining claim in Stanislaus County, brought suit to recover unpaid royalties from Hubert and Donald Kumle and Leon Brier, as lessees, under the terms of a mining lease of said property. The lease was assigned to the Bank of America to secure payment of a loan of $25,000, procured by the partnership for the purpose of operating the mining enterprise. The bank was made a party defendant in the action. The suit is in the nature of an accounting. On trial of the cause, at the close of the evidence, the Bank of America was permitted to file a pleading which was entitled "Plea for Moneys Unlawfully Paid to Vanciel After Assignment, to Conform to Proof." The court adopted findings favorable to the bank. Judgment was rendered in favor of the bank against the Kumles and Brier, as members of the copartnership, in the sum of $4,731.85, which included fourteen monthly payments to the plaintiffs of royalties, aggregating the sum of $2,800, which were made without the knowledge or consent of the parent bank. From that portion of the judgment which awards to the bank said sum of $2,800, and interest, the defendants Kumles and Brier have appealed.

The plaintiffs leased their placer mining claim in Stanislaus County to Hubert and Donald Kumle and Leon Brier, copartners doing business under the name of Placer Properties Company, on September 26, 1938. The lease contained the following provision:

"Commencing on January 1, 1939, Lessees agree to advance the sum of Two Hundred Dollars ($200.00) per month, which said sum shall be deducted from any royalties accruing hereunder as soon as said royalties accrue."

The lessors and the lessees borrowed from the Oakdale branch of the Bank of America National Trust and Savings Association in August, 1939, the sum of $25,000 to finance the operation of the mining enterprise. That loan was made with the approval of the parent bank. T. C. Smethers was the manager of the Oakdale branch of the bank. To secure that loan the lease was assigned to the bank on January 24, 1940, including all right, title and interest in and to all rent and royalties due or to become due under the terms of the lease. On the last mentioned date, the lessees, Hubert and Donald Kumle and Leon Brier, were given written notice of said assignment, which they acknowledged in writing. That acknowledgment contained the following language:

"We agree to pay over to Bank of America National Trust and Savings Association at its Oakdale, California, branch office, all royalties and rents now due and payable, and which may hereafter become due and payable under the terms of said agreement to the lessors named therein, * * *."

The trial court found that there was due to the bank, under the terms of the lease, the aggregate sum of $4,731.85, including therein fourteen monthly payments of $200 each, which were wrongfully made by the lessees to the plaintiffs between March 21, 1940, and April 11, 1941, amounting to $2,800, together with interest. The court, however, further found with respect to said fourteen payments of royalties of $200 each, that they were made "in good faith" and that T. C. Smethers, the manager of the Oakdale Branch of the Bank of America, consented to the first payment to plaintiffs of $200 only, but that no objection was made by him to the remaining payments and that he therefore "acquiesced" in those payments, although all of them were made without the authorization, knowledge or consent of the parent bank.

The theory upon which the trial court rendered judgment against the lessees for the amount of the payments of royalties to the plaintiffs was that Smethers, as manager of the branch bank, had no power or authority from the parent bank to consent to said payments.

The appellants contend that the judgment in favor of the bank for payments of said royalties in the aggregate sum of $2,800 is not supported by the evidence for the reason that Mr. Smethers acted as ostensible agent for the parent bank in authorizing those payments to plaintiffs, and that the court abused its discretion in permitting the bank to file an amended pleading to conform to the proof in that regard adduced at the trial.

[1] There may be a conflict of evidence as to whether Smethers acquiesced in other than the first $200 payment of royalties to the plaintiff, after the assignment of the lease. Both Hubert and Donald Kumle testified that "Mr. Smethers consented to the making of advanced royalty payments to Mr. Vanciel." On the contrary Mr. Smethers testified, in effect, that he did consent to the first payment of $200 to the plaintiffs, but that he did not consent to any further payments and that "he did not know that Kumles continued paying this advance royalty of $200.00 per month to Vanciel until March 1941, when he received a letter and statement from Placer Properties Co." He did say that he never talked to any of the lessees about their failure to make payments of the monthly installments of royalties to the bank "until some time in the spring of 1941." In view of the foregoing conflict of evidence, we must assume, in support of the findings, that Mr. Smethers, as manager of the branch bank, did acquiesce in the payments to plaintiffs of all said monthly installments aggregating the sum of $2,800.

[2] The important question to be determined is whether the Bank of America is estopped by its conduct from denying that the manager of its branch bank was authorized to waive the payments to the bank of said royalties.

It appears without conflict that Hubert and Donald Kumle and Leon Brier had personal written notice on the same date as the assignment of the lease that all payments of royalties were to be made to the bank. They then agreed in writing to make all such payments to the bank. Reliance upon ostensible authority is not justifiable when one has actual notice to the contrary. Actual notice of a limitation of authority of an agent negatives the assumption of ostensible authority. When ostensible authority is held to exist, it presupposes the absence of actual notice. 6A Calif.Jur. 1144, sec. 651. Section 2318 of the Civil Code provides that:

"Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, *except as to persons who have actual or constructive notice of the restriction upon his authority.*" (Italics added)

[3] Section 2319 of that Code provides in part:

"An agent has authority:

"1. To do everything necessary or proper and usual, in the ordinary course of business, *for effecting the purpose of his agency;* * * *."

The preceding section does not authorize an agent, even though he be the manager of a bank empowered to negotiate a loan, procure the execution of documents incident thereto and collect the money due in accordance with the terms of an assigned lease, to waive payments, dispose of property belonging to the principal or materially change the terms of the contract.

[4] In construing the language of the preceding section, it is said in California Annotations to Section 51 of Restatement of the Law of Agency at page 55 of the Pocket Supplement that:

"In accord see Civil Code, sec. 2319(1),

"'In the exercise of the power delegated, the agent could not go beyond it nor beside it, though it is competent for him to perform all such subordinate acts as are usually incident to or necessary to effectuate the object expressed.' (Citing authorities) However, '* * * an agent empowered to make contracts is not authorized to rescind or modify them.' (Citing authorities)"

[5] In support of that statement of law, the opinion in the case of State Finance Co. v. Hershel California Fruit Products Co., 8 Cal.App.2d 524, at page 527, 47 P.2d 821, at page 823, states:

"That an agent *is hired to acquire interests and not to give them up* is a presumption that may be overcome if the principal had knowledge of the change in a contract and did not within a reasonable time countermand and cancel the modification. The rule is well stated in 31 Cyc. 1387: 'Presumptively *an agent is employed to make contracts, not to rescind or modify them,* to acquire interests, not to give them up, and no power to cancel or vary an agreement is to be inferred from a general power to make it, *nor has the agent any implied power to waive or give up rights or interests for his principal * * * unless the principal knew or approved of such modification by the agent.*'" (Italics added)

With respect to the limitation of acts of an agent, incidental to his authority to make or carry out the terms of a contract, in dealing with a third party, it is said in comments on Section 51 of Restatement of the Law of Agency, at page 127:

"Since such acts are not incidental to the making of a contract, it is not inferred that authorizing an agent to make a contract authorizes him to alter its terms; to waive its conditions or otherwise to diminish or discharge the obligations of the third person."

And in Section 166 of the last mentioned authority it is said at page 406:

"If a third person has notice of a limitation of an agent's authority, he cannot subject the principal to liability upon a transaction with the agent in violation of such limitation."

[6-8] We are of the opinion Mr. Smethers, the manager of the Oakdale branch of the Bank of America, was without authority to consent, contrary to the assignment of the lease and written notice thereof, to the payment of any monthly installments of royalties to the plaintiffs. Such consent to divert payments of money belonging to the bank would be ultra vires and void. An officer of a bank may not release, nullify the contract or dispose of property of a bank without consideration. Bank officers are authorized to properly manage the property of a bank, but may not waive payments due to the bank or give away its property. Colley v. Chowchilla National Bank, 200 Cal. 760, 767, 255 P. 188, 52 A.L.R. 569; Bank of Ameri-

ca National Trust & Savings Assoc. v. Goldstein, 25 Cal.App.2d 37, 48, 76 P.2d 545; 4 Zollmann's Banks and Banking, Perm.Ed., p. 259, §§ 2233, 2234.

Mr. Smethers testified that, with the exception of the first $200 payment of royalties, he did not consent to waive the money due to the bank or authorize any payments of royalties to the plaintiffs. He said that he had no knowledge of those payments until the report of Placer Properties Company was rendered in March, 1941, in which it was stated, "Advances to Vanciel at $200.00 per mo Fr Mar/40 to Feb/41, Incl $2400.00." Smethers claimed that was the first notice to the bank that said payments, with the exception of the first one, had been wrongfully made to the plaintiffs. The doctrine of ostensible agency has no application to the facts of this case.

[9] For most purposes branch banks are not regarded as separate and distinct institutions, but the relationship between the parent bank and its branches is that of principal and agent. 7 Am.Jur. 41, sec. 25; 50 A.L.R. 1348, note; 2 Zollmann's Banks and Banking, Perm.Ed., p. 413, § 1296. It is true, as the reviewing courts held in Rutherford v. Rideout Bank, 11 Cal.2d 479, 80 P.2d 978, 117 A.L.R. 383, Ghiglione v. American Trust Co., 49 Cal. App.2d 633, 122 P.2d 301, and other cases relied upon by the appellants, that a principal who puts an agent in a position that enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud. In support of that principle the opinions in the foregoing cases cite Sections 261 and 262 of Restatement of the Law of Agency. That principle has no application to the present action. The cases last mentioned were suits for fraud perpetrated by the officers of the respective banks. It is not contended in this case that the bank or any of its officers were guilty of fraud. There is no finding of fraud in the present case. Fraud was neither pleaded nor proved. The preceding citations upon that subject are therefore not in point.

[10] The court did not abuse its discretion in granting permission to the Bank of America to amend its pleading at the close of the evidence to conform to the proof adduced at the trial. The cause was tried on the theory of an accounting to determine what amount, if any, was due and payable under the terms of the assigned lease. That evidence indicated that the lessees had wrongfully paid to plaintiffs the sum of $2,800 in royalties, without the knowledge or consent of the Bank of America. Those monthly installments of royalties were paid to plaintiffs by the lessees after written notice and full knowledge that they belonged to, and were required to be paid to the bank only, and after the lessees had agreed in writing to pay them to the bank. In effect, the pleading which is entitled "Plea for Moneys Unlawfully Paid to Vanciel After Assignment, to Conform to Proof" was a cross-complaint or counter demand against the defendants Hubert and Donald Kumle and Leon Brier, for royalties due to the bank under the assigned lease, which were wrongfully paid to plaintiffs. The lessees might have likewise asked for judgment against the plaintiffs for repayment of said sums, but they did not do so, and that was not an issue in the case, as the court specifically found. Without a doubt the bank's claim for payment of said royalties under the terms of the assigned lease were directly related to and grew out of the contract and transaction which was the subject of the litigation. That claim was therefore a proper issue under Section 442 of the Code of Civil Procedure, and the court did not abuse its discretion in permitting the bank to amend its pleading, even though it amounted to a counter demand against the lessees. It does not appear that the appellants were prejudiced in any manner by that ruling of the court. The subject of the payments of those fourteen installments of royalties was fully covered by various witnesses in behalf of all parties. Apparently all the facts and circumstances surrounding those payments were fully adduced in evidence.

[11] The trial court has a sound discretion, in furtherance of justice, to permit a party to amend any pleading to conform to the proof adduced at the trial (Secs. 470 and 473, C.C.P.; 21 C.J. 209, sec. 143), if the amendment does not result in changing the scope or nature of the action. Abbott v. Limited Mut. Comp. Ins. Co., 30 Cal.App.2d 157, 85 P.2d 961; 21 Cal.Jur. 185, sec. 128; Sweet v. Hamilothoris, 84 Cal.App. 775, 258 P. 652; 1 Bancroft's Code Pl., 785, sec. 544. Certainly the amended pleading which was filed in this case did not change either the nature or the scope of the action which was tried.

The order permitting the amendment to conform to the proof was not an abuse of discretion.

That portion of the judgment from which the appeal was perfected is therefore affirmed.

ADAMS, P. J., and PEEK, J., concur.

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67 Cal.App.2d Supp. 902

PEOPLE v. RATNER.

Cr. A. 2048.

Appellate Department, Superior Court,
Los Angeles County, California.

Nov. 30, 1944.

1. Indictment and Information 🔑114

The propriety of pleading a prior conviction must be determined by the principles of the common law where statute is silent with respect thereto.

2. Indictment and Information 🔑114

Where it is desired to charge defendant with an offense which is punishable more severely because of a prior conviction, the fact of the prior conviction is an essential element of the pleading by which the offense is charged.

3. Indictment and Information 🔑114

Under a complaint charging violation of Vehicle Code by failing to stop at a traffic control signal, it was proper to plead defendant's prior conviction of the same offense, where statute provided greater punishment for the second offense. Vehicle Code, § 476, St.1939, p. 1607; §§ 450, 762, St.1935, pp. 163, 243; Pen.Code §§ 1025, 1461a.

◆

Appeal from Municipal Court of Los Angeles; James H. Pope, Judge.

Proceeding by the People of the State of California against Abraham S. Ratner, charging a violation of the Vehicle Code by not stopping his vehicle when faced by a stop traffic signal, and charging that the violation was a second offense. From an order dismissing complaint, the State appeals.

Reversed.

Ray L. Chesebro, City Atty., Donald M. Redwine, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for appellant.

Stanley Moffatt, of Huntington Park, for respondent.

BISHOP, Judge.

This is an appeal by the People from an order dismissing a complaint which declared, first, that the defendant, on or about the 8th day of October, 1943, had violated section 476 of the Vehicle Code, St.1939, p. 1607, by not stopping his vehicle when he was faced by a traffic control signal which told him to stop, and, second, that within the year the defendant had been convicted of disobeying that same section. The reason given by the trial court for its order of dismissal, and the only argument presented in its defense on this appeal, is that the reference to the prior conviction rendered the complaint defective. We have concluded that it was proper to plead the prior conviction and that the complaint should not have been dismissed.

[1] The act alleged to have been committed by the defendant is made a misdemeanor by section 450 of the Vehicle Code, St.1935, p. 163. It is punishable, according to section 762 of the same code, St.1935, p. 243, "by a fine not exceeding fifty dollars ($50) or by imprisonment in the county jail for not exceeding five days," if a first offense, "and for a second conviction within a period of one year by a fine of not exceeding one hundred dollars ($100) or by imprisonment in the county jail for not exceeding ten days or by both such fine and imprisonment." Neither in the Vehicle Code nor elsewhere in the statutory law of this state, so far as we are aware, is there any direction respecting either the necessity for, or the propriety of, pleading the prior conviction. We must look, therefore, to the principles of the common law for our answer. In re Hudspeth, 1929, 100 Cal.App. 478, 280 P. 179.

[2, 3] We find that by the great weight of authority the rule is established that where it is desired to charge the defendant with an offense which is punishable more severely because of a prior conviction, the fact of the prior conviction is an essen-

tial element of the pleading by which the offense is charged. This statement appears in Massey v. United States, 8 Cir., 1922, 281 F. 293, 297: "Statutes providing for greater punishment of second or subsequent offenses by the same person have long been in force in this country and in England (Graham v. West Virginia, 224 U.S. 616, 623, 32 S.Ct. 583, 56 L.Ed. 917), and are to be found in the legislation of nearly every state in the Union. It is the established rule, under such statutes, unless the statute designates a different mode of procedure, that, if the prosecutor desires to invoke the severer punishment provided as to second or subsequent offenders, the indictment or information must allege the fact of the prior conviction, and the allegation of such conviction must be proved in the trial to the jury." Some forty-five authorities were cited in support of the statement and more may be found in State v. Scheminisky, 1918, 31 Idaho 504, 174 P. 611, 612, and the annotations in 58 A.L.R. 64, 82 A.L.R. 366, 116 A.L.R. 229, 132 A.L.R. 107, 139 A.L.R. 689.

Out of the plethora of cases at hand from sister states we limit our attention to four early ones involving misdemeanors. The earliest of these is Rauch v. Commonwealth, 1876, 78 Pa. 490, where the Supreme Court of Pennsylvania had before it an appeal from a judgment of imprisonment imposed for the unlawful sale of liquor. The penalty authorized by law was only a fine for the first offense; a jail sentence was authorized only in the event that the conviction was for a second offense. These words from the opinion give some additional facts and reveal the reasons for the rule which governs:

> "These indictments set forth no former conviction for selling liquors contrary to law, yet the court, upon its own knowledge of its records, sentenced the defendants to imprisonment in the county jail as upon a conviction of a second offence.
>
> "This raises a serious question, whether a defendant can be made to suffer the greater punishment due to a second offence, without a trial, on being called on to answer for a second offence? That in cases of felony he cannot is proved by the case of Smith v. Commonwealth, 14 Serg. & R.[Pa.] 69. There the sentence for a punishment due to a second offence was reversed, on the ground that the fact of judgment for the former offence did not appear in the indictment. It was held that this must be part of the record. But it is contended that this rule does not apply to misdemeanors. It is hard to discover any solid ground of distinction. * * *
>
> "As a general principle the punishment inflicted upon a citizen for any offence should appear by the record to be the lawful consequence of his conviction of that offence. Now, imprisonment in jail is not a lawful consequence of a mere conviction for an unlawful sale of liquors. It is the lawful consequence of a second sale only after a former conviction. On every principle of personal security and the due administration of justice, the fact which gives rightfulness to the greater punishment should appear in the record. To leave to a judge to determine it outside of the record is to subject the defendant to an unconstitutional mode of trial. The right to a trial of a material fact, to constitute his offence, by his peers, is one of the fundamental rights of the citizen, excepted out of the power of the legislature to impair or destroy. The opposite argument is that the setting forth of the former conviction would prejudice the defendant in his trial. But clearly the substantive offence, which draws to itself the greater punishment, is the unlawful sale after a former conviction. This, therefore, is the very offence he is called upon to defend against. He cannot complain if, after suffering a former conviction and sentence, he commits a second offence of the same kind. Besides, if he desires no trial upon the question of a former conviction, a court will take care of his interests, and see that he is not unduly prejudiced. The court below therefore erred in passing sentence of imprisonment as for a second offence."

An appeal from the Criminal Court of Baltimore City gave rise to the case of Maguire v. State of Maryland, 1877, 47 Md. 485. The defendant had been charged in three counts with selling, disposing of and giving away whiskey on the Sabbath day, and it was also alleged in each count that it was the defendant's second offense. In the course of its reply to the contention that the reference to the prior conviction should not have been read to the jury, the court said (page 496 of 47 Md.): "The law would seem to be well settled, that if the party be proceeded against for a second or third offence under the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offence, the fact thus relied on must be averred in the indictment; for the settled rule is, that the indictment must contain an averment of every fact essential to justify the punishment inflicted." [Citing English cases among other authorities.]

The opinion in Larney v. City of Cleveland, 1878, 34 Ohio St. 599, 600, dealt with a judgment, rendered by the Police Court of the City of Cleveland, imposing a fine of fifty dollars and sentencing the defendant to six months' imprisonment. This short quotation will suffice: "Under the ordinance, six months' imprisonment can be imposed only upon conviction of the third, or subsequent, violation of the ordinance, and in order to support such sentence, the information should show that at least two previous violations of the ordinance had been committed by the defendant. The rule, and the principle upon which it is founded, are well stated by Mr. Bishop: 'Where the offense is the first, or is prosecuted as such, the indictment need not charge it to be the first, for this is presumed. But if it be the second or third, and the sentence is to be heavier by reason of its being such, the fact thus relied on must be averred in the indictment; because, by the rules of criminal pleading, the indictment must always contain an averment of every fact essential to the punishment to be inflicted.' See 1 Bish. Cr.L., 6th ed., § 961, and cases there cited. The same rule applies to an information."

In Commonwealth v. Harrington, 1880, 130 Mass. 35, we find statutory law entering into the picture. "The only question in this case," the Supreme Judicial Court noted, "is whether a male person who is convicted on a complaint for drunkenness, which does not allege two previous convictions of a like offence within a year, can be sentenced to any greater penalty than the payment of a fine of one dollar, which is the penalty imposed by the St. of 1880, c. 221, sec. 1." Section 2 of the statute provided that when such person "is convicted of the offence of drunkenness, and it is proved that he has been convicted of a like offence twice before within the next preceding twelve months, he may be punished by a fine not exceeding ten dollars, or by imprisonment in any place now provided by law for common drunkards, for a term not exceeding one year." The statute continued with this declaration: "* * * it shall not be necessary in complaints under the act to allege such previous convictions." The trial court, in receiving evidence of previous offenses and in sentencing the defendant following his conviction, ruled "in strict conformity" to section 2. This, it was held, was error, the court stating (page 36 of 130 Mass): "It is provided by art. 12 of the Declaration of Rights that no subject shall be held to answer for any crimes or offence until the same is fully and plainly, substantially and formally, described to him. When a statute imposes a higher penalty on a third conviction, it makes the former convictions a part of the description and character of the offence intended to be punished. [Citing cases.] It follows that the offence which is punishable with the higher penalty is not fully and substantially described to the defendant, if the complaint fails to set forth the former convictions which are essential features of it. That clause of the statute, therefore, which provides that it shall not be necessary, in complaints under it, to allege such previous convictions, is inoperative and void, as being contrary to the provisions of the Declaration of Rights."

Among the many authorities cited by the Federal court in support of the statement we quoted from Massey v. United States, there appear People v. King, 1883, 64 Cal. 338, 30 P. 1028, and People v. Coleman, 1904, 145 Cal. 609, 79 P. 283. Not only do these cases support the rule that the prior conviction must be pleaded, if it is to be taken advantage of following conviction, but a later case, that of Cavassa v. Off, 1929, 206 Cal. 307, 274 P. 523, is of particular interest to us, because even with the added penalty the offense under consideration remained a misdemeanor. The action was one to prohibit the State Pharmacy Board from cancelling petitioner's certificate. The statute regulating the practice of pharmacy provided that in the event of a third conviction for its violation the penalty should be the cancellation of the offender's registration as a pharmacist, in addition to the punishment authorized upon the first and second conviction. In the course of its opinion, in which the conclusion was reached that the Pharmacy Board had no authority to cancel petitioner's registration, the Supreme Court said (pages 312, 313 of 206 Cal., at page 525 of 274 P.): "The court in which the petitioner was found guilty of violating the provisions of said act for the third time, as just stated, did not order the cancellation of petitioner's license. We doubt, under the facts as shown by the record, whether it had any authority to include such order in its judgment of conviction. There was no legal showing made before said court that the judgment of conviction rendered therein was the third conviction of petitioner. It is not shown that the fact of petitioner's prior convictions was either alleged in the complaint in said action or that any proof was offered before said court of the fact of petitioner's prior convictions. It is well established in this state, where a prior conviction is relied upon for the purpose of empowering a court to inflict an increased penalty upon a defendant, that the indictment or complaint must allege the prior conviction, and upon the trial, unless admitted, such prior conviction must be proven by competent evidence. People v. Delany, 49 Cal. 394, People v. Coleman, 145 Cal. 609, 612, 79 P. 283. In the Coleman case this court said: 'The former conviction is a fact, and a very important one, which constitutes or goes to make up this aggravated offense, and being a material fact in the case, necessarily it must be pleaded, and if issue be joined in reference thereto, * * * must be proven as any other material fact in the trial of the cause.'"

It may be that the statement just quoted is dictum. Even so, it is a correct expression of a rule which we find to be both established by authority and supported by the requirements, probably of due process, certainly of that fair play which we pride ourselves is characteristic of our administration of justice. One who is threatened with a more severe penalty because the People contend that his offense is not his first, should be given an opportunity to know of it, and govern himself accordingly. If he acknowledges the existence of a prior conviction and fears that the trier of fact will be prejudiced by it, an admission of its existence before a trial to a jury begins avoids the danger. The conclusion to this effect found throughout the cases, is now embodied in the code governing proceedings in the trial court. Section 1461a, Penal Code, adopting by reference at least the concluding sentence of section 1025, Penal Code.

For the reasons given, the order appealed from is reversed.

SHAW, P. J., and KINCAID, J., concur.

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67 Cal.App.2d 83

In re BOYER'S ESTATE.

BOYER v. BOYER.

Civ. 14601.

District Court of Appeal, Second District, Division 2, California.

Nov. 29, 1944.

1. Appeal and error ⚿931(1), 989

On review of evidence by appellate court, all conflicts and legitimate inferences must be resolved in favor of judgment, power of appellate court being merely to determine whether there is any substantial evidence which will support the finding and not to substitute its deductions for those of trial court when different inferences might reasonably be drawn from the facts.

2. Wills ⚿296

In proceeding to determine whether estranged wife fraudulently destroyed deceased husband's will disinheriting her, husband's declarations to friends indicating husband's sisters were his legatees, and declarations in his last illness to a friend, as to husband's substituting sisters in place of wife as beneficiaries of an insurance policy, were competent to prove that husband had entertained no intention to revoke his will.

3. Wills ⚿302(8)

Where husband following a support and maintenance decree for wife executed will disinheriting her, and refused thereafter to see her, and wife, after his death, removed all documents from husband's desk, evidence sustained finding of existence of will at husband's death, and that wife fraudulently destroyed the will, notwithstanding no witness saw will destroyed. Code Civ.Proc. § 1963, subd. 32.

4. Wills ⚿386

A finding as to destruction of a will based upon factual inference could not be supplanted by reviewing court.

◆

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Proceeding in the matter of the estate of John I. Boyer, deceased, between Harlan V. Boyer, petitioner, and Alicia Boyer, contestant, relating to deceased's will. From an adverse judgment, contestant appeals.

Judgment affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for Alicia Boyer.

George W. Trammell and Kenneth A. Davis, both of Long Beach, for Harlan Boyer.

MOORE, Presiding Justice.

The question for decision is whether the evidence supports the finding that the estranged wife without the knowledge or consent of decedent husband fraudulently destroyed his last will and testament.

Decedent, John I. Boyer, was married to appellant on February 26, 1938. They were separated December 15, 1941; she sued him for support and thereafter lived separate and apart. On June 5, 1942, a decree for the support and maintenance of Alicia was made by the superior court requiring the testator to pay his wife $70 monthly and certain expenses for the maintenance of her apartment. Twenty-five days following such decree decedent executed a will which expressly excluded appellant from all participation in his estate. After the separation testator resided in and had his office on the ground floor of an apartment building in Long Beach while appellant maintained an apartment on the fifth floor of the same building. During all of the time of their estrangement and residence in the same building appellant retained a key to her husband's office and had access thereto in his absence. On the 3rd of February, 1943, testator entered a hospital where he died on February 21, 1943.

Upon proof of the due execution of the will and of the circumstances surrounding its disappearance the court found (1) that at the time of testator's entry into the hospital his will was in his office where he had placed it for safe-keeping; (2) that it had not been revoked by testator in whole or in part; (3) that during his confinement in the hospital, without his knowledge or consent, or promptly after his death, appellant entered his office and fraudulently destroyed the will. Basing her argument primarily upon the fact that there was no witness who testified explicitly to having witnessed the destruction of the will and upon the presumption of her honesty and fair dealing, she now contends that the evidence is not sufficient to support the finding of the will's fraudulent destruction.

[1] In following our discussion it is to be borne in mind that (1) in our review of the evidence all conflicts must be resolved in favor of the judgment, (2) all legitimate inferences must be indulged to uphold the finding, (3) the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence which will support the finding, and (4) the court has no power to substitute its deductions for those of the trial court when different inferences may reasonably be drawn from the facts proved. Crawford v. S. P. Co., 3 Cal.2d 427, 45 P.2d 183; In re Bristol's Estate, 23 Cal.2d 221, 143 P.2d 689.

In the light of those principles we find no difficulty in concluding that the evidence warrants the finding of appellant's fraudulent destruction of the will. In deriving this conclusion we are not restricted to a consideration of the actual behavior of appellant as detailed from the witness stand. Other factors are conspicuous and luminous. The relationship of appellant to the testator is of prime importance. Where a testator was amiably disposed to all of his legal heirs and none of them was unfriendly to him, it would be more reasonable to conclude that he would have destroyed his will with intention of revocation, if its provisions had favored some as against others. But where one of the heirs was unfriendly and the testator had a bitter disdain toward her and had excluded her from all benefits under his will, it is not reasonable to suppose that he himself would have destroyed his will and thereby leave the inimical heir in a position to participate in his estate on equal terms with those he loved. After the entry of judgment against the testator for the support of his estranged wife they never lived together again, but on the contrary testator's attitude toward appellant was such that he declined ever to see her at all.

The background of the controversy contributes much to an understanding of the judgment. While appellant had instituted legal action against decedent in December, 1941, she had no contacts with him prior to his death. Promptly following his decease, although she knew that he had sisters living in Los Angeles, she stealthily entered his office, procured clothing for his burial and there "wondered if John has papers in his office and his insurance papers." She removed all documentary contents from his desk and kept them in her own apartment overnight. She testified that she did not examine any of them or look at them until after she had delivered them on the following day to her counsel. Those delivered included the insurance policies and a copy of his will. Three days later she employed a locksmith to change the lock on the office door and remarked to him "that somebody had been in there before she had." She qualified as administratrix of the estate and filed a verified inventory on June 24, 1943, listing as the only assets of the estate his furniture and equipment although she had found in his office $3,300 in cash and securities on June 7. In her testimony concerning the cash and securities she evinced a decided peeve at the discovery because decedent had "sat in court and said he made $175 a month."

[2] The testimony furnished substantial support for the finding of the existence of the will at the time of the testator's decease. Attorney Trammell testified to its execution in June, 1942. Near Christmas of the same year he saw it in the desk of decedent who stated that he had it there and had been postponing its removal. In the summer of 1942 in conversation with the witness Butterfield, a friend since childhood, testator stated that "he had fixed it up that my own sisters are taken care of. I am a good deal like you. You told me you have things arranged for your sister." With the witness Fisher, an insurance agent whom he had known for 50 years, he had a conversation respecting the beneficiary of a $10,000 policy of life insurance of which he had at one time made his wife the beneficiary. In the summer of 1942 at the request of the testator Mr. Fisher substituted the names of testator's sisters as beneficiaries of the insurance policy on a form he had provided. The form was filled and the instrument was signed by testator and witnessed by Fisher. In a conversation of the two men during Dr. Boyer's last illness he told the witness that he wished to pay a premium on his insurance; that the policy was in his office; that the form containing his change of beneficiary was with the policy; that he had neglected to send the policy and the completed form to the company. To his friend he then repeated his declaration that everything was set up so that "his sisters would get everything possible; that he felt alone in the world," and like Mr. Fisher had made a will giving all to his sisters. Such declarations by one who felt the approach of final dissolution to a familiar friend were competent and significant proof that he had entertained no intention or desire to revoke his will. 79 A.L.R. 1498; Estate of Sweetman, 185 Cal. 27, 195 P. 918; See Estate of Ross, 199 Cal. 641, 647, 651, 250 P. 676; Estate of Duffill, 14 Cal.App.2d 284, 58 P.2d 185.

The witness Christine Lorgion, a nurse in the hospital, attended testator during his last illness. She was with him during most of the daylight hours. In the course of his conversations with her he stated that he had two sisters in Los Angeles and wished them to have charge of his body and to have all of his personal belongings and his property.

The evidence, if believed, clearly established that the testator had no desire to confer benefits of his estate upon appellant. One week before he entered the hospital he consulted his attorney with reference to obtaining a divorce in Nevada. Upon being advised of the illegality of a Nevada decree based upon six weeks' residence there, he stated that he might as well live and practice in Nevada. During his last illness he refused to see appellant and threatened to leave the hospital if she should be admitted to his bedside.

[3, 4] Endued with a bitterness of feeling arising out of her belief that she had been worsted in the matter of support money, she was tempted to thwart the testator's will on being confronted with the secret opportunity to become possessed of all his worldly goods. In view of that probability and of all the circumstances surrounding the disappearance of the will, the court was warranted in finding that she had fraudulently destroyed that document. In re Bristol's Estate, 23 Cal.2d 221, 143 P.2d 689. It was not without authority for its judgment. Code Civ.Proc. § 1963, subd. 32. Two recent decisions whose facts closely parallel those before us demonstrate the approved course of judicial logic. In the Estate of Thompson, 44 Cal.App.2d 774, 112 P.2d 937, the decedent wife had placed her will in her safety box in the bank's vault never to see it again. While there was no direct evidence of her husband's having entered the deposit box, he had access thereto and the opportunity was at hand. The will excluded the husband from sharing in the estate of his wife from whom he was separated. They had agreed upon a property settlement, and the will provided to his disadvantage. The find-

ing that he did destroy the will was held to be "based upon a factual inference" and could not be supplanted by an opinion of the reviewing court. See Estate of Dean, 62 Cal.App.2d 418, 144 P.2d 849.

In the case of Mrs. Boyer, she had been disinherited by the will of her husband; she had been living on a modest allowance from her husband's earnings for which she deemed herself aggrieved. Although a gulf of enmity separated them, she not only entered his office after death had barred him, but she confessedly removed all of the valuable contents from his desk without moral justification. It was no abuse of judicial ratiocination to infer that she removed also the original will and destroyed it.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

67 Cal.App.2d 155

HUTCHISON et al. v. CLARK et al.

Civ. 14303.

District Court of Appeal, Second District, Division 1, California.

Dec. 1, 1944.

1. Master and servant 🔑69

The Cosmetology Act does not warrant assumption by Industrial Welfare Commission that persons attending a cosmetology school operated under Cosmetology Act and who follow course prescribed by State Board of Cosmetology occupy dual relationship to school, of students and employees so as to authorize commission to order that school pay senior students for their services. St.1937, p. 215, § 1182; St. 1939, p. 400 et seq., § 7330 et seq.; p. 405, § 7390 et seq.; p. 1404, § 7394; p. 1405, § 7400; Const. art. 20, § 17½.

2. Master and servant 🔑69

The constitutional provision authorizing Legislature to provide for establishment of minimum wage for women and minors and to provide for comfort, health, safety and general welfare of all employees, contemplates relationship of employer and employee, and, unless such relationship exists, Legislature is without power to legislate on subjects referred to. Const. art. 20, § 17½.

3. Master and servant 🔑69

That school of cosmetology purchases in exchange for tuition and markets to public the services of a student does not establish relation of master and servant so as to authorize Industrial Welfare Commission to order schools to pay students after students have completed a specified number of hours of training. St.1937, p. 215, § 1182; St. 1939, p. 400 et seq., § 7330 et seq.; p. 405, § 7390 et seq.; p. 1404, § 7394; p. 1405, § 7400; Const. art. 20, § 17½.

4. Licenses 🔑21

Any conflict in asserted authority between Industrial Welfare Commission and Cosmetology Board involving a plan of education to be followed by students in cosmetology schools operated under Cosmetology Act must be resolved in favor of Cosmetology Board. St.1937, p. 215, § 1182; St.1939, p. 400 et seq., § 7330 et seq.; p. 405, § 7390 et seq.; p. 1404, § 7394; p. 1405, § 7400; Const. art. 20, § 17½.

5. Master and servant 🔑69

Where Cosmetology Act established training period for a student in school of cosmetology at 1600 hours, Industrial Welfare Commission did not have authority to decide that a student could complete such training in 1250 hours and require that thereafter students should be paid for their services. St.1937, p. 215, § 1182; St. 1939, p. 400 et seq., § 7330 et seq.; p. 405, § 7390 et seq.; p. 1404, § 7394; p. 1405, § 7400; Const. art. 20, § 17½.

◆

Appeal from Superior Court, Los Angeles County; Clarence L. Kincaid, Turney Fox and Hartley Shaw, Judges.

Action by Mildred Hutchison, as President of the Golden State Ethical Beauty Schools Association, Inc. and others, against Margarete L. Clark, as Chief of the Division of Industrial Welfare of the State of California and others for an injunction and declaratory relief. From a judgment for plaintiffs, defendants appeal. Affirmed.

Robert W. Kenny, Atty. Gen., and Alberta Gattone and Elizabeth Palmer, Deputy Attys. Gen., for appellants.

Rosalind Goodrich Bates, of Los Angeles, for respondents.

DORAN, Justice.

This is an appeal by defendants from a judgment for plaintiffs in an action for an injunction and declaratory relief.

Appellants present the issues on appeal as follows:

"Plaintiffs are some twenty-five beauty schools duly licensed and operating under the Cosmetology Act of the State of California (Business and Professions Code, Article 8, Chapter 10, St.1939, p. 405). These schools sought an injunction and declaratory relief in the Superior Court of Los Angeles County against the Chief of the Division of Industrial Welfare and the Industrial Welfare Commission asking that subsection (c) of section 4 of Industrial Welfare Commission Order No. 2 N.S. be declared void, inoperative and unconstitutional as to them, and that the defendants and each of them be permanently enjoined and restrained from enforcing or attempting to enforce any portion of said subsection (c) against these plaintiffs.

"The section in controversy reads as follows: 'Bona fide students attending schools registered under the cosmetology act of the State of California, after they have completed 1250 hours of attendance, shall be paid not less than 50% of the total amount received directly or indirectly for services rendered to the public.'

"Plaintiffs contend that the provision is void on its face and also contend that the order is void as to them because it was not validly enacted. A general demurrer was interposed to plaintiffs' complaint. The demurrer was overruled and defendants given ten days to answer. Defendants refused to answer, whereupon judgment was entered for plaintiffs as prayed. Defendants appeal from that judgment. There is much that is redundant in the complaint and much that is mere conclusion, recital and pleading of statutes. With most of these defects appellants will not deal. They will attempt to adhere only to those errors which go directly to the one question before this Court: Does this complaint state facts sufficient to constitute a cause of action?

"Appellants' argument falls into three parts, as follows: I. The complaint fails to state facts sufficient to raise the question of whether or not subsection (c) of section 4 of Industrial Welfare Commission Order No. 2 N.S. is constitutional. II. The complaint fails to state facts sufficient to show that the order was irregularly promulgated and hence inoperative as to these plaintiffs. III. The order is constitutional on its face."

Respondents summarize the facts as follows:

"In the fall of 1942 the Chief of the Industrial Welfare Commission, then Margarete L. Clark, decided that Beauty students at a certain period, said period arbitrarily selected by her, in their nine months' course, became employees and should be paid. After hearings before a wage board, no member of which was a beauty school owner, the Industrial Welfare Commission arbitrarily classified Cosmetology students in the last three months of their course as employees and ordered the Beauty Schools of the State to compensate said employees under subsection (c) of section 4 of Industrial Welfare Commission Order No. 2 N.S."

"On publication of said order, notice of which was admittedly not given to any beauty school, Mack E. Marin, one of the respondents, owner of the largest school of beauty culture in the State of California, and Mary Malone, of Riverside, California, past president of the United and Registered Cosmetologists of the State of California filed a request for rehearing under section 1188 of the Labor Code, on the basis that the order was procured by fraud and commission exceeded its powers."

A petition for a rehearing was denied. Respondents continue as follows:

"Whereupon, effective as of November 23, 1942, the Division of Industrial Welfare notified all of the beauty schools in the state that students who completed 1250 hours, or senior students, must be paid, and failure so to do would be a violation of the Labor Code of the State of California and punishable by fine or imprisonment or both. In a letter addressed to the beauty schools of the state under date of November 20, 1942, Margarete L. Clark, the then director of Department of Industrial Relations, Division of Industrial Welfare, notified the schools that they would either return the enclosed postcard indicating compliance or their payrolls would be immediately inspected to ascertain whether or not they were paying their students."

The Cosmetology Act as adopted by the legislature established a comprehensive method by which individuals may practice any one or more of the vocations included in cosmetology as therein set forth. Provision is included for the training, examination and licensing of those who determine to adopt and follow such vocations. The act also provides for the licensing of schools and the requirements thereof; also their supervision.

Among other things it is provided that, "The board shall admit to examination for a certificate of registration and license as a hairdresser and cosmetician or cosmetologist, at any meeting of the board duly held for the purpose of conducting examination, any person, a resident of this State, who has made application to the board in proper form, paid the fee required by this chapter, and who is qualified as follows: * * * (1) Training of at least 1,600 hours, extending over a school term of nine months in a school of cosmetology approved by the board. * * *" Sec. 7332, Business and Professions Code, as amended by Stats. 1939, Ch. 168, p. 1400, and by Stats. 1941, Ch. 340, p. 1583.

The order of the chief of the Division of Industrial Welfare and the Industrial Welfare Commission, hereinbefore set forth, has reference to said 1,600 hours of training above quoted as provided by section 7332 of the Cosmetology Act.

It is argued by appellants that: "The authority for the promulgation of order No. 2 I.W.C. N.S., and all other orders of the Industrial Welfare Commission lies in Part IV, Chapter One of the Labor Code, sections 1171 to 1203 inclusive, St. 1937, p. 213 et seq., and Article XX, section 17½ of the Constitution of the State of California. Under the provisions of the Labor Code, section 1182 thereof, the Industrial Welfare Commission may fix a minimum wage, maximum hours and standard conditions of labor for women and minors engaged in *any occupation, trade* or *industry.* (Italics ours.) Cosmetology constitutes an occupation, a trade, and an industry in the State of California and schools teaching cosmetology are an integral part of that occupation, trade or industry. For proof of this one need look no farther than the cosmetology act. Business and Professions Code, Chapter 10, Division 3, St.1939, p. 400 et seq. Here the legislature has provided that the practice of the trade and the regulation of the industry, including schools, shall be carefully supervised by a Board of Cosmetology." It is also pointed out by appellants that, "The fact that the Industrial Welfare Commission drew the line at 1250 hours is not of itself arbitrary. They wanted to require payment to the student for work after completion of the practical operations required by the Cosmetology Board. The Industrial Welfare Commission *estimated* that number of hours. The board had to draw the line somewhere."

In line with the foregoing it is contended by appellants that "The Industrial Welfare Commission had a wide discretion in classifying for their purpose. The lines in the present order were drawn about the type of work done by the women whose wages and hours were being regulated, rather than the character of the business of the employer. The beauty school falls squarely within the classification made for the purpose of regulation. The business of the beauty school is as we have pointed out, of a dual nature; it is selling instruction, but it is also purchasing and reselling the services of its students. Insofar as it is the latter, it is not a separate industry, but identical in character with all of the other establishments within the classification."

Appellants' brief also contains the following argument:

"We note that the total curriculum of a beauty school is 1600 hours. Cosmetology Act, Business and Professions Code, Section 7394. For the first 350 hours of that course, students may not operate upon the public at all. Cosmetology Act, Business and Professions Code, Section 7400.

"As plaintiffs allege in paragraph XIV of their complaint, the State Board of Cosmetology has required as a part of the curriculum for beauty schools that the student perform a certain number of practical operations, plaintiffs have attached to their complaint as Exhibit A a list of those operations. Plaintiffs nowhere allege the number of hours necessary to perform these required operations.

"For the first 350 hours of the course, the student cannot operate upon the public at all; for the last 350 hours of the course, she can operate on the public only if she is paid. (I.W.C. Order 2 N.S., sub. 4c.) But for 900 hours the student may be required to operate upon the public, and the school may charge the public and pay the student nothing at all. It is a fact that the practical operations required by the Cosmetology Board can be easily completed within much less than 900 hours.

"There is, therefore, no necessity so far as the school curriculum is concerned, for requiring the student to operate upon the public after completion of 1250 hours of work."

"The relationship between the beauty school and the student is a dual one. Insofar as the school imparts and the student imbibes knowledge, the relationship is that of teacher and pupil. Insofar as the school purchases (in exchange for tuition) and markets to the public the services of the student, the relationship is that of employer and employee. The consideration moving to the student for her services is instruction and an opportunity to complete the 1600-hour curriculum required before taking the state examination. (A wage may be anything of value. Schumann v. California Cotton Credit Corporation, 105 Cal.App. 136 [286 P. 1068].) She could pay for this instruction in cash. Instead she pays for it in services. The school promptly markets the services to the public. It is impossible to say when the business of selling instruction to the student leaves off and the business of selling the student's services to the public commences."

[1-5] A review of the record and, in particular, a consideration of the foregoing somewhat comprehensive quotations from the briefs, reveal appellants' position to be untenable; and the argument relied on to support appellants' contentions is unconvincing. Primarily, such argument is based on the assumption or decision of the Industrial Welfare Commission that "the relationship between the beauty school and the student is a dual one". Such assumption is unwarranted. The status of those attending a school operated by virtue of and under the Cosmetology Act is fixed by the act itself. And by the terms of the act those attending such schools are either students or they are not students; they are either employees or they are not employees, during the period of their attendance. There is nothing in the act to suggest the relationship of employer and employee. "The Legislature may, by appropriate legislation, provide for the establishment of a minimum wage for women and minors and may provide for the comfort, health, safety and general welfare of any and all employees." Sec. 17½, Art. XX, Calif.Const. Manifestly, the foregoing provision of the constitution contemplates the relationship of employer and employee and unless such relationship exists the legislature is without power to legislate on the subjects referred to in said provision. And the legislature has made no attempt to do so in the Cosmetology Act. Evidently the plan of education is approved by the Cosmetology Board, the only governmental agency that has any authority in the circumstances here presented. There is nothing in the plan that even suggests the relationship of employer and employee. The fact that "the school purchases (in exchange for tuition) and markets to the public, the services of the student", established no such relation. Although such a plan may not meet with the approval of the Industrial Welfare Commission, it must be assumed that it is approved by the Cosmetology Board; and any conflict in asserted authority between the two governmental agencies, in such circumstances, must be resolved in favor of the latter. Responsibility is imposed by statute upon the Cosmetology Board, hence, its powers, duties and prerogatives must be upheld. Moreover, there appears to be nothing inherently obnoxious in the scheme of operating the cosmetology schools. No hardship appears to result therefrom; indeed, so far as the student is concerned, it may be popular from the standpoint of economy. And it is not difficult to perceive that the Cosmetology Board, in its judgment, regards the opportunity to practice the art or trade upon the public under supervision, as a very necessary part of the course of instruction. In any event, as hereinbefore noted, the status of student and the absence of any relationship of employer and employee is determined by statute. To uphold appellants' contention would in effect modify the statute. This, neither the Industrial Welfare Commission nor the court has the power to do, either directly or indirectly. The training period has been set by statute at 1600 hours, and it is not within the province of the Industrial Welfare Commission to decide that a student of cosmetology may complete such training in a shorter time.

The complaint in the action was sufficient.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 69

GRIFFIN et al. v. NORTHRIDGE et al.

Civ. 14587.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1944.

1. Nuisance ⇨49(4)

In determining the extent of detriment suffered by owner of residence occupied as a home, as result of nuisance created by others, the court may consider the sentimental and aesthetic values of things destroyed, the owner's affection for his possessions, as well as his peace, comfort and quiet.

2. Nuisance ⇨50(1)

The owner of a residence occupied as a home is entitled to just compensation for annoyance, discomfort and inconvenience caused by a nuisance on adjoining property.

3. Evidence ⇨13

Court was warranted in taking judicial notice that roots of eucalypti extend great distances and will by growth soon alter the adjacent walks and driveways and later the foundations of residences located nearby.

4. Trial ⇨375

Inspection by trial judge of board fence alleged to constitute a nuisance constituted independent evidence and provided support for finding that fence constituted a nuisance. Gen.Laws 1937, Act 2532.

5. Nuisance ⇨3(12)

Even though board fence erected on adjoining property had not been ten feet in height so as to violate the spite fence law, still it would be a nuisance if it was constructed with malice and interfered with neighbor's full enjoyment of their home and if its usefulness to persons erecting it was subordinate. Gen.Laws 1937, Act 2532.

6. Nuisance ⇨49(5)

In action to abate a nuisance and for damages, proof that acts of defendants who were neighbors of plaintiff in moving garbage can to close proximity to dining room of plaintiffs and in destroying flower beds and erecting a fence so as to obstruct light and view, and that they were of such nature as to harass and annoy plaintiffs continuously and to interfere with the comfortable enjoyment of life and of their home, established a nuisance. Civ.Code, § 3479.

7. Nuisance ⇨50(7)

$1,000 as damages for nuisance as result of acts of defendants who were plaintiff's neighbors in destroying flower beds, interfering with sale of premises, erecting board fence and other similar acts interfering with plaintiffs' comfortable enjoyment of life and of their home was not excessive. Gen.Laws 1937, Act 2532.

8. Appeal and error ⇨1013

For the personal discomfort and annoyance to which a person has been subject by nuisance on adjoining property, the determination of the amount of his compensation is a question for the trial court.

9. Nuisance ⇨4

It is not necessary that compensation for nuisance should be denied because it is not continuous.

10. Nuisance ⇨4

A plaintiff should not be denied a recovery for nuisance because he is deprived of only a part of his property, comfort or life.

11. Appeal and error ⇨1010(1)

A judgment will not be disturbed so long as it is supported by any substantial evidence.

12. Trespass ⇨56, 57

A single intentional trespass on the rights of another justifies an award of punitive damages against wrongdoer, and if the act is maliciously done, the damages may be enhanced to such extent as will afford complete redress.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by C. J. Griffin and another against Herbert C. Northridge, Gladys Northridge and others seeking to recover damages for a nuisance. Judgment for plaintiffs, and defendants named appeal. Affirmed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellants.

R. M. Trezevant, of Hollywood and Melen Lee MacKellar, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the facts established justify the finding of a nuisance on adjacent premises and the consequent award of damages.

In the fall of 1940 plaintiffs purchased a lot on Oporto Drive in a hillside district. The area was restricted exclusively to residential structures with minimum building requirements of $10,000. The lot had dimensions of 109 feet frontage and a depth of 100 feet. At the time plaintiffs acquired their building site defendants had already erected their home on the adjoining lot. In February, 1941, plaintiffs commenced their structure which was completed in October, 1941. At the time of its completion plaintiffs had an unobstructed view of the neighboring hills, the territory which formerly comprised the suburban town of Hollywood and vast stretches of the metropolitan area. Both lots had a long descent at the rear, but there was no alley or other means of access from the street below. Both houses were built according to a plan which placed the kitchen and service quarters to the side. Each house was approximately the same distance from the common property line.

Immediately following plaintiffs' occupancy of their home defendants commenced a course of exhibiting malice toward plaintiffs by both words and deeds. Mrs. Northridge trespassed upon flower beds of plaintiffs, ground her heel into the flowers and removed plaintiffs' only blooming hibiscus plant from a flower pot. Defendants removed their garbage can from the place originally constructed for it on the east side of the Northridge home and placed it on the west side, against the property line and almost directly under plaintiffs' dining room window. They raised a line along the common boundary to which they tied many tin can tops which by their constant clanging caused plaintiffs to be annoyed in the daytime and to be kept awake at night. They wilfully caused paint to be cast upon the walls and windows of plaintiffs' home. To add insult to injury, at many times and on divers occasions Mrs. Northridge approached the common property line and called to Mrs. Griffin that she was a "tin-pan-alley queen," "cheap people," "dirty people," "a sloppy wench," "a sloppy huzzy," "an alley cat," and by directing to her such statements as "There you go you old sloppy wench with your trash"; "Why don't you do something about your figure?" "Why don't you spend a little of your dirty money to have your car washed?" Also, at times, while the Griffins were entertaining friends she advanced to plaintiffs' windows, screamed that plaintiffs' guests had parked their cars in front of defendants' property and demanded their removal. Along and by the common property line defendants planted eucalyptus trees which grew to some 18 feet in height. They obstructed the eastward view from plaintiffs' home, deprived plaintiffs of light and air, and sent their roots beneath the soil of the Griffin lot and imperiled the foundations of plaintiffs' residence. During the period of plaintiffs' occupancy of their property defendants maintained a wall adjacent to the common property line with huge dirt and concrete foundations with an ugly, hideous board fence upon it, which obstructed the sun, light, ventilation and view for portions of the Griffin home and which wall so excluded sunlight from the plants on the east side of the Griffin lot as to cause them to die. And to crown their deeds with a shocking display of ill-will they exposed the fangs of their malice by dissuading a buyer from completing her acquisition of plaintiffs' home after she had deposited $1,000 on the purchase price. These acts of defendants were done with malice and with intent to harm and injure plaintiffs in the peaceful occupancy of their home. Plaintiffs declared that the alleged acts constituted a nuisance and demanded the abatement thereof with damages. But prior to the trial they sold their home and submitted only their prayer for damages which were assessed in the sum of $1,000 without comment as to what portion of the award was by way of punishment.

In their brief defendants have attempted to minimize the significance of each of their several acts with a view of demonstrating that by reason thereof no damage could have been suffered by plaintiffs. They assert that there is no sufficient evidentiary support for any one of the acts found to constitute a nuisance. They argue, in effect, that the only approach to a declaration of a nuisance is the maintenance of the wall and its exclusion of view, air and sunshine, but that they have a right to erect any kind of fence not prohibited by law; that plaintiffs have no easement for view, light and air across defendants' property (citing Western Granite & Marble Co. v. Knickerbocker, 103 Cal. 111, 37 P. 192; Ingwersen v. Barry, 118 Cal. 342, 50 P. 536; Kennedy v. Burnap, 120 Cal. 488, 52 P. 843, 40 L.R.A. 476), and consequently have no legal complaint unless the structure violates the spite-fence law, Act 2532, Deering's General Laws; Statutes 1913, p. 342, which inhibits a fence in excess of ten feet in height.

We are not impressed by claim that the evidence is insufficient to support the several findings. While it may be true that no one finding alone would justify the judgment for $1,000, yet the sum total of all of defendants' behavior abundantly warrants such decision. That the acts were done by defendants in person makes them even more culpable, more dreadful and repulsive than if robots had acted. The financial value of the trespasses committed, of plants or flowers destroyed, of walls and windows marred by paint, of peace and quiet disturbed, of cruel epithets spoken, of unsightly walls that precluded view and darkened the home, of the spreading roots of the eucalypti—the detriment caused by any one of these factors measured by its money value alone is of little importance in appraising the sum total of them all as a nuisance to those who occupy the adjoining home. The old proverb that a man's home is his castle embodies a rich heritage of truth. All things in it or about it are as fine gold to them that dwell there. It is their palace to their friends, their refuge from toil and unkind foes. There they commune with the thoughts of the wise and virtuous, thrill under the spell of music, enjoy laughter and love. He who maliciously aims and attempts to destroy the peace and recreative value of a home robs its inmates of immeasurable riches and does an inestimable damage.

[1, 2] But because financial recompense is an inadequate exchange for the deprivation of home comforts it is no good reason for denying pecuniary award for the damage sustained thereby. In deriving a determination of the extent of the detriment suffered in such event the court may consider the sentimental and aesthetic values of things destroyed, the owner's affection for his possessions, as well as his peace, comfort and quiet which have been scorned by his neighbor. Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 P. 581, 26 L.R.A.,N.S., 183, 21 Ann.Cas. 1247. The owner of a residence occupied as a home is entitled to just compensation for annoyance, discomfort and inconvenience caused by a nuisance on the adjoining property. Green v. General Petroleum Corporation, 205 Cal. 328, 333, 337, 270 P. 952, 60 A.L.R. 475; Dauberman v. Grant, 198 Cal. 586, 246 P. 319, 48 A.L.R. 1244; 39 American Jurisprudence, p. 398. While the Green judgment was for eviction and other special damages resulting from oil and mud blown onto their home from an oil well near by, without negligence, and the Dauberman judgment was for the inconvenience suffered from smoke and rain waters from Grant's adjoining property, yet we see no reason why such acts as those of defendants would not be a nuisance to the occupants of a home as much as smoke, water and oil. Especially is this true where the acts complained of were activated by sheer malice.

[3] There was substantial evidence of each fact found by the court. Mr. Griffin saw Mrs. Northridge trample and ruin his flower beds on two occasions. Mrs. Griffin saw the lady "tramping over our young geraniums." The witness Marian Campbell saw Mrs. Northridge take an hibiscus bloom and a spray of jasmine from plaintiffs' yard. Also, she observed that the malodorous garbage can of defendants was taken from the place constructed for it and placed in close proximity to the dining room windows of the Griffins. Plaintiffs witnessed defendants, while painting their walls, sling paint onto plaintiffs' house. Both Mr. and Mrs. Griffin testified to the epithets applied to Mrs. Griffin by Mrs. Northridge. The findings that Mrs. Northridge cried out to plaintiffs to wash their automobile; that on numerous occasions they called that plaintiffs' guests had parked their cars in front of defendants' lot, were supported by the testimony of plaintiffs and by that of Mrs. Du Plesis who saw Mrs. Northridge come to the window and demand to know what "cheap people" had parked their vehicles in front of defendants' property and declared she was "very tired of such cheap neighbors and cheap trash parked in front of her place." While there is no testimony that the roots of eucalyptus trees had undermined the foundations of plaintiffs' residence, the court was warranted in taking judicial notice that the roots of the eucalypti extend great distances and will by growth soon alter the adjacent walks and driveways and later the foundations of the residence. That Mrs. Bruel, the purchaser, was induced by declarations of Mrs. Northridge to breach her contract for the purchase of the Griffin home after depositing $1,000 was established by the testimony of Mr. Turney, the broker, and of Mrs. Bruel. To that lady Mrs. Northridge declared: "I am going to block that house if I can"; and to Mr. Turney, Mr. Northridge said: "Wait until you hear what I am going to do; I am taking that [fence] down to make it four feet higher."

That action would not have lain against defendants for inducing the breach as contended by defendants (citing In re Lyons, 27 Cal.App.2d 293, 297, 81 P.2d 190) is of no great moment here. Arguendo, it might be conceded that the Lyons case states the law, although it is not in accord with the decisions of Remillard-Dandini Co. v. Dandini, 46 Cal.App.2d 678, 116 P.2d 641 and Elsbach & Sons v. Mulligan, 58 Cal.App.2d 354, 136 P.2d 651, yet there is no indication that defendants inquired, or stopped to consider, whether plaintiffs had an enforcible contract of sale. Their malice and their zeal to annoy and discomfit plaintiffs by fair means or foul was evidenced on every available occasion.

[4, 5] The board fence mounted on the retaining wall along the east line of plaintiffs' lot darkened their home and excluded their eastern view of the city and prevented designed ventilation. Judging by the behavior of defendants in other respects, the trial court must have been impressed that the fence was not constructed to serve the comfort of defendants but only to annoy and grieve plaintiffs. At the trial it was contended, as here, that a board fence is not a nuisance per se and it will not be abated unless it unnecessarily exceeds ten feet in height. Act 2532, Deerings' General Laws; Stats.1913, p. 342. While the testimony was closely conflicting upon the height of the rough board fence, the court's finding was made after the judge's inspection of the premises. Such inspection constituted independent evidence and provided support for the finding. Gibson Properties Co. v. City of Oakland, 12 Cal.2d 291, 83 P.2d 942. Even though the fence had not been ten feet in height, still it was a nuisance if it was constructed with malicious intent, interfered with plaintiffs' full enjoyment of their home and if its usefulness to defendants was "subordinate and incidental." See Haehlen v. Wilson, 11 Cal.App.2d 437, 54 P.2d 62. While the Haehlen judgment abating a six-foot fence was reversed, it is implied that the reason for the reversal was because no malice was shown.

[6] That the acts of defendants created a nuisance is established by the proof that the acts committed were of such a nature as to harass and annoy plaintiffs continuously and to interfere with their comfortable enjoyment of life and of their home. Civil Code, § 3479; Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 60 Cal.App.2d 478, 141 P.2d 46. If the contention were established that defendants did no unlawful acts and therefore created no nuisance, the maintenance of a comfortable home in a city would be imperiled by the presence of a neighbor who would wilfully frustrate the peace and comfort of another without just cause. Where people attempt to dwell side by side in urban life, where their interests are common if not intertwined, the liberties we might unrestrictedly enjoy on a forty-acre farm must be foregone if the metropolitan areas are to succeed in the development of wholesome culture and in the extension of civilization. While we take pride in the towering structures that adorn a city, its parks, its paved boulevards and its utilities, these marks of grandeur and facilities are as naught if homes are rendered untenantable by those who on adjacent properties delight in their display of malice and hatred for a fellow man.

[7-12] The judgment is not excessive. For the personal discomfort and annoyance to which a person has been subjected by a nuisance on adjoining property, the determination of the amount of his compensation is a question for the trial court. Dauberman v. Grant, supra, 198 Cal. page 590, 246 P. 319, 48 A.L.R. 1244. It is not necessary that compensation for a nuisance should be denied because it is not continuous. Neither should a plaintiff be denied recovery because he is deprived of only a part of his property, comfort or life. Judson v. Los Angeles Suburban Gas Co., supra, 157 Cal. page 172, 106 P. 581, 26 L.R.A.,N.S., 183, 21 Ann.Cas. 1247. A judgment will not be disturbed so long as it is supported by any substantial evidence. Bellman v. S. F. H. S. District, 11 Cal.2d 576, 581, 81 P.2d 894. A single intentional trespass on the rights of another justifies an award of punitive damages against the wrongdoer. If the act is maliciously done the damages may be enhanced to such extent as will afford complete redress. 20 Ruling Case Law, p. 471.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.

67 Cal.App.2d 77

HAWORTH v. ELLIOTT et al.

Civ. 14630.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1944.

1. Appeal and error ⚷1012(1)

The appellate court is not required to weigh evidence which has convinced trial court.

2. Appeal and error ⚷931(1)

If there is substantial evidence which, in connection with inferences therefrom most favorable to respondent, supports finding in his favor, intendments favor judgment based thereon.

3. Appeal and error ⚷931(1), 1008(1)

In action for injuries allegedly sustained when barkeeper's employees used excessive force in ejecting plaintiff from barroom, matter of identifying actual assailants was peculiarly for trial court, and evidence was required to be reviewed most favorably to plaintiff successful on such issue.

4. Evidence ⚷587

Findings may be based on circumstantial evidence alone.

5. Appeal and error ⚷1011(1)

Judgment supported by substantial proof will not be reversed because of contradictory testimony.

6. Appeal and error ⚷996

A finding based on inferences reasonably drawn will not be disturbed on appeal.

7. Master and servant ⚷302(3)

Where bartenders in charge of barroom during barkeeper's absence were authorized to maintain order and protect employer's property, and in doing so bartenders ejected patron for allegedly creating disturbance, they were acting within scope of employment and employer would be liable for their use of excessive force causing injuries to patron, regardless of whether alleged blows were struck by them before they emerged from barroom or thereafter on sidewalk. Civ.Code, § 2338.

8. Master and servant ⚷302(1)

To establish employer's liability for injuries inflicted by his employee it is sufficient to prove merely that excessive force was applied and that employee was acting within general scope of employment. Civ. Code, § 2338.

9. Master and servant ⚷302(1)

An employer's responsibility for wrongful acts of his employee is to be determined from nature of the tort and from activity of employee on behalf of employer in connection with which act was committed. Civ.Code, § 2338.

10. Master and servant ⚷302(1)

In determining whether master is liable for wrongful act of employee, question is not whether wrongful act itself was authorized but whether it was committed in course of a series of acts of employee authorized by employer. Civ.Code, § 2338.

11. Master and servant ⚷302(3)

It was sufficient proof of barkeeper's liability that his bartenders were acting in his behalf when they ejected patron from barroom for allegedly causing disturbance. Civ.Code, § 2338.

12. Appeal and error ⚷1008(1)

Whether acts of bartenders in ejecting patron were within scope of their employment was for determination of trial court, on issue of barkeeper's liability therefor. Civ.Code, § 2338.

13. Master and servant ⚷302(3)

To fix employer's liability it is not necessary that an assault by his employee should have been made for purpose of performing a task specifically assigned so long as the assault took place during course of employment. Civ.Code, § 2338.

14. Master and servant ⚷327

A finding that bartenders, in ejecting plaintiff from barroom for allegedly causing disturbance, violently seized and brutally beat plaintiff, injuring him so severely as to require hospitalization, negatived contention that the assault was privileged because it was consented to by plaintiff and because necessary to prevent breach of the peace. Civ.Code, § 2338.

15. Master and servant ⚷302(3)

A bartender whose duty it was to maintain order in barroom was privileged to apply only such force in ejecting a customer as a reasonable man under circumstances would believe to be necessary to prevent further disturbance of the peace within barroom or to avoid injury to persons or property there. Civ.Code, § 2338.

16. Master and servant ⚿302(3)

The force used by bartenders in ejecting plaintiff from barroom because he was allegedly creating disturbance therein was unreasonably excessive where it resulted in breaking of plaintiff's finger and nose, and other serious bodily injuries and plaintiff was fighting no one when he was forcibly ejected and had done no damage to property or person. Civ.Code, § 2338.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by George D. Haworth, Jr., against Lawrence Elliott, doing business as Brownie's, and others, for injuries allegedly sustained by wrongful application of excessive force in ejecting plaintiff from a barroom. Judgment for plaintiff, and defendants appeal.

Affirmed.

Charles H. Goebel, of Los Angeles, for appellants.

Samuel Schekman, of Los Angeles, for appellee.

MOORE, Presiding Justice.

The question for decision is whether the evidence supports the findings that (1) the employees of a barkeeper caused the injuries of plaintiff by the wrongful application of excessive force in ejecting him from the barroom and, (2) if so, whether they were acting within the scope of their employment.

On December 18, 1943, plaintiff in company with his wife and some friends entered a barroom operated by defendant Elliott. While there plaintiff became involved in a quarrel with another invitee. Defendants Collier and Symington, bartenders for Elliott, leaped over the bar and began their efforts to eject plaintiff from the room. Collier grabbed him around the neck and with a headlock dragged him to the door and out into the street. In the course of the ejectment plaintiff's little finger and nose were broken and other serious bodily injuries resulted. He was awarded the sum of $1200 including approximately $500 as special damages.

[1-6] Appellants recite the testimony of a number of witnesses to show that the bartenders were not identified as the assailants of plaintiff. But the appellate court is not required to weigh the evidence which has convinced the trial court. It observed the witnesses and heard them testify. If there is substantial evidence which, in connection with the inferences therefrom most favorable to the respondent, supports the finding, the intendments favor the judgment. Bellman v. S. F. H. S. District, 11 Cal.2d 576, 589, 81 P.2d 894. The matter of identifying the actual assailment under circumstances of stress and excitement is peculiarly a matter for the trial court and the evidence must be reviewed most favorably to respondent. Gackstetter v. Market Street Ry. Co., 130 Cal.App. 316, 320, 20 P.2d 93. Findings may be based upon circumstantial evidence alone (Erreca v. Western States Life Insurance Co., 19 Cal.2d 388, 397, 121 P.2d 689, 141 A.L.R. 68), and if it is substantial proof the judgment will not be reversed because of contradictory testimony. Crawford v. Southern Pacific, 3 Cal.2d 427, 45 P.2d 183; Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689. A finding based upon inferences reasonably drawn will not be disturbed on appeal. Barsha v. Metro-Goldwyn-Mayer, 32 Cal.App.2d 556, 561, 90 P.2d 371; Rideout v. City of Los Angeles, 185 Cal. 426, 197 P. 74; Ryder v. Bamberger, 172 Cal. 791, 799, 158 P. 753.

The witness Swain testified that the "two bartenders jumped over the bar, grabbed hold of the civilians and sailors and separated them and told them to stop fighting"; that thereupon Collier grabbed the plaintiff around the neck and with this headlock proceeded to drag him to the door and out into the street; that Collier was immediately followed by Symington and in a few seconds they both returned to the room but that plaintiff did not return.

The witness Ragsdale who had accompanied plaintiff and his party to the barroom witnessed the commencement of the fight between Haworth and the sailors and saw the bartenders take hold of plaintiff and carry him out. In the course of such removal Ragsdale saw one bartender, in while shirt and apron, with his right hand strike plaintiff who then fell to the ground, following which the bartenders "turned around and came back in and went behind the bar." Ragsdale immediately told the investigating officer that one of the bartenders hit Mr. Haworth. Just prior to the intervention of the bartenders, Ragsdale had laid hold upon Haworth and requested one of the sailors to help hold him and not to hit him. The sailor did not again strike plaintiff. It was at that time that Collier intervened.

[7] The assault upon plaintiff by the bartenders was committed while they were acting within the scope of their employment. Defendant Elliott testified that he was absent at the time of the occurrence and that in his absence the two bartenders were in charge of the place; that they were authorized to maintain order, quell disturbances and protect their employer's property; that if necessary it was their duty to eject any one creating a disturbance and they had the authority to do so. Whether the blows were struck before the bartenders emerged from the barroom or on the sidewalk is wholly immaterial. Regardless of the exact point at which they had arrived before the blows were administered they were acting in the course of their duty to remove one who they believed was creating a disturbance.

[8-10] In order to establish the liability of the employer for injuries inflicted by his employees it is sufficient to prove merely that excessive force was applied and that the servant was acting within the general scope of his employment. Riordan v. Gas Consumers' Ass'n, 4 Cal.App. 639, 88 P. 809. It is statutory that a principal is responsible for the wrongful acts committed by his agent when done as a part of the transaction of the business of the agency. Civil Code, sec. 2338. The front door of the barroom is not the dividing line between liability and nonliability on the part of the proprietor for the tortious acts of his bartenders. His responsibility for wrongful acts of his agents is to be determined from the nature of the tort and from the "activity of the agent on behalf of the principal in connection with which the act was committed." The question is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal. Andrews v. Seidner, 49 Cal.App.2d 427, 121 P.2d 863.

[11-13] It is sufficient proof of Elliott's liability that the bartenders were acting in his behalf at the time they ejected Haworth from the barroom. Hiroshima v. Pacific Gas & Electric Co., 18 Cal.App.2d 24, 63 P.2d 340. Whether their acts were within their employment's scope was for the determination of the trial court. 18 R.C.L., p. 797. To fix the liability of the employer it is not necessary that an assault by his employee should have been made for the purpose of performing a task specifically assigned so long as the assault took place during the course of the employment. Stansell v. Safeway Stores, Inc., 44 Cal. App.2d 822, 113 P.2d 264. Liability of the employer was established by the fact that assault by the bartenders upon plaintiff grew immediately out of the performance of duties owed to the barkeeper. Gulf, Colorado & Santa Fe Ry. Co. v. Cobb, Tex. Civ.App., 45 S.W.2d 323. The attempt of the bartenders to remove plaintiff from the barroom was the sole cause of the encounter and the barkeeper is liable therefor. Ruppe v. City of Los Angeles, 186 Cal. 400, 199 P. 496; Andrews v. Seidner, supra; see Stansell v. Safeway Stores, Inc., supra; Johnson v. Monson, 183 Cal. 149, 190 P. 635.

Appellants have cited authorities to support their claim that an agent may use such force as is necessary to resist any one who actually threatens the safety or the liberty or the property of his principal, without incurring liability for his acts. Rest. Law of Torts., Secs. 5, 63, 76, 77, 343, 346, 347; Sec. 50, Civil Code; Crouch v. Ringer, 110 Wash. 612, 188 P. 782, 9 A.L.R. 374; Townsend v. Briggs, 99 Cal. 481, 34 P. 116. There is nothing in any of the cited authorities contrary to our holding. The principles there announced do not apply to the facts before us. Excessive force was used by the bartenders against plaintiff who could have been removed from the barroom without breaking his bones or bruising his body.

Also, the authorities they cite to establish their contention that at the time of the striking of plaintiff the bartenders acted beyond the scope of their employment (People v. One Buick 8 Sedan, 63 Cal.App. 2d 661, 147 P.2d 401; Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538; Yates v. Taft Lodge, 6 Cal.App.2d 389, 44 P.2d 409; Copelin v. Berlin Dye Works, 168 Cal. 715, 144 P. 961, L.R.A.1915C, 712; Deevy v. Tassi, 21 Cal.2d 109, 130 P.2d 389) are all distinguishable. The employees had not abandoned their duties to play with plaintiff, to resent an insult, or to exhibit their pugilistic talents.

[14-16] Appellants contend that the assault upon plaintiff was privileged because (1) it was consented to by plaintiff and (2)

it was necessary to prevent a breach of the peace. (Citing Rest. of Law of Torts, Sec. 141.) The contention on both grounds is met by the finding that the bartenders "violently seized * * * and brutally beat plaintiff about the head, face, neck, arms, limbs and person, injuring him so severely that plaintiff was compelled to be hospitalized." The actor is privileged to apply only such force as a reasonable man under the circumstances would believe to be necessary to prevent a further disturbance of the peace within the barroom or to avoid injury to persons or property there. (Ibidem, subd. f.) Plaintiff was fighting no one at the time he was seized by Collier and had done no damage to property or person. No justification appears for the "brutal" assault. The force imposed upon plaintiff was unreasonably excessive.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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66 Cal.App.2d 837

PEOPLE v. PHILLIPS.

Cr. 3826.

District Court of Appeal, Second District, Division 3, California.

Nov. 17, 1944.

Criminal law 🔑1023(3)

An order denying a motion to plead "not guilty by reason of insanity", which order was made prior to judgment, was not appealable. Pen.Code, § 1237.

Appeal from Superior Court, Los Angeles County; Charles W. Fricke, Judge.

D. Wendell Phillips was charged with issuing a check without sufficient funds, to which he entered a plea of guilty. From an order denying his motion for permission to enter a plea of not guilty by reason of insanity, he appeals.

Appeal dismissed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards, Deputy Atty. Gen., for respondent.

FOX, Justice pro tem.

In an amended information defendant was charged with grand theft in count I and with issuing a check without sufficient funds, a felony, in count II. On February 14, 1944, he entered a plea of guilty to the second count, and requested leave to file an application for probation. This request was granted. On April 20, 1944, at a continued hearing on the application for probation, a motion was made by counsel for defendant for permission to interpose the additional plea of "not guilty by reason of insanity." This motion was supported by two affidavits. The court, under the provisions of section 1871, Code of Civil Procedure, ordered Dr. Marcus Crahan to make an examination as to defendant's mental condition and to report thereon to the court. On April 27, 1944, defendant's motion to interpose the plea of "not guilty by reason of insanity" was denied. Defendant's application for probation was then denied and he was sentenced to the state prison for the term prescribed by law, and count I was dismissed.

Defendant has attempted to appeal from "the order denying his motion to enter a plea of not guilty by reason of insanity." He has not appealed from the judgment. He contends that the trial court abused its discretion in denying his motion.

At the outset the People make the point that there is no appeal from the order in question since it was made prior to judgment and that the purported appeal must therefore be dismissed. This contention is correct.

The court's order denying defendant's motion would have been reviewable on an appeal from the judgment (People v. Morgan, 1935, 9 Cal.App.2d 612, 617, 50 P.2d 1061), but no such appeal has been taken. Since the order from which defendant has attempted to appeal was made before judgment, his appeal must be dismissed because under the Penal Code (§ 1237) such an order is not appealable. People v. Brickert, 1935, 3 Cal.App.2d 474, 39 P.2d 450; People v. Morgan, supra; People v. Price, 1942, 51 Cal.App.2d 716, 125 P.2d 529.

The failure, however, of the defendant to appeal from the judgment, and thus be in a position to have the court's order denying his motion reviewed, does not appear to have prejudiced his rights because our examination of the record fails to disclose any abuse of discretion on the part of the trial court in denying said motion.

The purported appeal from the order denying defendant's motion to enter a plea of "not guilty by reason of insanity" is dismissed.

SHINN, Acting P. J., and PARKER WOOD, J., concurred.

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67 Cal.App.2d 178

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14661.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1944.

Constitutional law ⇨301
Workmen's compensation ⇨1383

Industrial Accident Commission violated statutes relating to matters of proof in workmen's compensation cases and denied due process of law in receiving into record and basing award thereon on letter from rating bureau in reply to referee's inquiry, without affording employer's insurance carrier an opportunity to be heard, and in failing to make referee's inquiry a part of record. St.1937, p. 299, §§ 5703, 5704; Const.Cal. art. 1, § 13; U.S.C.A. Const. Amend. 5.

◆

Proceeding under the Workmen's Compensation Law by Sidney Schiff, claimant, opposed by Aaron Fefferman and another, doing business as Mercury Printing, employer, and the National Automobile Insurance Company, insurance carrier. The Industrial Accident Commission made an award of compensation and the insurance carrier seeks annulment of the award by writ of review.

Award vacated and cause remanded.

Charles W. Bowers, of Los Angeles, for petitioner.

Everett A. Corten and R. C. McKellips, both of San Francisco, for respondents.

YORK, Presiding Justice.

Petitioner insurance carrier by means of a writ of review seeks the annulment of an award of the Industrial Accident Commission granting compensation to an injured employee and ordering it to be paid by petitioner.

At the hearing held April 20, 1944, the following facts were admitted:

"1. Sidney Schiff, born September 3, 1911, was employed December 3, 1943, as a linotype operator, at Los Angeles, California, by Aaron Fefferman and Myer Fefferman, co-partners, doing business as Mercury Printing Company, a co-partnership, whose insurance carrier was National Automobile Insurance Company, a corporation, under a limited policy.

"2. On said date said employee sustained injury arising out of and occurring in the course of his employment, while riding upon a motorcycle, resulting in fracture to the right side of the pelvis, laceration of right thigh and fracture of fourth metacarpal bone in the right major hand. * * *

"3. All medical treatment furnished by applicant, none by defendants. Defendants admit liability for the reasonable medical expense, to be determined subsequently upon the filing of itemized bills in duplicate approved by this Commission, if the parties are unable to adjust the same out of court.

"4. Earnings, $51.00 a week.

"5. No compensation has been paid.

"6. Said employee has been temporarily totally disabled from December 3, 1943, to April 20, 1944, and will be disabled indefinitely thereafter."

The issue presented at the hearing was the extent to which the employer was covered by the policy issued by petitioner insurance carrier. At that time the referee before whom the matter was heard, made the statement: "We have this problem, Mr. Fefferman. It is a misdemeanor to be uninsured. You have a limited policy here, so you will have to either secure full coverage within ten days, or secure a certificate of consent to self-insure, because you see you are uninsured." To this Mr. Fefferman replied: "I didn't realize that. The Referee: And you are subject to a civil suit. Case submitted. * * * Mr. Fefferman: May I ask a question? Does that mean if one of my employees is doing something other than what he is specifically employed for, then that constitutes no coverage? The Referee: No. Your limitation is that he is either doing house-to-house distributing of hand bills, or he is using a motorcycle. Apparently you have full coverage in all but those two things."

Subsequently, in response to inquiry from the referee who conducted the hearing, the California Inspection Rating Bureau indited the following letter:

"We have your inquiry of April 24th, with reference to the limiting and restricting endorsement attached to this policy, and it is our judgment that your interpretation is correct.

"We have always considered the endorsement as removing from the policy coverage door to door delivery of newspapers, periodicals, etc., and motorcycle delivery. The use of the form for the most part is precautionary. The Company is unwilling to write the risk with such known exposure. The employer states that he has no such employees. The Company attaches the form as a precaution, and the employer accepts the restrictions because he has no one to whom they apply. * * *"

Thereafter, it was found by the referee that "On said date the employer's compensation insurance carrier covering said injury was National Automobile Insurance Company, a corporation, and both the employer and the employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Laws of the State of California.

"In accordance with underwriting practices, there would be no segregation of payroll to cover the time on an isolated errand, and the terms 'operations or occupations * * * assignable to Classification Code 7380' are used in the sense of identifying a payroll segregation, and are not applicable in the present case."

Basing it on the foregoing findings, the respondent commission made the following award on May 24, 1944: "Award is made in favor of Sidney Schiff against National Automobile Insurance Company, a corporation, in the sum of $30.00 per week beginning December 11, 1943, and thereafter during the continuance of disability or until further order of this Commission, together with reimbursement for medical treatment, as hereinabove provided, less the sum of $35.00 payable to J. W. Joslyn and Charles Hollopeter as attorneys' fees."

Petitioner here urges (1) that the respondent commission committed prejudicial error in receiving evidence (the letter from California Inspection Rating Bureau, above quoted) after the cause was submitted for decision, without giving the employer and his insurance carrier an opportunity to be heard; and (2) that the policy of insurance, by reason of the endorsement agreement attached thereto, excluded the claim of the employee herein.

Said endorsement agreement reads:

"The insurance under this policy is limited as follows:

"It is Agreed that, anything in this policy to the contrary notwithstanding, this policy Does Not Insure:

Employees and/or Operations and/or Locations not Insured Option 6	As respects injuries (or death resulting therefrom) sustained by Any employee engaged in the following operations or occupations: A—House to house distributing of hand bills, circulars, newspapers or other printed matter, assignable to: Classification Code 8742—Salesmen, etc. B—Using motorcycle, assignable to Classification Code 7380—Chauffeurs, etc.

"Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, agreements or limitations of this policy other than as above stated.

"Attached to and forming part of Policy No. C 290744 issued by the National Automobile Insurance Company to Mercury Printing Company."

The laws appertaining to workmen's compensation, as contained in the Labor Code, St.1937, p. 265, § 3201 et seq., enumerate those matters which, in addition to sworn testimony presented in open hearing, the commission may receive and use as proof of any fact in dispute. Sec. 5703. As heretofore stated, after the instant cause was submitted for decision by the referee, he addressed an inquiry to the California Inspection Rating Bureau, and later received the reply hereinbefore quoted, which was then made a part of the record. The record does not disclose the context of the letter of inquiry, nor that any evidence was presented at the hearing on the question of underwriting practices, it being petitioner's contention at all times that the policy of insurance did not cover the alleged injury.

Under section 5704 of the Labor Code, "Transcripts of all testimony taken without notice and copies of all reports and other matters added to the record, otherwise than during the course of an open hearing, shall be served upon the parties to the proceeding, and an opportunity shall be given to produce testimony in explanation or rebuttal thereof before decision is rendered."

It is clear that petitioner was not afforded such opportunity in the present instance.

In Union Lumber Co. v. Industrial Accident Comm., 124 Cal.App. 584, 590, 12 P.2d 1047, 1049, it was held necessary to set aside an award and remand the cause for further proceedings, "because of prejudicial error which occurred in submitting the cause without notice to the employer and without affording it an opportunity to adduce evidence to rebut the certificate of Dr. Pajari of Finland as to the cause of the alleged permanency of the injury."

It was held in the case of Bascom v. Industrial Accident Comm., 25 Cal.App.2d 334, 77 P.2d 305, that an award of compensation for the death of an employee, made by the commission after a hearing in which petitioner was not given an opportunity to present his defense that he was not an employer of decedent within the meaning of Workmen's Compensation Act, but was an employee only of the trustees for creditors, —was made without due process guaranteed under section 13 of article I of the Constitution of California, and the Fifth Amendment to the Constitution of the United States.

The error here is particularly flagrant because at the close of the hearing when the matter was submitted for decision, the referee stated: "We have this problem, Mr. Fefferman. It is a misdemeanor to be uninsured. You have a limited policy here, so you will have to either secure full coverage within ten days, or secure a certificate of consent to self-insure, because you see you are uninsured. * * * Mr. Fefferman: * * * Does that mean if one of my employees is doing something other than what he is specifically employed for, then that constitutes no coverage? The Referee: No. Your limitation is that he is either doing house-to-house distributing of hand bills, or he is using a motorcycle. Apparently, you have full coverage in all but those two things." After receiving the reply to his inquiry addressed to the California Inspection Rating Bureau, the referee found "In accordance with underwriting practices, there would be no segregation of payroll to cover the time on an isolated errand, and the terms 'operations or occupations * * * assignable to Classification Code 7380' are used in the sense of identifying a payroll segregation and are not applicable in the present case." Such finding has no support in the evidence adduced at the open hearing in the instant cause.

It conclusively appears, therefore, that the commission committed prejudicial error in receiving into the record the letter from the Bureau and basing its award thereon, without affording petitioner an opportunity to be heard, and as well, in failing to make the referee's inquiry to the Bureau a part of the record.

For the reason that the instant cause must be remanded for further proceedings, it is not deemed advisable to pass upon the question of coverage of the employee under the policy of insurance issued by petitioner containing the limitations above adverted to, because at another hearing, evidence may be presented which will shed an entirely different light upon that issue.

For the reasons stated, the award is vacated and the cause remanded for further proceedings in accordance with the foregoing suggestions.

DOREN and WHITE, JJ., concur.

25 Cal.2d 375

NICHOLSON et al. v. HENDERSON.

L. A. 18830.

Supreme Court of California.

Dec. 5, 1944.

1. Appeal and error ⊂⇒78(4)

An order granting motion for nonsuit, and thereafter regularly entered in the minutes of the court, is a final order and appealable.

2. Appeal and error ⊂⇒694(2)

Record failed to sustain contention that there was a material variance between order of nonsuit and the entry thereof by the clerk in his minutes.

3. Judgment ⊂⇒203

Generally, there can be only one final judgment in a single action.

4. Judgment ⊂⇒203

Where plaintiff sought to establish a trust in real property and to quiet title, and defendant denied plaintiff's claim and sought to quiet her title to the same property, only one judgment was necessary to settle the entire controversy.

5. Judgment ⊂⇒203

To attempt to adjudicate the rights of one party by a single judgment and those of the other by a separate judgment, when the controversy is between only two parties, and concerns only a single piece of property, is simply an attempt to dispose of the case piecemeal, which is not permissible.

6. Appeal and error ⊂⇒78(4)

In action to establish a trust in real property and to quiet title in which defendant filed a cross-complaint to quiet title to same property, where the court, after granting motion for nonsuit on the complaint, purported to enter a judgment for defendant on the cross-complaint, no single final judgment was entered, and appeal from purported judgment on cross-complaint was not permissible.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Edward R. Brand, Judge.

Action by William M. Nicholson and others against Mabel Scott Henderson, as administratrix, etc., to impress a trust and to quiet title to a parcel of land, wherein defendant filed cross-complaint to have her title quieted to the land described. Defendant's motion for nonsuit on the complaint was granted, and, from a judgment for defendant on the cross-complaint, plaintiffs appeal.

Appeal dismissed.

Prior opinion, Cal.App., 146 P.2d 52.

Earl Oakley and George R. Wickham, both of Los Angeles, for appellants.

William H. Haupt, of Los Angeles, for respondent.

CURTIS, Justice.

Appellants, plaintiffs in this action filed a complaint seeking to impress a trust and to quiet title to a parcel of land. Subsequently they filed an amended complaint in which they asked for the same relief. We will refer to plaintiffs' final pleading as the complaint rather than as the amended complaint. Respondent, the defendant, filed an answer to the complaint, and also sought by cross-complaint to have her title quieted to the same parcel of land described in the complaint. During the trial, the court granted respondent's motion for a nonsuit on the complaint, which order was entered in the clerk's minutes on March 12, 1943. The entry reads, "Defendant's Motion for a nonsuit on the Complaint is granted on the grounds of insufficiency of the evidence." After the granting of respondent's motion for a nonsuit, the cause proceeded to trial on the cross-complaint and answer thereto. When the trial was completed, judgment was entered upon the cross-complaint alone in favor of respondent. The judgment was dated March 22, 1943, and contains, among other matters, the following recitals:

"The above-entitled cross-complaint, and the action thereon, duly and regularly came on for trial before the above-entitled court * * * William H. Haupt, Esq., appearing for the cross-complainant, and Messrs. Earl Oakley, Esq., and George R. Wickham, Esq., appearing for the cross-defendants, and evidence having been adduced, * * * and the court having duly made and caused to be filed herein written findings of fact and conclusions of law * * *.

"It is ordered, adjudged and decreed that the title of the cross-complainant * * * in and to the following described property, * * * be, and it hereby is, forever quieted as against the cross-defendants. * * *" Then follows a description of the real property involved in this action and a decree that cross-complainant recover from the cross-defendants her costs.

The appeal is from "that certain judgment herein made and entered * * * in favor of said cross-complainant * * * and against said cross-defendants * * *," which judgment was entered on the 23d day of March, 1943.

The respondent contends that this purported judgment is one based solely on the issues made by the cross-complaint and the answer thereto, and does not include any adjudication by the trial court of the issues arising out of the complaint in said action; that the issues arising out of the complaint were definitely and finally adjudicated by the court in its order granting a nonsuit. Therefore respondent contends that the only matters which may be reviewed on this appeal are those put in issue by the cross-complaint and cross-defendants' answer, and that the appellants are precluded from raising any question involving the issues arising out of the complaint and finally decided adverse to appellants by the order of the court granting defendant's motion for a nonsuit. In other words, it is the position of respondent that there were two judgments rendered in said action: one being the order granting the nonsuit, which was regularly entered in the minutes of the court on March 12; and the other being the formal judgment on the cross-complaint rendered by the court on March 22 and entered on March 23.

The reporter's transcript shows that at the conclusion of plaintiffs' evidence in support of their complaint the defendant moved for a nonsuit, and that after argument of counsel the following proceedings were had:

"The Court: The motion is granted.

"Mr. Haupt: Judgment will be entered for defendant on the complaint?

"The Court: Yes."

The minutes of the court contain the following statement: "Defendant's Motion for a nonsuit on the Complaint is granted on the grounds of insufficiency of the evidence." No further or formal judgment of nonsuit was ever entered after the entry of the order.

Immediately following the proceedings just set forth, the defendant or cross-complainant proceeded to introduce evidence in support of her cross-complaint. Thereafter the cross-defendants failed to put in any further evidence, and a formal judgment signed by the judge was rendered in the form hereinbefore indicated.

[1] Appellants contend that the court in answering in the affirmative Mr. Haupt's question "Judgment will be entered for defendant on the complaint?" intended that the order of nonsuit was a mere memorandum "affording data from which a proper final judgment might thereafter be granted." Supporting this contention appellants call attention to the formal judgment subsequently rendered and entered in said action, and they rely upon the fact that the trial court subsequently did actually enter a formal judgment. But as we have seen, this judgment does not in any manner make reference to the complaint, to any of the issues of the complaint, or to the order of nonsuit. It is so well settled in this state as to remove the question beyond dispute, that an order of nonsuit rendered by the court under the circumstances in which the order herein involved was rendered and thereafter regularly entered by the clerk in the minutes of the court, is a final order from which an appeal will lie. Lewis v. Hammond Lumber Co., 114 Cal.App. 390, 300 P. 49; Tromanhauser v. Grisemer, 123 Cal.App. 153, 11 P.2d 32; Nulsen v. Nulsen, 3 Cal.App.2d 407, 39 P.2d 509; McColgan v. Jones, Hubbard, etc., Inc., 11 Cal.2d 243, 78 P.2d 1010.

[2] Appellants' contention that there is a material variance between the court order of nonsuit and the entry thereof by the clerk in his minutes is without merit. A reading of the reporter's transcript shows clearly that the motion for a nonsuit was granted on the insufficiency of the evidence.

The record shows therefore that two purported final judgments were rendered in the action; one a judgment of nonsuit, the other a formal judgment on the cross-complaint, in which latter judgment no mention or reference was made either to the action on the complaint or to the order granting a nonsuit. Appellants attempt to appeal only from the formal judgment on the cross-complaint.

[3] This condition of the record raises the question as to whether two valid final judgments may be legally rendered in this action. It is settled that as a general rule there can be only one final judgment in a single action. Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. 557, 577, 33 P. 633; Colton L. & W. Co. v. Swartz, 99 Cal. 278, 282, 33 P. 878; Nolan v. Smith, 137 Cal. 360, 362, 70 P. 166; Doudell v. Shoo, 159 Cal. 448, 454, 114 P. 579; Rowley v. Davis, 169 Cal. 678, 681, 147 P. 958; Howe v. Key System Transit Co., 198 Cal. 525, 529, 246 P. 39; Gunder v. Gunder, 208 Cal. 559, 561, 282 P. 794; Middleton v. Finney, 214 Cal. 523, 525, 6 P.2d 938, 78 A.L.R. 1104; De Vally v. Kendall De Vally O. Co., Ltd., 220 Cal. 742, 745, 32 P.2d 638; Mather v. Mather, 5 Cal.2d 617, 618, 55 P.2d 1174; Greenfield v. Mather, 14 Cal.2d 228, 231, 93 P.2d 100; Bank of America v. Superior Court, 20 Cal.2d 697, 701, 128 P.2d 357; Mather v. Mather, 22 Cal.2d 713, 716, 140 P.2d 808; Provident Land Corp. v. Bartlett, 53 Cal.App.2d 383, 387, 127 P.2d 928; Caminetti v. Imperial Mut. Life Ins. Co., 54 Cal.App.2d 514, 517, 129 P.2d 432. There are at least two exceptions to this general rule, instances of which are to be found in two of the cases just cited: Rowley v. Davis, 169 Cal. 678, 147 P. 958, supra, and Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39, supra. While they support the general rule that there can be but one final judgment in a single action, they point out that due to the somewhat unusual situation existing in each of those cases, it was within the discretion of the trial court to enter two final determinations on the separate issues respectively involved in those actions.

In Rowley v. Davis, supra, the plaintiff sought to foreclose a mortgage on certain real property, making parties to the action the owners of the real property and other persons claiming to be the owners of liens subsequent to plaintiff's mortgage. The owners of the mortgaged property appeared and admitted all allegations of the complaint, except that respecting attorney's fees. The trial court proceeded to try the issues arising upon the complaint and answer thereto, without trying the conflicting claims of the other defendants in said action. Findings of fact were made and a judgment was rendered in favor of the plaintiff decreeing a sale of the land and providing that, after satisfying plaintiff's claim, the surplus, if any, should be paid into court to be distributed to the respective defendants as their interests might subsequently be determined by the court.

An appeal was taken from this judgment, and in affirming the judgment this court, after approving the general rule above stated, held that (169 Cal. at page 682, 147 P. at page 960) "It was both just and reasonable to give the plaintiff the relief which all the parties admitted he was entitled to, and not compel him to wait the termination of litigation of that character [the conflicting claims to the surplus] before enabling him to recover a just debt." The court based its decision upon the fact that plaintiff had established his case and that the disposition of the conflicting claims of the defendants did not affect the plaintiff's rights. Accordingly, the court held that it was a proper procedure to enter a judgment in favor of plaintiff on his complaint foreclosing the mortgage, and that the conflicting claims of subsequent lienholders should be adjudicated in a later judgment.

In the case of Howe v. Key System Transit Co., supra, the plaintiff, a passenger on the Key System, brought suit for damages alleged to have been sustained by her in a collision between a Key System train and a car of the San Francisco-Sacramento Railroad. Both companies were made defendants, besides some forty fictitious parties sued as First Doe, Second Doe, etc. An injured employee of the Key System appeared, alleging himself to be designated a Doe defendant. He answered the complaint denying its material allegations and filed a cross-complaint against the San Francisco-Sacramento Railroad, charging that the collision was due to the negligence of the last-named company and asking for damages for injuries sustained by him in the collision against said company. The plaintiff moved to strike the cross-complaint from the files of the action. The court granted the motion and the order was entered in the minutes of the court. The defendant Doe appealed from said order, and plaintiff moved to dismiss the appeal on the ground that an appeal does not lie from an order striking a cross-complaint from the files. The motion to dismiss was denied, the court holding that the order striking the cross-complaint was a final judgment and therefore appealable. The court approved the doctrine announced in Stockton, etc., Works v. Glen's Falls Ins. Co., 98 Cal. 557, 33 P. 633, supra, followed by many of the other cases above cited, but held (198 Cal. at page 529, 246 P. at page 40) "that case, and others cited by respondents to the same effect, can only have application to parties to an action whose interests are identical. Separate parties, if the court in its discretion so directs, may litigate their controversies separately, and may proceed to final judgment without waiting for judgments as to other parties. [citing authorities.]"

There may be other exceptions to this general rule in addition to the two discussed in these two cases, but none has been called to our attention, and we know of no exception which would cover the facts in this case and permit two final judgments to be rendered in an action with a factual background similar to that now before us.

[4] The plaintiffs in the present action sought to establish a trust in their favor in the real property described in the complaint. The defendant denied plaintiffs' claim and sought to quiet her title to the same property. Had plaintiffs succeeded in the action, they would have been entitled to a decree establishing a trust in their favor in said real property. Had defendant succeeded in defeating plaintiffs' claim and establishing her own, she would have been entitled to a decree that plaintiffs take nothing by their action, and that her title to said real property be quieted. In either case one judgment would have settled the entire controversy.

[5] To attempt to adjudicate the rights of one party by a single judgment and those of the other by a separate judgment when the controversy is between only two parties and concerns but one subject matter—a single piece of real property—is simply an attempt to dispose of the case piecemeal, a procedure which has been condemned by this court in numerous decisions as will be found in the cases of Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174, supra, and Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100, supra. In these cases and the authorities cited therein, it was held, on an appeal from one such judgment, that "It is at once apparent that no final judgment was entered in the action * * * under the terms of section 963 of the Code of Civil Procedure, or otherwise. * * * The motion [to dismiss the appeal] is granted, and the purported appeal is dismissed." 5 Cal.2d 618, 55 P.2d 1174.

[6] The decisions in this state as to whether an action in which a cross-complaint is filed is a single action, or consists of two actions, are not in accord. Lowe v. Superior Court, 165 Cal. 708, 134 P. 190; Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 25 P.2d 983, 90 A.L.R. 384. But whatever the rule may be respecting that question, the authorities in this state as hereinbefore cited are clearly to the effect that an action like the present one, although a cross-complaint has been filed and the matters therein stated are put in issue, is not such an action that requires, or permits, the rendition of two final judgments.

As no final judgment in this action has been rendered by the trial court, the appeal from the purported judgment on the cross-complaint is dismissed. The proper procedure to be followed by the trial court after the going-down of the remittitur, is outlined in the case of Mather v. Mather, 22 Cal.2d 713, 140 P.2d 808.

GIBSON, C. J., and SHENK, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. The record in this case shows that plaintiffs commenced an action to impress a trust on real property and to quiet title thereto. Defendant in her answer to that complaint raised the general issue by denials and by way of affirmative defenses asserted title to the property. Hence, the entire issue of the *interest in the property of both plaintiffs and defendant* was raised by the complaint and answer. Defendant also filed a cross-complaint to quiet title in herself to the *same property*. Plaintiffs in their answer to the cross-complaint made general denials but did not again plead the matter set forth in their complaint. Nevertheless, the issues raised by the cross-complaint were *no different nor more extensive than those already raised by the complaint and the answer thereto.* Under those circumstances the cross-complaint was mere surplusage and served no useful purpose. Under those circumstances it was not necessary for plaintiffs to answer the cross-complaint in order to introduce evidence establishing their claim. It is said in 22 California Jurisprudence 160:

"In an action to determine adverse claims a defendant may *in his answer* set up his title and ask that he be adjudged owner of the land described in the complaint; or if he does not ask for such relief in his answer, he may file a cross-complaint demanding it. The principal reason for so doing is to prevent the plaintiff from dismissing his action without the consent of the defendant. But such practice is, ordinarily, not essential to the protection of the defendant, since a conclusion against the plaintiff upon the issues raised fully determines title as between the parties, and protects the defendant against any claim of the plaintiff as fully as would an affirmative decree in his favor. And so it has been held that the cross-complaint may in such case be treated as an answer containing affirmative matter. It has even been held that it was not error in such case to strike out the cross-complaint, or at least that any error in so doing is harmless where judgment is given for the plaintiff. On the other hand, a refusal to strike out is harmless if no judgment is rendered on the cross-complaint. There are, of course, cases in which a cross-complaint is necessary to the defendant's protection. But where an answer denies plaintiff's ownership and avers ownership and right to possession in defendant, *a cross-complaint which in terms is but a repetition thereof, and presents no new issues, is unnecessary; the plaintiff need not plead to it, and the court need not make findings with respect thereto.*" (Italics added.)

In the instant case after the plaintiffs rested on their introduction of evidence on their complaint the court granted defendant's motion for a nonsuit. Thereafter defendant introduced evidence on her cross-complaint. Thereafter plaintiffs' offer of proof in answer to the cross-complaint consisting of the evidence they had introduced on their complaint was denied upon defendants' objection. While the court probably based its denial on the proposition that the evidence was unavailing because of its previous order of nonsuit, the denial was erroneous on any other ground. It cannot be said that the proof offered was not embraced within plaintiffs' answer to the cross-complaint for under the rule above stated plaintiffs were not required to plead to the cross-complaint. It follows therefore that unless the presence of the judgment of nonsuit and the judgment on the cross-complaint is an insuperable obstacle, this court should determine the appeal on the merits considering all of the evidence introduced. That those purported two judgments are not an obstacle is clear. As stated in the majority opinion, the issues in this action involve the title to property claimed by the two parties and no new issues were presented by the cross-complaint. It must follow therefore that the two purported judgments *should be treated as one,* that the judgment of nonsuit is merged into the judgment on the cross-complaint. For all practical purposes both judgments determined the same thing. It is not like the case of Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100, where *different* issues were determined by each of the two judgments. It is recognized that two judgments in an action may be treated as one, although only one judgment in an action is proper (Stone v. Perkins, 217 Mo. 586, 117 S.W. 717; Mann v. Doerr, 222 Mo. 1, 121 S.W. 86; Williamson v. Mann, 134 Ky. 63, 119 S.W. 232), and the party who has two judgments entered in an action, as defendant did in the case at bar, cannot complain of that circumstance. Mann v. Doerr, supra; Jemo v. Tourist Hotel Co., 55 Wash. 595, 104 P. 820, 30 L.R.A.,N.S., 926, 19 Ann.Cas. 1199. If we adopt the theory of Greenfield v. Mather, supra, the same result follows. Under the theory of that case the judgment of nonsuit in the case at bar would be void but the judgment on the cross-complaint would embrace all the issues. The defendant here is not in a position to complain of a piecemeal adjudication of the litigation because if such exists she brought it about herself. It is said in Greenfield v. Mather, supra, 14 Cal.2d 233, 93 P.2d 103:

"To permit a litigant to deprive his adversary of an opportunity for *full appeal* by erroneously procuring the entry of successive purported partial judgments, and then having appeals from all save the last of said judgments dismissed on the ground that the cause should not have been split, *would be unfair.*" (Italics added.)

In a concurring opinion in the case of Mather v. Mather, 22 Cal.2d 713, at page 720, 140 P.2d 808, I pointed out the error of this court in its decision in the case of Greenfield v. Mather, supra, and while the precise situation involved in that case is not involved in the case at bar, it is obvious that this court may reasonably and logically hold in this case that the two judgments are in effect one judgment which became effective when the last judgment was entered.

Taking this as a basis for our decision, we might well review the entire case on its merits and render a decision determining the rights of the parties without sending the case back to the trial court for the mere formality of having another judgment entered.

25 Cal.2d 384

HOUSE v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

L. A. 18968.

Supreme Court of California.

Dec. 5, 1944.

1. Eminent domain 🔑2(1)

The police power, although broad in concept, is not unrestricted in relation to taking or damaging property, and when it passes proper bounds in invading property rights, it comes within purview of law of eminent domain, and its exercise requires compensation. Const. art. 1, § 14.

2. Eminent domain 🔑2(10)

Where landowner's action against flood control district to recover for flood damage was based upon negligence of district in removing existing protective structures and substituting inadequate levees, district could not escape liability on theory of exercising a riparian right. Const. art. 1, § 14.

3. Constitutional law 🔑87

Where right to own property is recognized in a free government, practically all other rights become worthless if government possesses an uncontrollable power over a citizen's property.

4. Constitutional law 🔑81
Eminent domain 🔑2(1)

Under police power, in emergency calling for immediate action, private interests are subservient to right of state to proceed in manner deemed appropriate for protection of public health or safety, and property may be destroyed without payment of compensation. Const. art. 1, § 14.

5. Eminent domain 🔑92

Although errors of judgment in planning and constructing a public work may be consistent with reasonable care, procedure so grossly incompetent as to constitute negligence may give injured property owner just cause for complaint on ground that limits of police power have been transgressed. Const. art. 1, § 14.

6. Eminent domain 🔑56

A public agency in undertaking flood control program does not become an insurer against all possible damage which may be inflicted on private property, but damage to individual must not exceed necessities of particular case because of failure to use reasonable care. Const. art. 1, § 14.

7. Constitutional law 🔑87, 212, 253

The organic rights to acquire, possess and protect property and to due process and equal protection of the laws, render inapplicable principles of nonliability and damnum absque injuria in exercise of police power wherever private, personal and property rights are impaired in a manner not reasonably necessary to serve a public purpose for general welfare. Const. art. 1, § 14.

8. Eminent domain 🔑2(10)

The fact that flood control district was exercising police power in flood control project did not render it immune from liability to landowner damaged by flood as result of district's alleged negligence in removing existing protective structures and substituting inadequate levees. Const. art. 1, § 14.

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In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Lillian Candace House against the Los Angeles County Flood Control District to recover for damages to her property because of negligence of the defendant district in the planning, construction and maintenance of flood control channel work in the Los Angeles River. From a judgment of dismissal, the plaintiff appeals.

Judgment reversed.

Prior opinion, 144 P.2d 389.

Henry M. Lee, of Los Angeles, for appellant.

J. H. O'Connor, County Counsel, and S. V. O. Prichard, Asst. County Counsel, both of Los Angeles, for respondent.

CURTIS, Justice.

This is an appeal from a judgment of dismissal entered after the trial court had sustained a demurrer to the plaintiff's first amended complaint without leave to amend.

The plaintiff, as the owner of certain land in Los Angeles County adjacent to the Los Angeles River, undertakes to state a cause of action based upon damages to her property by reason of the negligence of the defendant district in its planning, construction and maintenance of certain flood control channel work in said river. She rests her right of recovery upon article I, section 14, of the state Constitution, which provides that private property shall not be taken or damaged for public use without just compensation to the owner. The trial court erred in failing to sustain the constitutional basis of the plaintiff's claim under the distinguishable concept of her pleading.

As appears from the amended complaint, the gist of the plaintiff's case is as follows: In pursuance of its plan for flood control, the Los Angeles County Flood Control District removed permeable dikes, piling, wire mesh and groins that bordered the Los Angeles River adjacent to the plaintiff's land and replaced these installations with levees. The effect of the dikes and other obstructions had been to reduce the high velocity of the river waters in flood season by permitting them to spread over an extensive overflow area, leaving a deposit of silt thereon. Upon the removal of these protective structures and the substitution of the levees along the river banks, the regimen of the stream was completely changed in that there was no provision for overflow spread on adjoining lands, with the result that the waters were confined to a smaller area and their velocity was greatly increased. The plaintiff charges the defendant district with negligence in these principal particulars in the planning and erection of the newly installed flood control works: (1) in failing to make the artificial river channel of sufficient size to accommodate the augmented volume of waters in flood season; and (2) in building the levees of improper materials—sand and gravel upon which were piled small stone blocks of inadequate size, without being bonded together with cement, grout or other substance—so that they were unable to withstand the erosive force of the river waters. The plaintiff then alleges that as the proximate result of these negligent acts, the storm waters flowing in the Los Angeles River on March 2, 3 and 4, 1938, broke through the levees and burst with great violence upon her adjacent land, denuding it of its soil to a depth of from six to ten feet and washing away all the improvements situate thereon, to her damage in the sum of $30,663. The plaintiff further avers that the defendant district's undertaking of such public improvement work was not occasioned by such imminent peril or emergency in relation to the general welfare as would excuse it from taking proper measures in the course of construction—during the years of 1935, 1936 and 1937—to safeguard her property from the danger attendant upon its pursuit of a flood control plan contrary to good engineering practices, and its installation and maintenance of defective structures following the removal of the protective agencies that had theretofore existed along the river banks. In this connection the plaintiff alleges that she suffered no damage to her property during the great flood of the Los Angeles River in January, 1934.

It would serve no useful purpose to engage here in a detailed discussion of the opposing arguments as to whether under the above-mentioned constitutional provision a public agency in the installation of river channel improvements is generally liable to the property owner for overflow damage incident to the exercise of such governmental function. The divergent views on that unqualified proposition were fully reviewed by this court recently in the cases of Archer v. City of Los Angeles, 1941, 19 Cal.2d 19, 119 P.2d 1, and O'Hara v. Los Angeles County Flood Control Dist., 1941, 19 Cal.2d 61, 119 P.2d 23. While the latter case involved the same flood control project as is now subject of complaint and under the prevailing view there, the varying claims of damage were held to be noncompensable upon distinguishable theories, the liability feature here arises under a different aspect. By her pleading the plaintiff advances, in the nature of a limitation upon a public agency's performance of its governmental function, the charge of *negligence,* an added feature which did not enter into the O'Hara decision. Accepting the premise of argument of the parties here that a levee improvement made in the channel of a stream for the general welfare is referable to the police power, the propriety of its exercise must still be considered under the distinct circumstances presented.

[1] While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation. Varney & Green v. Williams, 155 Cal. 318, 100 P. 867, 21 L.R.A.,N.S., 741, 132 Am.St. Rep. 88; Pacific Telephone, etc., Co. v. Eshleman, 166 Cal. 640, 137 P. 1119, 50 L.R.A.,N.S., 652, Ann.Cas.1915C, 822. In fact, on the point of a governmental agency's liability for damages arising in connection with its undertaking construction work, the prevailing opinion in the Archer case, supra, does not purport to dispute the settled principle that public necessity limits the right to exact uncompensated submission from the property owner if his property be either damaged, taken or destroyed. Rather it is expressly stated there in the prevailing opinion (19 Cal.2d 23, 24, 119 P.2d at page 4): "The state or its subdivisions may take or damage private property without compensation if such action is *essential* to safeguard public health, safety, or morals. [Citing authorities.] *In certain circumstances, however, the taking or damaging of private property for such a purpose is not prompted by so great a necessity as to be justified without proper compensation to the owner.* [Citing authorities.]" (Italics added.) Thus there is recognized the incontestable proposition that the exercise of the police power, though an essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to destroy constitutional rights as to the inviolateness of private property.

A case closely in point here is Pacific Seaside Home v. Newbert P. District, 190 Cal. 544, 213 P. 967, where the sufficiency of the plaintiff's pleading was likewise under attack. There this court said at pages 545, 546 of 190 Cal., at page 968 of 213 P.:

"* * * The defendant was a public corporation * * * entitled to maintain and defend actions in law and in equity * * * and would be liable for the *negligent* diversion of storm waters upon the plaintiff's property. Elliott v. County of Los Angeles, 183 Cal. 472, 475, 191 P. 899. The gist of the plaintiff's complaint is that the defendant *constructed channels for the water of the Santa Ana river so defectively and negligently that they would not carry the waters of the stream.* Plaintiff alleges that—'Had the defendant not changed the natural course of the Santa Ana river, or in anywise interfered with its natural flow, the waters of the Santa Ana river would have flowed on into Newport Bay and no damage would have accrued to the plaintiff had the said river been permitted to flow as it naturally would had not the defendant constructed its channel to divert the same. * * *' It is further alleged in effect that the injury occurred to the plaintiff by reason of the fact that the defendant *negligently turned the waters of the Santa Ana river in a channel which was too small, and which was negligently constructed and maintained, and that by reason thereof it was damaged.*

"These facts sufficiently state a cause of action." (Italics added.)

The Elliott and Pacific Seaside Home cases were cited as the basis for upholding the sufficiency of the plaintiffs' complaint against a general demurrer in the first appellate consideration of the damage claim presented in Archer v. City of Los Angeles, 15 Cal.App.2d 520, 59 P.2d 605. The pleading was described by the District Court of Appeal as follows at pages 521, 522 of 15 Cal.App.2d, at page 606 of 59 P.2d: "The gist of [the] complaint * * * is that respondent constructed and built an artificial drainage system so defectively, carelessly, and negligently that it would not carry the storm waters to the Pacific Ocean as designed and intended" and "that the injury to the appellants occurred by reason of the fact that respondent negligently turned the storm waters into La Ballona lagoon, which was too small to conduct the water turned into it by and through the drainage system constructed, operated and maintained by respondent. * * *" Subsequently, the Archer damage action was before this court for decision upon the appeal from the judgment of nonsuit entered at the close of the plaintiffs' evidence at the trial. Archer v. City of Los Angeles, supra, 19 Cal.2d 19, 119 P.2d 1. In the prevailing opinion affirming the judgment, the following distinction, after quotation of the above portion of the decision of the District Court of Appeal on demurrer, was made at page 29 of 19 Cal.2d, at page 7 of 119 P.2d: "According to the allegations of the complaint, the damage resulted because defendants negligently diverted water out of its natural channel, and obstructed the channel of the creek. Plaintiffs' evidence, however, fails to substantiate such allegations. The decision of the District Court of Appeal on demurrer is therefore not binding on this court in passing on the *sufficiency of the evidence to support the allegations*." (Italics added.) Measured by its own limitation, such language, denoting the deficiency in the plaintiffs' establishment of their case, does not mean that a governmental agency in the installation of stream improvements may escape liability under the constitutional compensation requirement where the property owner sustaining damage from such work *proves, in accordance with his allegations, negligence* in the construction and maintenance of the public project. Under the accepted circumstances there, the prevailing opinion in the Archer case applied the doctrine of damnum absque injuria by declaring that the governmental agency was exercising a riparian right so that it would be no more liable to a lower property owner damaged thereby than would a private person inflicting a like injury in protection of his upper lands. Archer v. City of Los Angeles, supra, 19 Cal.2d at page 24, 119 P.2d 1; cf. O'Hara v. Los Angeles County Flood Control Dist., supra, 19 Cal.2d at page 63, 119 P.2d 23.

[2, 3] In the present case the defendant district may not escape liability on any theory of exercising a riparian right, for the plaintiff does not correlate her damage claim with any such principle. Rather she makes the direct charge that the defendant district removed a safe and secure protection to her land immediately adjacent thereto and substituted therefor an unsafe, careless and negligently planned bank or wall, resulting in the overflow, inundating and washing away of her property, which had theretofore never been visited by the river waters. It is a principle of universal law that wherever the right to own property is recognized in a free government, practically all other rights become worthless if the government possesses an uncontrollable power over the property of the citizen. Upon this premise the plaintiff relies on the *unnecessary* damage to her property as the result of the defendant district's negligence in the planning, construction and maintenance of the flood channel work to sustain the constitutional basis of her claim. In other words, it is her position that damage suffered by a property owner as the result of a public improvement undertaken in the exercise of the police power must have some reasonable relation to the purpose to be accomplished under the prevailing circumstances, and that the governmental agency proceeding with such work may not *needlessly* inflict injury upon private property without being liable to make compensation therefor. This accords with the general object of the constitutional guaranties in protection of property rights and but places upon a reciprocal basis the individual's damage in relation to the public benefit. *Unnecessary* damage to his property is of no benefit to the public; rather it only entails unwarranted sacrifice and loss on the individual's part, which should be compensable damage.

[4-7] Unquestionably, under the pressure of public necessity and to avert impending peril, the legitimate exercise of the police power often works not only avoidable damage but destruction of property without calling for compensation. Instances of this character are the demolition of all or parts of buildings to prevent the spread of conflagration, or the destruction of diseased animals, of rotten fruit, or infected trees where life or health is jeopardized. In such cases calling for immediate action the emergency constitutes full justification for the measures taken to control the menacing condition, and private interests must be held wholly subservient to the right of the state to proceed in such manner as it deems appropriate for the protection of the public health or safety. 18 Am.Jur. 778; 29 C.J.S., Eminent Domain, § 6, p. 784. But the present case does not appear to be one of such emergency character as would preclude the defendant district from being held liable for *unnecessary* damage resulting from the alleged inadequate and negligent planning, construction and maintenance of its flood channel project. Ac-

cording to the plaintiff's pleading, the defendant district, with time to exercise a deliberate choice of action in the manner of its installation of the river improvements, followed a plan "inherently wrong" and thereby caused needless damage to her property.

While mere errors of judgment in planning and constructing a public work may be consistent with reasonable care, procedure so grossly incompetent and contrary to "good engineering practices" as to constitute negligence might well give the injured property owner just cause for complaint upon the ground that the governmental agency responsible for the project has transgressed the limits of the police power. Kaufman v. Tomich, 208 Cal. 19, 280 P. 130. Such conclusion does not make the public agency, in undertaking its flood control program, an insurer against all possible damage which thereby might be inflicted on private property (cf. United States v. Sponenbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230), but it merely requires that the damage to the individual, on whom the sovereign power justifiably makes demands in the public interest, not exceed the necessities of the particular case due to a failure to use reasonable care and diligence. In view of the organic rights to acquire, possess and protect property and to due process and equal protection of the laws, the principles of nonliability and damnum absque injuria are not applicable when in the exercise of the police power, private, personal and property rights are interfered with, injured or impaired in a manner or by a means, or to an extent that is not reasonably necessary to serve a public purpose for the general welfare. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322, 28 A.L.R. 1321; cited with approval in Archer v. City of Los Angeles, supra, 19 Cal.2d at page 24, 119 P.2d at page 4.

[8] For the foregoing reasons the defendant district's exercise of the police power does not of itself furnish complete justification for the infliction of damage upon the plaintiff's property without liability for compensation. Under the theory of her pleading, the plaintiff has alleged facts sufficient to constitute a cause of action within the scope of article I, section 14. of the state Constitution, and it was error for the trial court to rule otherwise. The judgment of dismissal is therefore reversed.

GIBSON, C. J., and SHENK, J., concurred.

SCHAUER, Justice.

I concur in the foregoing judgment and opinion. The distinction made in the opinion between this case and the cases of Archer v. City of Los Angeles (1941), 19 Cal.2d 19, 119 P.2d 1, and O'Hara v. Los Angeles County Flood Control Dist. (1941), 19 Cal.2d 61, 119 P.2d 23, seems tenable, but by my concurrence herein I do not imply accord with the majority views expressed in those cases.

TRAYNOR, Justice.

I concur in the judgment. Since this is an appeal from a judgment following an order sustaining a demurrer, the following allegations of the first amended complaint must be regarded as true. The Los Angeles River, which becomes a menace to the neighboring property during the rainy season because of its violent floods, overflowed plaintiff's land during a storm in the first days of March, 1938, washed out the land to a depth of approximately six to ten feet, and destroyed buildings, other improvements, and personal property. The injury was caused by a system of flood control installed by defendant in the period between December, 1935, and the storm. The plaintiff's property would have been protected from the flood, as it was in January, 1934, during an even greater flood, had the defendant not replaced the former system of flood control, installed by defendant between 1917 and 1930, with new structures that were inadequate for the purpose. The former installations consisted of permeable dikes of piling and wire mesh along the margin of the river bed through which the waters could freely flow into an overflow area on both sides of the river channel. These structures and the riparian vegetation reduced the velocity of the flood waters, rendering them less dangerous to neighboring property. Groins installed transversely to the overflow area accomplished the restoration and maintenance of the natural condition of the river by causing a regrowth of vegetation in the overflow area and the building up of that area with silt deposited by the water. The new construction work, mainly excavation of the river channel and installation of levees along its banks, necessitated removal of the shrubs and trees along the river. The channel was narrowed and its capacity to carry water lowered, while the velocity of the water through the channel was increased. Since the levees lacked adequate openings to permit the drainage waters to flow into the river, the danger to the adjacent land from overflowing water was intensified. The levees were built several feet above the level of the riparian area and were thus exposed to great pressure by the water compressed into the narrowed channel. They were constructed of sand and gravel upon which small stone blocks were laid on the inner slopes not bound together with cement or other material. As a consequence of this defective construction of the levees, upon which the adjacent land depended for its protection, the water could flow through the holes between the stone blocks and percolate through the levees. Thus, the invasion of plaintiff's land by the flood water was caused by the defectiveness of defendant's structures, which diverted the water out of its natural channel onto the plaintiff's land. For the damages sustained, plaintiff seeks compensation from defendant under article I, section 14 of the California Constitution, providing that private property shall "not be taken or damaged for public use" without just compensation.

Defendant contends that plaintiff is seeking to revive an issue settled in Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, and in O'Hara v. Los Angeles County Flood Control Dist., 19 Cal.2d 61, 119 P.2d 23. The Archer case involved the question whether a governmental agency is liable under article I, section 14, when improvements constructed by it along the natural course of a stream accelerate the flow of the water, and lower lands are flooded because of the inadequacy, known to the governmental agency, of the outlet to accommodate the increased flow. It was held that the governmental agency was not liable, since there is no liability under the constitutional provision if the property owner would have no cause of action were a private person to inflict the damage, and there would have been no cause of action against a private person for installing improvements in the stream accelerating the flow of the water but not diverting it out of its channel. San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200. The O'Hara case involved the same question as the Archer case as well as the question whether a governmental agency is liable under the constitutional provision to a property owner whose property was damaged by the obstruction of the flow of surface water not running in a natural channel resulting from an embankment that prevented the drainage of surface waters into the river. In reliance on Corcoran v. City of Benicia, 96 Cal. 1, 30 P. 798, 31 Am.St.Rep. 171; Conniff v. San Francisco, 67 Cal. 45, 7 P. 41; Jefferis v. City of Monterey Park, 14 Cal.App.2d 113, 57 P.2d 1374; and Lampe v. City and County of San Francisco, 124 Cal. 546, 57 P. 461, 1001, it was held that in constructing the improvement, the governmental agency could validly exercise its police power to obstruct the flow of surface waters not running in a natural channel without making compensation for the resulting damage. The present case differs from the Archer and O'Hara cases. In the former there was no evidence that defendants negligently diverted water out of its natural channel, and in the latter there was no allegation of such diversion. Here plaintiff's allegations that the damages to her property were caused by diversion of the water of a river out of its natural channel onto her land by means of defective levees causing and allowing the water to burst out of its channel onto her land must be regarded as true.

Defendant contends that article I, section 14, is inapplicable upon the grounds that defendant did not deliberately take or damage plaintiff's property and did not utilize it for the purposes of its public improvements, and that therefore the damages were not sustained for "public use", and were too remote in point of time and foreseeability to be incident to defendant's public undertaking.

Defendant is a public corporation created by an act of the Legislature, known as the "Los Angeles Flood Control Act", Stats. 1915, p. 1502, as amended; Deering's Gen. Laws, Act 4463, to protect lands, including harbors and public highways from flood waters and to conserve the flood waters for useful purposes. § 2 of the act, Los Angeles County Flood Control Dist. v. Hamilton, 177 Cal. 119, 126, 169 P. 1028. These purposes are essentially

public although beneficial to many private individuals (see Los Angeles v. Los Angeles County Flood Control Dist., 11 Cal.2d 395, 404, 80 P.2d 479; Los Angeles County Flood Control Dist. v. Hamilton, supra, 177 Cal. at page 124, 169 P. 1028; Chesebro v. Los Angeles County Flood Control Dist., 306 U.S. 459, 465, 59 S.Ct. 622, 83 L.Ed. 921; see 29 C.J.S., Eminent Domain, § 64, p. 852; Gutierrez v. Middle Rio Grande Conservancy District, 34 N.M. 346, 282 P. 1, 70 A.L.R. 1274), and the Legislature properly vested defendant with the power of eminent domain. §§ 2(6), 16 of the act and § 16½ added by St. 1941, p. 1658. Property taken or damaged for defendant's purposes is therefore "taken or damaged for public use" in the sense of the constitutional provision. In the absence of contract the right to discharge water onto another's property may be based on property law or on the police power of the state. Archer v. City of Los Angeles, supra, 19 Cal.2d at page 24, 119 P.2d 1. If the discharging of water incident to the construction of a public improvement cannot be sustained as the exercise of a right, it is a taking or damaging within the meaning of the constitutional provision of the property injured. Powers Farms v. Consolidated Irr. Dist., 19 Cal. 2d 123, 126, 119 P.2d 717; Pacific Seaside Home v. Newbert P. Dist., 190 Cal. 544, 213 P. 967; Elliott v. County of Los Angeles, 183 Cal. 472, 475, 191 P. 899; Smith v. City of Los Angeles, 66 Cal. App.2d 562, 153 P.2d 69; Conniff v. San Francisco, 67 Cal. 45, 48, 7 P. 41; Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 78 L.Ed. 142, 96 A.L.R. 1; United States v. Cress, 243 U.S. 316, 327, 37 S.Ct. 380, 61 L.Ed. 746; United States v. Lynah, 188 U.S. 445, 470, 23 S.Ct. 349, 47 L.Ed. 539; Hurley v. Kincaid, 285 U.S. 95, 104, 52 S.Ct. 267, 76 L.Ed. 637; Pumpelly v. Green Bay, etc., Co., 13 Wall. 166, 177, 20 L.Ed. 557; Eaton v. Boston, etc., Railroad, 51 N.H. 504, 12 Am.Rep. 147; see Franklin v. United States, 6 Cir., 101 F.2d 459; 128 A.L.R. 1195. The destruction or damaging of property is sufficiently connected with "public use" as required by the Constitution, if the injury is a result of dangers inherent in the construction of the public improvement as distinguished from dangers arising from the negligent operation of the improvement. The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. In erecting a structure that is inherently dangerous to private property, the state or its agency undertakes by virtue of the constitutional provision to compensate property owners for injury to their property arising from the inherent dangers of the public improvement or originating "from the wrongful plan or character of the work." Perkins v. Blauth, 163 Cal. 782, 789, 127 P. 50, 53; Kaufman v. Tomich, 208 Cal. 19, 25, 280 P. 130; Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d at page 127, 119 P.2d 717; Reardon v. City and County of San Francisco, 66 Cal. 492, 505, 6 P. 317, 56 Am.Rep. 109. This liability is independent of intention or negligence on the part of the governmental agency. Reardon v. City and County of San Francisco, supra, 66 Cal. at page 505, 6 P. 317, 56 Am.Rep. 109; Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal.App. 559, 200 P. 814, opinion of Supreme Court denying a hearing, 53 Cal.App. at page 568, 200 P. at page 818; Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d at page 126, 119 P.2d 717; Mitchell v. City of Santa Barbara, 48 Cal. App.2d 568, 572, 120 P.2d 131; Morrison v. Clackamas County, 141 Or. 564, 18 P.2d 814; Hooker v. Farmers' Irr. Dist., 8 Cir., 272 F. 600; see 10 Cal.Jur. 337; Stephenson v. Pioneer Irr. Dist., 49 Idaho 189, 288 P. 421, 69 A.L.R. 1231. The decisive consideration is the effect of the public improvement on the property and whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking. It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the measure of liability is not the benefit derived from the property, but the loss to the owner. Rose v. State of California, 19 Cal.2d 713, 737, 123 P.2d 505; City of Stockton v. Vote, 76 Cal.App. 369, 404, 244 P. 609; Santa Ana v. Harlin, 99 Cal. 538, 542, 34 P. 224; City of Redding v. Diestelhorst, 15 Cal.App.2d 184, 193, 59 P.2d 177; City of Pasadena v. Union Trust Co., 138 Cal. App. 21, 25, 31 P.2d 463; Temescal Water Co. v. Marvin, 121 Cal.App. 512, 521, 9 P.2d 335; see 18 Am.Jur., Eminent Domain, § 240 et seq. Defendant, therefore, cannot rely on the fact that the injury to the property was caused, not by a deliberate appropriation thereof, but by a collapse of defendant's structures. It is of no avail to defendant that the invasion of plaintiff's property in the manner in which it happened was not foreseeable. The provision in article I, section 14, that the compensation for the taking or damaging of property shall be paid in advance protects the interests of the property-owner where advance payment is feasible under the circumstances; liability is not avoided simply because such payment is not feasible. The public purpose was not the mere construction of the improvement but the protection that it would afford against floods. The dangers inherent in the improvement would cause injury only when storms put the flood control system to a test. The injury sustained by plaintiff was therefore not too remote.

According to the complaint the injury to plaintiff's land was caused by direct invasion thereof by water bursting through defendant's levees. Compensation for that injury is called for under article I, section 14, if the flood waters would not have injured her property but for the directing of the water out of its channel onto the plaintiff's property because of the defectiveness of the levees. By allowing the water to leave its channel and to burst onto the plaintiff's land, the levees diverted the water out of its natural channel. Barring situations of immediate emergency, neither the property law nor the police power of the state entitles a governmental agency to divert water out of its natural channel onto private property. Larrabee v. Cloverdale, 131 Cal. 96, 98, 63 P. 143; Los Angeles Cem. Ass'n v. Los Angeles, 103 Cal. 461, 467, 37 P. 375; Conniff v. San Francisco, supra, 67 Cal. at page 49, 7 P. 41; see 7 So.Cal.L.Rev. 295.

EDMONDS, J., concurred.

CARTER, Justice.

I concur in the judgment of reversal but I do not agree with that portion of the majority opinion which attempts to distinguish this case from the cases of Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, and O'Hara v. Los Angeles County Flood Control Dist., 19 Cal.2d 61, 119 P.2d 23. These last-mentioned cases are not distinguishable from the case at bar, and in my opinion, the only sound basis upon which the case at bar can be reversed is that stated in my dissenting opinions in the above-cited cases. In these dissenting opinions I pointed out the patent fallacy of the theory upon which the majority opinions in those cases was based, and Mr. Justice Curtis concurred in those dissenting opinions. My opinion in regard to those cases has not changed because the views expressed in my dissenting opinions therein were and are absolutely sound. It now appears that a majority of this court are not satisfied with the conclusion reached in the majority opinions in the Archer and O'Hara cases, but instead of overruling these cases, they have attempted to distinguish them from the case at bar. I do not approve of this practice as it merely adds to the confusion which already exists. However, by limiting the application of the doctrine announced in those cases, the majority opinion in the case at bar has taken a commendable step, and I trust that the time will come in the not distant future when a majority of this court will have the wisdom, foresight and courage to take the further step and expressly overrule the Archer and O'Hara cases and thus remove the injustice and confusion which those decisions have brought to the law of this state.

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67 Cal.App.2d 244

STATE DEPARTMENT OF PUBLIC HEALTH v. IMPERIAL COUNTY.

Civ. 3291.

District Court of Appeal, Fourth District, California.

Dec. 11, 1944.

1. Counties ⚷208

A county, as branch of the state government, may be sued only by consent of state, and then only by strict compliance with terms of permission granted.

2. Counties ⚷216
Statutes ⚷190

The statute providing that refusal or neglect of county supervisors to allow or reject claim for 90 days after it has been filed may, at claimant's option, be deemed equivalent to a final action and rejection on the 90th day, and that claimant may sue county on claim any time within 6 months after such final action but not afterward, unambiguously gives claimant an option to consider claim as rejected on such 90th day, but no option is given him to consider claim as rejected at any earlier or later date. Pol.Code, § 4078.

3. Statutes ⚿190

Where meaning of statute is clear, there is no room for judicial construction.

4. Counties ⚿216

The general purpose of statute providing that, if county supervisors refuse or neglect to allow or reject claim within 90 days after it is filed, claimant may deem this equivalent to final action and rejection on the 90th day and may sue on claim within 6 months thereafter, was to shorten time within which such a suit may be brought where claim has not been acted on and not to indefinitely extend time therefor at claimant's option. Pol.Code, § 4078.

5. Counties ⚿216

Where county supervisors failed to act on claims of State Department of Health to recover amounts expended for hospitalization and medical care of crippled children for about 10 years, action thereon was barred by limitations. Pol.Code, §§ 2979b, 4078.

◆

Appeal from Superior Court, Riverside County; G. R. Greeman, Judge.

Action by the State Department of Public Health of the State of California against County of Imperial, a political subdivision of the State of California, to recover certain amounts expended for the hospitalization and medical care of two crippled children. Judgment for defendant, and plaintiff appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Carl Wynkoop and Allen L. Martin, Deputy Attys. Gen., for appellant.

C. G. Halliday, Dist. Atty., and Don C. Bitler, Deputy Dist. Atty., both of El Centro, for respondent.

BARNARD, Presiding Justice.

This is an action to recover certain amounts expended for the hospitalization and medical care of two crippled children, as authorized by section 2979b of the Political Code (now sections 254–258, Health and Safety Code, St. 1939, p. 488, 489.) In connection with one of the children a claim for $450 was presented to the board of supervisors of the defendant county on January 26, 1931, and a further claim for $180 on March 27, 1931. In connection with the other child a claim for $470.50 was presented on September 20, 1930, a further claim of $320.50 was presented on November 21, 1930, and a third claim for $10 was presented on October 18, 1932. The board of supervisors took no action on these claims and they were neither allowed nor rejected. On April 15, 1942, more than 11 years after the first of these claims was presented and nearly 10 years after the last one, the plaintiff brought this action to collect these amounts. A demurrer on the ground that the action was barred by the various statutes of limitation was sustained. The plaintiff refused to amend and a judgment of dismissal was entered, from which the plaintiff has appealed.

The appellant relies on section 4078 of the Political Code which, so far as material here, provides that the refusal or neglect of the board to act upon such a claim "may, at the option of the claimant, be deemed equivalent to a final action and rejection on the ninetieth day," and that the claimant "may sue the county therefor at any time within six months after the final action of the board, but not afterward." It is argued that this six months period does not begin to run until the claimant exercises his option to consider the claim as having been rejected. The complaint here alleged that the appellant did not at any time between the ninetieth day after these claims were filed and February 6, 1942, deem the failure of the board to act on said claims as equivalent to a final action and rejection on the ninetieth day but that on February 6, 1942, it did exercise its option and then deemed the refusal and neglect of the board to act within ninety days after the filing of the claims to be equivalent to a final action and rejection. It is, therefore, argued that this action, having been filed within six months of the latter date, was within the time permitted by section 4078.

The appellant relies on Walton v. County of Kern, 39 Cal.App.2d 32, 102 P.2d 531; Barry v. County of Glenn, 42 Cal.App.2d 76, 108 P.2d 81; Harvey v. County of Kern, 107 Cal.App. 590, 290 P. 648; Hennessy v. County of San Bernardino, 47 Cal.App.2d 183, 117 P.2d 745, and Smith v. County of San Mateo, 57 Cal.App.2d 820, 135 P.2d

372, 374. The first four of these cases have little direct bearing on the question presented.

In Smith v. County of San Mateo, the injury occurred on June 22, 1939; a claim was filed on September 18, 1939; the ninetieth day thereafter was December 17, 1939; and the complaint was filed on June 20, 1940, six months and three days after that date. A question was there directly presented as to whether or not the six months period provided for in section 4078 commenced to run on the ninetieth day. The court held to the contrary, basing its decision on three early cases in which provisions now found in sections 712 and 714 of the Probate Code were considered, and on the general rule that the reenactment of a statute or the reenactment of another statute in similar language is to be construed as an adoption of a prior judicial interpretation of the former statute. It was, therefore, concluded that the plaintiff having exercised his option when he filed his action on June 20, 1940, had filed it within the six months period fixed by section 4078.

While this conclusion finds some support, by analogy, in the cases there cited it is not so well supported by any reasoning expressed in those cases. The opinion itself points out that in the first two of the cited cases a distinction was drawn between "actual rejection" and "deemed rejection", and that "Neither of the cases discusses the meaning of the language that the exercise of the option should be equivalent to a rejection 'on the tenth day.'" Moreover, the cases there cited were dealing with the language formerly used in sections 1496 and 1498, C.C.P., which is somewhat different from the wording of section 4078 of the Political Code, with which we are here concerned. Section 1498 provided for written notice of an actual rejection and that a suit must be brought within three months after the service of such notice. Section 1496, while providing that a claimant might, at his option, deem the failure of the administrator to act as "equivalent to a rejection 'on the tenth day,'" contained no limitation of time within which the claimant must then act. Some interpretation of the meaning and effect of these two sections was therefore required and it was accordingly held that the "tenth day" was not conclusive as to the time of rejection.

[1-3] On the other hand, section 4078 of the Political Code, which involves claims against a branch of the state government which may be sued on only by consent of the state and then by strict compliance with the terms of the permission granted, not only provides that a claimant may deem the failure of the board to act on a claim, presented as required by law, as "equivalent to a final action and rejection on the ninetieth day," but it then further specifically provides that if dissatisfied the claimant may sue the county thereon "at any time within six months after the final action of the board, but not afterward." The language thus used contains no ambiguity or uncertainty. Its meaning is clear and it leaves no room for any judicial interpretation or construction which would give a contrary effect to the intention clearly expressed therein. The final action of the board, within six months of which the suit may be filed, is the same constructive final action which is previously provided for in the same sentence. The claimant is given a clear-cut option which he may but does not have to exercise. That option is definitely defined as a right to consider and treat the claim as having been rejected on the ninetieth day, if he so desires. No option is given him to consider the claim as having been rejected at any earlier or later date. If he desires to exercise his option he must exercise the one given him and not an entirely different one. Not only is this the clearly expressed intention of the language used but all doubt seems to be removed by the further provision contained in the same sentence that he may bring suit within six months after such constructive rejection (the final action referred to and which is the deemed rejection on the ninetieth day), and that he may not do so "afterward". His right to bring suit in such a case is thus expressly limited to a period of six months after the "ninetieth day" from the time the claim was filed.

Section 4078 is a part of the machinery provided requiring the presentation of claims before a suit may be brought, and the bringing of such a suit is also governed by other general statutes, including various statutes of limitations. This fact is recognized in Smith v. County of San Mateo and in Walton v. County of Kern, Harvey v. County of Kern, Hennessy v. County of San Bernardino, on which the appellant also relies.

[4] The object and purpose of section 4078 was to prevent a situation where the board, by its failure to act, could indefinitely postpone a claimant's right to bring

an action. The clear intent was to facilitate that end and to place a limitation both on the board and on the claimant. It clearly appears that it was not intended merely to transfer the means of delaying the matter from the board to the claimant and to give him, at his option, an unlimited time within which to bring an action in entire disregard of other statutory provisions. In general, the purpose of section 4078 was to shorten the time within which such a suit could be brought, where the claim had not been acted upon, and not to indefinitely extend that time at the option of the claimant. While this statute might have the effect of extending the time allowed by other statutes for filing such a suit under certain circumstances, no such a situation here appears.

It would be unreasonable to hold that although this action was barred by other statutes at the time the appellant alleges it elected to consider its claims rejected, some ten and eleven years after the claims were filed, it was intended by section 4078 to permit such a claimant, in direct violation of the limitation clearly expressed therein, to plead its own neglect and delay as a reason for keeping the action alive. In Barclay v. Blackinton, 127 Cal. 189, 59 P. 834, 835, cited in Smith v. County of San Mateo, the court, in speaking of a situation not entirely dissimilar to that with which we are now concerned, said:

"If it was barred by the statute when rejected, it continued to be barred when suit was brought upon it. Any other construction would enable a claim against an estate to be kept alive for years, or until all the witnesses were dead, simply by the neglect of the administrator to act upon it. He might forget it, or by accident or negligence mislay it, and the estate be closed and distributed; and yet, under the interpretation of the statute claimed by plaintiff, suit could be brought upon it, and the assets taken from the heirs, though years had passed. If the contention of plaintiff is correct, the administrator by his negligence could add over seven months to the general statutes of limitation. If he could add seven months, there is no reason why he could not add seven years or any other time in the same manner. The right of a claimant to enforce his claim under our statutes of limitations depends upon his own vigilance, and is often lost by his own laches. We know of no principle that will preserve it by the carelessness or laches of the party against whom it is sought to be enforced."

In that same case, the court quoted from an Illinois case, Reitzel v. Miller, 25 Ill. 67, 69, as follows:

"'It was not the design of the general assembly that the filing of the claim should arrest the general statute of limitations. * * * The object of this section is to facilitate and produce speedy settlement of estates of deceased persons, and it could not have been the design to give creditors an unlimited period of time within which to establish the justice of their claims after they had been exhibited in the probate court. Such a construction would defeat the manifest intention of the enactment.'"

[5] In effect, the appellant would change the wording of section 4078, and interpret it as providing not only that a claimant may exercise an option at any time after the ninetieth day, but also that his option then is to deem the board's neglect to act as equivalent to a rejection on the day he elects to consider it rejected, (instead of on the 90th day after filing) and that he may sue the county within six months after he decides to act in the matter (instead of after the board's final action, as fixed by the statute). Such an interpretation of this statute not only is contrary to its plain meaning, but it would defeat its manifest intention and purpose. In our opinion, the causes of action here alleged were barred by the provisions of section 4078 of the Political Code, and it follows that the demurrer was properly sustained.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

GRAY v. KENNY, Atty. Gen., et al.

Civ. 7099.

District Court of Appeal, Third District, California.

Dec. 13, 1944.

Hearing Denied Feb. 8, 1945.

1. Constitutional law ⚷48

The constitutionality of a statute is presumed and reasonable doubt must be resolved in favor of legislative action.

2. Statutes ⚷35½

Statute requiring proponent of initiative measure to submit draft of petition to Attorney General for preparation of summary and to make deposit of a $200 fee which is to be refunded to proponent if within two years from date summary is furnished to proponent, measure qualifies for ballot, does not violate constitutional right to initiate legislation, and the fee required to be deposited is not unreasonable. St.1943, pp. 1067, 1127, §§ 1401, 1407; Const. art. 4, § 1.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Proceeding for a writ of mandate by John Gray against Robert W. Kenny, Attorney General of the State of California, and another. From an adverse judgment, plaintiff appeals.

Affirmed.

John Gray, in pro. per.

Robert W. Kenny, Atty. Gen., and Charles W. Johnson, Supervising Deputy Atty. Gen., for respondents.

ADAMS, Presiding Justice.

Appellant, John Gray, appearing in propria persona, on or about the 3rd day of February, 1944, filed in the Superior Court of Sacramento County a petition for a writ of mandate to compel respondents to prepare a title to and a summary of the chief purposes and points of a proposed initiative measure to be submitted to the electors of the state, alleging in his petition that such a measure had been submitted to respondents by petitioner on December 24 and 25, 1943, with a request that same be so entitled and summarized, but that respondents had refused to prepare a title or summary. An alternative writ having issued, respondents filed a return thereto in the form of a general demurrer, which was sustained by the court without leave to amend. Judgment dismissing the action followed and petitioner has appealed therefrom.

It appears from the brief of appellant in this court, and the opinion of the trial court which is set forth in the record before us, that respondents' demurrer was sustained because of the failure of the petition to allege that petitioner had paid or tendered to the Attorney General the fee required by section 1401 of the Elections Code, as amended in 1943, Stats.1943, ch. 171, p. 1067. That section provides that the proponents of any proposed initiative measure, prior to circulating any petition for signatures thereon, shall submit a draft of the petition to the Attorney General with a request that he prepare a summary of the chief purposes and points of the proposed measure; and, as amended, requires that the proponents of any such initiative measure shall, at the time of submitting the draft thereof to the Attorney General, accompany the same with a fee of $200. such fee to be placed in a trust fund in the office of the State Treasurer to be refunded to the proponents if, within two years from the date such summary is furnished to the proponents, such measure qualifies for the ballot. Otherwise such fee shall be forthwith paid into the general funds of the state.

Appellant contends that the aforesaid statute, in so far as it requires the deposit of the $200 fee, is in violation of Article IV, section 1, of the Constitution of this state, because of the provision of said section 1 that "This section is self-executing, but legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of this section or the powers herein reserved." He cites no authorities in support of his position but argues that the sum demanded is a tax, a toll, an assessment, and since it is returnable if the proposed measure qualifies for the ballot, it becomes a penalty because of failure of the proponents; that the amount of the fee is arbitrary and out of all proportion to the value of the service; that the constitutional provision forbids the Legislature from exacting fees to county clerks for canvassing signatures, and provides that boards of supervisors shall provide for extra help and provide their compensation, thus indicating that no fees are to be exacted of proponents; and that the exaction of the $200 fee is not in furtherance of the purpose of the initiative provision, but restricts, narrows and embarrasses the right. He designates section 1401 of the Elections Code and section 1407 (Stats.1943, ch. 226, p. 1127) as "vicious and void acts," and prays that they be so declared by this court.

Respondents in their reply brief assert that the provision of the Constitution relied upon by appellants is, in effect, but a canon of interpretation which would be applicable if not specifically set forth in the measure, and that, as stated in Chester v. Hall, 55 Cal.App. 611, 616, 204 P. 237, 239, while the section is self-executing, legislation may be enacted "to facilitate its operation and place safeguards around the exercise of the rights thereby secured so long as the right itself is not curtailed or its exercise unreasonably burdened"; that the Legislature may impose reasonable limitations upon the exercise of a constitutional right in order to prevent an abuse thereof; and that the provision in section 1401 of the Elections Code, for the deposit of the $200 fee, is a reasonable requirement designed to prevent an abuse of the right and the circulation of frivolous petitions.

In 1915, and subsequent to the adoption of section 1 of Article IV of the Constitution, the Legislature provided, in section 1197a of the Political Code, that proponents of an initiative measure should, prior to circulating any petition for signatures thereon, submit a draft of the petition to the Attorney General with a request that he prepare a title and summary; and in section 1197b, that proponents of any measure place upon each section of the petition the title and summary referred to in section 1197a, and across the top of each page after the first page of every petition a short title in not to exceed twenty words. Also that no officer chargeable by law with receiving or filing in his office any such petition should receive or file it if it did not conform to these provisions. The Constitution did not at that time contain the provisions of those sections though portions of them, but not the portion requiring the short title, were incorporated into it in 1932. It did, however, contain the provision that the measure is self-executing, but that legislation may be enacted to facilitate its operation, but in no way limiting or restricting either the provisions of the section or the powers therein reserved.

While the question of whether sections 1197a and 1197b were unconstitutional for the reason that they "limited or restricted" the provisions of section 1, Article IV, does not appear to have been raised in the courts though since they imposed certain duties upon proponents of initiative measures, and prohibited the filing of petitions which did not comply therewith, the arguments made by this appellant regarding the 1943 amendment to section 1401 of the Elections Code might have been advanced against them with equal logic. However, in Boyd v. Jordan, 1 Cal.2d 468, 35 P.2d 533, and Clark v. Jordan, 7 Cal.2d 248, 60 P.2d 457, 106 A.L.R. 549, writs of mandamus to compel the Secretary of State to refrain from placing on the ballot initiative measures which did not conform were issued, the court holding that the requirements of section 1197b regarding short titles on initiative petitions are mandatory. In both cases distinguished and able counsel opposed the granting of the writs, and it seems reasonable to assume that had they been of the opinion that the aforesaid requirements limited or restricted the provisions of section 1 of Article IV they would have so urged in those proceedings. In the former case the court said that section 1197b was enacted in pursuance of the authority given by section 1, Article IV, to enact legislation to facilitate the operation of said section, and that its purpose was to throw additional safeguards around the operation of the initiative law.

Section 1083a of the Political Code provided, prior to the incorporation of said section into the Elections Code, that one signing an initiative petition should, at the time of signing, affix the "date of such signing," a provision which is not required by section 1 of Article IV of the Constitution. But the court, in Boggs v. Jordan, 204 Cal. 207, 214, 267 P. 696, said that this Code section was intended to supplement the constitutional regulations governing the circulation, filing and examination of initiative, referendum and recall petitions, and while its validity was not disputed, that it need not be questioned, citing Chester v. Hall, 55 Cal.App. 611, 616, 204 P. 237 and Chambers v. Glenn-Colusa Irr. Dist., 57 Cal.App. 155, 206 P. 773. In the former case this court said, pages 616, 617 of 55 Cal.App., page 239 of 204 P., that the requirement of section 1083a of the Political Code that the signer of a petition shall affix thereto the date of such signing in no manner prevents any person from signing or places an undue burden on the exercise of the right; that the Constitution prescribes the qualifications of electors and provides that all persons having such qualifications "shall be entitled to vote at all elections", Const. art. 2, § 1; that the Constitution makes no provision for the registration of electors, yet registration laws have always been upheld as reasonable regulations by the Legislature for the purpose of ascertaining who are qualified electors and preventing illegal voting. Also see Thompson v. Kerr, 16 Cal.2d 130, 131, 132, 104 P.2d 1021, holding that the provision in the Elections Code that each signer of an initiative petition shall at the time of signing the petition or paper himself affix thereto the date of his signing, is mandatory, and constitutes a reasonable legislative regulation in furtherance of and not a limitation upon the initiative power reserved in the Constitution, citing Uhl v. Collins, 217 Cal. 1, 17 P.2d 99, 85 A.L.R. 1370.

An analogous situation was presented in Chesney v. Byram, 15 Cal.2d 460, 101 P.2d 1106, where it was argued that a legislative enactment was invalid as constituting a limitation upon a right granted by the Constitution. Section 3612 of the Political Code (see secs. 251–255.5, Revenue and Taxation Code) required a veteran desiring the exemption from taxation provided for by Article XIII, section 1¼, of the California Constitution, to give to the assessor, under oath, information prescribed by the Board of Equalization, failure to do so being deemed a waiver of the exemption. Chesney contended that the requirement of the statute was void as being a limitation upon his constitutional right. The court held that though the constitutional provision was self-executing, the Legislature had power to enact legislation providing reasonable regulation for the exercise of the right to the exemption. It said, as was said in Boggs v. Jordan, supra, that the Constitution prescribes the qualifications of electors and provides that all persons having such qualifications shall be entitled to vote at all elections; that it makes no provision for the registration of electors, yet registration laws have always been upheld as reasonable regulations for the purpose of ascertaining who are qualified electors, and preventing illegal voting; and that it has been uniformly held that the Legislature has power to enact statutes providing for reasonable regulation and control of rights granted under constitutional provisions (citing cases, page 465 of 15 Cal.2d, page 1109 of 101 P.2d).

In Socialist Party v. Uhl, 155 Cal. 776, 103 P. 181, a statutory provision that filing fees be paid by candidates for office under the Primary Election Law was held valid. The court said that the Constitution, Article II, section 2½, gave the Legislature the right to fix conditions upon which participation in a primary election may be had, and under this grant of power it had a right to determine what are reasonable regulations, citing State v. Nichols, 50 Wash. 508, 97 P. 728, 730; that the exaction of a fee tends to prevent an indiscriminate scramble for office; that where it is fixed at an amount which will impose no hardship upon any person for whom there should be any desire to vote, and yet enough to prevent the wholesale filing of petitions for nomination of anyone regardless of whether or not he is a desirable candidate, it is but a reasonable means to regulate primary elections; that the constitutional provision that no property qualification shall be required of any person to vote or hold office is not violated by such provision as the payment of a fee, but is a reasonable regulation prescribed by the Legislature on the wise assumption that any candidate who is of sufficient worth to stand before the people as a candidate for public office and whose candidacy calls for the payment of the fee required by the act, will have no difficulty in paying the required amount. Citing State v. Scott, 99 Minn. 145, 108 N.W. 828; Montgomery v. Chelf, 118 Ky. 766, 82 S.W. 388, 389.

In State v. Nichols, above cited, it was held that under the primary election law of Washington the exaction of a reasonable fee for the privilege of running for office could be sustained on the principle that those who seek the benefit of a particular proceeding provided by law may be compelled to reimburse the state for a portion of the cost the state incurs in carrying into effect the particular proceeding. Also see Riter v. Douglass, 32 Nev. 400, 109 P. 444, 456, and State v. Brodigan, 37 Nev. 492, 143 P. 238, 239, L.R.A.1915B, 197.

[1] It is said in Cooley's "Constitutional Limitations", 7th Ed., p. 254, that the constitutionality of a law is presumed, because the Legislature must be deemed to have acted with integrity, and with a just desire to keep within the restrictions laid by the

Constitution upon their actions. Also, pp. 236-237, that the judiciary "cannot run a race of opinions upon points of right, reason and expediency with the law-making power." A reasonable doubt must be solved in favor of legislative action. Cooley's "Constitutional Limitations," 8th Ed., p. 372.

The measure which petitioner alleges he submitted to the Attorney General for entitling proposes the amendment of Article VI of the Constitution dealing with the Judicial Department, by the addition of sections 24a, 24b and 24c to said article, said sections being designed to prescribe, regulate and limit the manner of rendering decisions by appellate courts, and to provide severe penalties for judges whose opinions fail to conform to the views of the author of the measure.

[2] If there is any great popular demand for such legislation, and grave necessity for incorporating its provisions into the Constitution, certainly the payment of a fee of but $200 cannot be said to be out of proportion to the importance of the proposed legislation, nor to impose an unreasonable burden upon its proponents, especially since, if the proposed measure has sufficient merit to find support by the requisite number of electors, the amount deposited is to be returned. It is not even alleged by appellant that he is unable to advance the required fee. It is obvious from the litigation that has heretofore arisen involving the sufficiency of titles to initiative measures that the preparation of such titles calls for skillful and painstaking work on the part of the Attorney General and his staff, and we cannot say that the provision by the Legislature that those persons who impose upon public officials the duty of preparing such titles shall advance a fee of $200, unduly or unreasonably, or at all, narrows, limits or embarrasses the right to initiate legislation pursuant to section 1, Article IV, of the Constitution, or does more than throw additional safeguards around its operation to the end that it may not be misused for purely personal purposes by proponents of measures that have no reasonable chance of approval by the requisite number of voters. The Legislature must be deemed to have acted with integrity in enacting this amendment to section 1401 of the Elections Code, and to have determined that the amount of the fee required to be deposited is reasonable; and we are not prepared to say that it is unreasonable. Any doubt on that subject must be resolved in favor of the legislative action.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

67 Cal.App.2d 33

PEOPLE v. CORLETT.

Cr. 1875.

District Court of Appeal, Third District, California.

Dec. 12, 1944.

1. Appeal and error 🔑989

Appellate court, in passing on sufficiency of evidence to sustain verdict and judgment, is not required to quote evidence which merely shows a conflict.

2. Appeal and error 🔑837(12)

Reliance of appellate court on evidence which was stricken from the record was not erroneous, where the identical testimony was restated by witness and remained in the record without objection.

3. Appeal and error 🔑832(1)

Original opinion of District Court of Appeal correctly construed the evidence in every material respect, and abridgment of testimony in the interest of brevity did not result in misconstruction of the evidence.

4. Appeal and error 🔑989

Weighing evidence or passing on the credibility of witnesses is not within the province of a reviewing court in determining sufficiency of evidence to support a verdict, but it is the duty of reviewing court to consider the evidence favorable to such verdict.

5. Courts 🔑104

Appellate court was not warranted in extending opinion to undue length to specifically pass upon 94 separate assignments of error in rulings upon the evidence in the course of trial, none of which upon examination appeared to have substantial merit.

Appeal from Superior Court, Butte County; Ben. G. Ragain, Judge.

On petition for rehearing.

Petition denied.

Prior opinion 67 Cal.App.2d 33, 153 P.2d 595.

J. Oscar Goldstein and Burton J. Goldstein, all of Chico, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

PER CURIAM.

[1-4] On motion for a rehearing appellant's attorney, who did not represent him at the trial of the case, earnestly contends that we have misquoted and omitted important evidence in our opinion. It is claimed our abridgment of testimony in the interest of brevity has resulted in misconstruction of evidence. Many pages of evidence are correctly quoted in the petition, but they merely show a conflict of evidence. One quotation of evidence in the opinion is challenged on the ground that it was stricken from the record. But the identical answer of the witness, which was stricken out, was restated by him on the following page of the transcript and remained in the record without objection. That fact was evidently overlooked by the petitioner. On examination we found each challenged quotation of evidence to be supported by the record. The absolute accuracy of the abridgment or interpretation of evidence is always open to argument owing to the inherent infirmity of language to express the exact thought of a witness. With the object of brevity, we assume a court is not warranted in unnecessarily quoting evidence at great length. We are convinced the opinion correctly construes the evidence in every essential respect. To be sure we have quoted evidence favorable to the support of the verdict, which is the duty of a reviewing court. It is not the province of a reviewing court to weigh evidence or to pass on the credibility of witnesses. The petitioner has apparently overlooked that rule. As an illustration, appellant challenges our statement that Stafford asked permission to get his clothes from the bunkhouse or that the defendant previously threatened to get his gun. On page 376 of the transcript Stafford testified: "I asked him to give me time to get my clothes. * * * He hollered *he would get his gun.*" On the following page Stafford said, "I told him to give me time *to get my clothes.*" Of course Stafford had to go to the bunkhouse to get his clothes. The defendant said at page 694 of the transcript: "I looked north and I seen his car parked in front of the bunkhouse * * * so I went downstairs and got my gun and walked out and got in my car and drove over to the bunkhouse * * * to look after my property."

The evidence indicates that the defendant knew that Stafford had breakfast at the ranch Sunday morning. At page 689 he stated: "I was on the porch by the kitchen. * * * As I was fixing the lunches *I noticed Stafford come out* of the dining room." Mr. Griffin testified that Mr. Corlett "appeared there," in the dining room. Mr. Corlett testified at page 693: "Usually when you fire a man he stays all night and has breakfast the next morning before leaving." He therefore conceded that Stafford was rightfully on the premises according to his own custom, and that he was therefore not a trespasser.

Moreover, the appellant now definitely admits that the evidence is sufficient to support the judgment. We assumed the defendant challenged the sufficiency of the evidence to support the judgment. It seems inconsistent to challenge alleged inaccuracies of quotations of evidence and at the same time admit that the evidence is sufficient to support the judgment.

[5] The appellant insists that the court failed to pass upon assignments of errors in rulings upon the evidence in the course of the trial "totalling in number some 94 and 95, which were highly prejudicial." We did examine the record with relation to each of those assignments of error and concluded there was no prejudicial error in any of them. We so stated in our opinion. We assume a court is not warranted in extending an opinion to undue length to specifically pass upon 94 separate assignments of that nature, none of which, upon examination, appears to have substantial merit.

The petition for rehearing is denied.

LOCKHEED AIRCRAFT CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 14590.

District Court of Appeal, Second District, Division 1, California.

Dec. 6, 1944.

Hearing Granted Feb. 1, 1945.

1. Discovery 🔑97(4)

Affidavit for subpoena duces tecum in re deposition to compel defendant to produce certain documents concerning plaintiffs as former employees of defendant corporation which contained averments stated to be within affiant's knowledge and of positive character was sufficient as based upon facts within affiant's knowledge. Code Civ.Proc. § 1985.

2. Discovery 🔑97(6)

In determining materiality of evidence sought to be obtained by subpoena duces tecum in re deposition, reference may be had not only to supporting affidavit, but also to pleading. Code Civ. Proc. § 1985.

3. Discovery 🔑97(4)

Affidavit for subpoena duces tecum in re deposition to compel defendant to produce documents referring to plaintiffs as former employees of defendant corporation to be used in action by employees claiming wrongful discharge for political activities in violaton of Labor Code sufficiently described documents to be produced where custodian should have been able to identify particular records required. Code Civ.Proc. § 1985.

4. Discovery 🔑97(4)

In affidavit for subpoena duces tecum in re deposition, description of paper in possession of adverse party which will apprise a man of ordinary intelligence of the document desired is sufficient. Code Civ.Proc. § 1985.

5. Discovery 🔑97(4)

Affidavit for subpoena duces tecum in re deposition to compel defendant to produce documents concerning plaintiffs as former employees of defendant corporation to be used in action by plaintiff employees claiming wrongful discharge because of political activities in violation of Labor Code, and which averred that materiality lay in fact that from it could be determined whether plaintiffs were discharged because they violated certain rules, regulations and policies, sufficiently showed materiality. St.1937, p. 212, §§ 1101-1103; Code Civ.Proc. § 1985.

6. Searches and seizures 🔑7(1)

It is only when search is illegal that it is "unreasonable" within constitutional provision prohibiting unreasonable searches. Const. art. 1, § 19.

See Words and Phrases, Permanent Edition, for all other definitions of "Unreasonable Search".

7. Searches and seizures 🔑7(1)

Constitutional provision prohibiting unreasonable searches and seizures was not intended to hamper or abrogate inherent power of court to secure production of evidence in trial of an action, but was merely intended to limit judicial tribunals to extent that they do not direct an unreasonable search or seizure. Const. art. 1, § 19.

8. Searches and seizures 🔑7(25)

Statute relating to subpoena duces tecum in re deposition conforms to requirements of constitutional provision prohibiting unreasonable searches and seizures. Code Civ.Proc. § 1985; Const. art. 1, § 19.

9. Searches and seizures 🔑7(25)

Affidavit for subpoena duces tecum in re deposition to compel defendant to produce documents concerning former employees of defendant corporation suing for alleged wrongful discharge because of political activities sufficiently met test of statute authorizing subpoena so as not to violate constitutional provision against unreasonable searches. St.1937, p. 212, §§ 1101-1103; Code Civ.Proc. § 1985; Const. art. 1, § 19.

10. Master and servant 🔑35

An employee injured by a violation by employer of statute prohibiting employer from making any rules preventing employees from engaging in politics or controlling their political activity has civil remedy against employer. St.1937, p. 212, §§ 1101-1103, 1105.

11. Master and servant 🔑39(1)

Amended and supplemental complaint alleging plaintiffs were discharged from employment with defendant in pursuance of defendant's rules forbidding employees, including plaintiffs, from engaging or participating in politics, stated cause of action for damages. St.1937, p. 212, §§ 1101-1103; Code Civ.Proc. § 1985.

12. Statutes ⚷47

The statute prohibiting employers from making rules or adopting "policy" forbidding employees from engaging or participating in "politics" is not unconstitutional as being of uncertain meaning because of the quoted words. St.1937, p. 212, § 1101; Const. art. 4, § 24.

13. Discovery ⚷91

A corporation and its president could not refuse to comply with a subpoena re deposition duces tecum on ground that it would compel corporation and president to be witnesses against themselves, since guaranties against compulsory self-incrimination do not extend to corporations and privilege of refusing to produce documents under such provisions must be determined by court and not by the individual and question must be presented in appropriate manner. Code Civ.Proc. § 1985; Const. art. 1, § 13.

14. Constitutional law ⚷42

The statute forbidding employer from making rules or adopting policy forbidding employees from engaging in politics is not unconstitutional as applied to defendant employer in civil action by employees for violation thereof on ground statute deprives employers of right to contest validity due to excessive penalties imposed, since penalties are not involved in a civil action. St.1937, p. 212, §§ 1101-1103.

15. Constitutional law ⚷48

Presumption is that Legislature had adequate and reasonable basis for its police regulations and that statute providing for such regulations is constitutional.

16. Master and servant ⚷10

Legislature has wide field of discretion in making regulations to insure wholesome conditions of work and freedom from oppression in connection with relation of employer and employee.

17. Constitutional law ⚷251

Regulation which is reasonable in relation to subject to which it is applied and which is adopted in interest of community is in itself due process.

18. Constitutional law ⚷89(1)

It is absence of arbitrary restraint, and not immunity from reasonable regulations and prohibitions adopted in interest of community that "liberty" as used in constitutional provision relating to liberty of contract implies. Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Liberty".

19. Constitutional law ⚷89(4), 276
Master and servant ⚷11

The Statute forbidding employer from making rules or adopting policies forbidding employees from engaging in politics is not unconstitutional as an arbitrary and unjustifiable limitation and restriction upon liberty and freedom of contract. St.1937, p. 212, § 1101; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 14.

20. Constitutional law ⚷90, 274
Master and servant ⚷11

The statute forbidding employers from making rules or adopting policies forbidding employees from engaging in politics is not unconstitutional as depriving employers of right to free speech. St.1937, p. 212, § 1101; Const.Cal. art. 1, § 9; U.S.C.A.Const. Amend. 14.

Proceeding in prohibition by Lockheed Aircraft Corporation to restrain the Superior Court of the State of California in and for the County of Los Angeles, and others, from taking further proceedings in connection with or based upon a subpoena re deposition duces tecum issued in a pending action. An alternative writ was issued.

Alternative writ discharged and peremtory writ denied.

H. C. Tallmadge and Roger B. Smith, both of Burbank, and Chase, Barnes & Chase, of Los Angeles, for petitioner.

J. H. O'Conner, County Counsel, Douglas De Coster, Deputy County Counsel, and Katz, Gallagher & Margolis, all of Los Angeles, for respondents.

WHITE, Justice.

This is an application for a writ of prohibition to restrain respondent court and certain of the judges thereof from taking any further steps or proceedings in connection with or based upon a subpoena re deposition duces tecum in a certain proceeding now pending in respondent court, and praying that a writ of mandate issue directing said court and certain judges thereof to enter an order of said court quashing the subpoena re deposition duces tecum issued in said action.

The record before us reveals that on January 10, 1944, Andrew J. Charles and the 17 other above named defendants, as plaintiffs, instituted in the Superior Court of Los Angeles County a certain action No. 490452 against petitioner herein, Lockheed Aircraft Corporation, a corporation, as defendant. By their amended and supplemental complaint, plaintiffs alleged that they were employees of defendant corporation and that, at various times, each of them was discharged from his employment by defendant; that such discharge from employment was occasioned by reason and in pursuance of rules, regulations and policies adopted by defendant corporation forbidding and preventing its employees, including plaintiffs, from engaging and participating in politics, and which regulations, rules and policies controlled, directed, and tended to control and direct the political activities and affiliations of defendant's employees, including plaintiffs, in violation of section 1101 of the Labor Code, St.1937, p. 212. By their complaint, plaintiffs sought to recover damages allegedly sustained by reason of their discharge from defendant's employ and prayed for the issuance of a mandatory injunction directing defendant corporation to reinstate plaintiffs in their former positions without prejudice to their seniority and other rights and privileges set forth in detail in plaintiff's complaint and allegedly appurtenant to their said employment.

By its answer, defendant denied the existence of any of the rules, regulations or policies above referred to or that plaintiffs were discharged by reason of the enforcement by defendant of any rule, regulation or policy condemned by section 1101 of the Labor Code.

By way of a further, separate and distinct defense, defendant alleged that at all times mentioned in plaintiffs' complaint, defendant was engaged and now is engaged in the manufacture and construction of materials essential to the war effort, to wit: airplanes; that said airplanes are constructed and manufactured in compliance with the terms of certain contracts and agreements entered into by defendant with the United States government and its agencies, and between defendant and other of the United Nations; that by the terms of said contracts defendant was required to assume full responsibility to "protect its plants from the entry of any and all persons of unknown loyalty, or of suspected disloyalty to the government of the United States, or to the cause of the allied nations, or to this answering defendant".

By its separate defense, defendant further alleged that it was required by "directives" issued by the government of the United States to exclude from its property and plants all persons, including citizens of the United States, either of unknown loyalty, or of suspected disloyalty to the United States government or to the cause of the United Nations, or of suspected loyalty to any nation other than the United States, or of unknown loyalty to defendant as an employer, or of suspected disloyalty to said defendant, as an employer. Defendant alleges that by reason of the terms of the aforesaid contracts and "directives", it is made liable for contract cancellation, penalties and fines in the event of its failure to comply with the terms and conditions of said contracts and "directives".

It is further alleged by defendant in its separate defense that, pursuant to the terms of the hereinbefore mentioned contracts and "directives", it is required to become the sole judge of the qualifications of all persons coming upon defendant's premises, not authorized so to do directly by the Government of the United States.

Finally, by its separate defense, it is alleged by defendant that it does not have "sufficient information or belief as to the respective plaintiffs to satisfy itself of the unquestioned patriotism and loyalty of the plaintiffs and each of them to the United States Government and to the cause of the allied nations, and to this answering defendant, as an employer".

Hereinafter when the term "plaintiffs" is used it will refer to plaintiffs in the aforesaid action commenced January 10, 1944, while petitioner herein, Lockheed Aircraft Corporation, will be designated "defendant", unless otherwise referred to as "petitioner".

Pursuant to an affidavit filed by one of the attorneys for plaintiffs, a subpoena duces tecum was issued by the clerk of respondent court to Robert E. Gross, as president and a member of the board of directors of defendant corporation, to appear before a notary public and give his deposition, and at the same time to produce certain personnel records, interoffice communications and other documents having to do with the employment of plaintiffs and reflecting the reasons for their discharge.

Thereafter, on behalf of defendant corporation and its president, Robert E. Gross, there was served upon plaintiffs and filed in respondent court a notice of motion to "quash subpoena re deposition duces tecum". After hearing had upon said motion, respondent court made its order denying the same and directing said Robert E. Gross, as president of defendant corporation, to appear before a designated notary public to give his deposition and that he bring with him the documents and records enumerated in the subpoena duces tecum. Thereafter, upon application to this court we issued an alternative writ of prohibition.

The subpoena duces tecum, around which this controversy centers, was issued upon the affidavit of Ben Margolis, one of counsel for plaintiffs, Sec. 1985, C.C.P. In such affidavit, it is averred that Robert E. Gross, as president of defendant corporation, has in his possession or under his control certain documents which referred to or concerned the plaintiffs herein as former employees of defendant corporation. Then follows a detailed and complete description of all of the documents which plaintiffs desired to examine upon the taking of such deposition. In that regard, the affidavit reads: "Personnel records, notices, communications, and all other records and documents showing the terms of employment, advancement, transfers, increases in pay, and favorable or unfavorable criticisms of the work of said former employees; all personnel records and other records of the defendant corporation showing the reasons for discharge of the persons named above; all plant protection records and other records of investigations of the said above-mentioned former employees showing investigations made and results thereof prior to the discharge of said former employees; all communications relating to the discharge of said former employees, including all inter-company communications so relating; all reports of commercial reporting agencies and retail merchants type of reporting agencies regarding the aforementioned former employees."

The affidavit then clearly, explicitly and in full detail, sets forth the claimed materiality of the above named documents to the issues involved in the instant case. In that regard, the affidavit, in part, sets forth that the foregoing records and documents relating to the discharge of plaintiffs and the cause therefor are material to the following issues:

"whether plaintiffs, and each of them, were discharged pursuant to the company's rules, regulations and policies forbidding and preventing its employees, including the plaintiffs herein, from engaging and participating in politics and controlling and directing and tending to control and direct the political activities and affiliations of its employees as alleged in the Amended and Supplemental Complaint herein. Plaintiffs expect to prove through said records that they were discharged because of the aforesaid rules, regulations and policies, and for no other reason.

"3. That the said records relating to the discharge of said plaintiffs and the cause therefor are material to the proceedings herein insofar as they relate to the possible defense of the defendant corporation showing that plaintiffs were allegedly discharged for reasons other than the rules, regulations and policies hereinabove referred to.

"4. That the records showing the terms of employment are material to the inquiry herein for the purpose of establishing that plaintiffs, and each of them, were not discharged pursuant to or upon the basis of any of the terms of employment authorizing such discharge, and are further material to any defense of the defendant corporation based upon such terms of employment.

"5. That the records and documents of the company relating to advancements, transfers, increases in pay, and criticisms are material to the proceedings herein for the purpose of establishing that plaintiffs were not discharged because of failure to properly perform work or for lack of ability or skill, and are further material because of the possible defense of defendant corporation based upon any claim that plaintiffs did not properly perform their work or were not in other ways qualified as employees.

"6. That the main issue in this proceeding relates to the cause of discharge of each of the plaintiffs herein, and that each of the documents and records requested are relevant to and have bearing upon the cause of discharge of each of said plaintiffs."

Section 1101 of the Labor Code reads as follows:

"No employer shall make, adopt, or enforce any rule, regulation, or policy:

"(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.

"(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

The provisions of section 1102 read: "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

Section 1103 provides that any employer who violates the foregoing provisions is guilty of a misdemeanor punishable by imprisonment in the county jail not to exceed one year or a fine of not to exceed $1,000, and in the case of a corporation by a fine not to exceed $5,000.

Section 1104 provides that, in prosecutions under the provisions of the foregoing sections, the employer is responsible for the acts of his managers, officers, agents and employees.

Section 1105 of the same chapter (ch. 5 of the Labor Code) provides that: "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter."

[1] Petitioner's first ground of objection to the issuance of the subpoena duces tecum in re deposition is that the statements and averments contained in the affidavit upon which the subpoena was issued are not based upon facts within the knowledge of the affiant, Ben Margolis. This claim is not supported by the record, which shows that the averments contained in the affidavit upon which the subpoena was issued were not made upon information and belief. Such averments, which we have hereinbefore set forth, are stated to be within the affiant's knowledge and are of a most positive and direct character.

[2-4] Petitioner's next contentions that the affidavit does not contain sufficient averments of the materiality of the documents sought, that the description of such documents is insufficient, and that the same would not be competent evidence in the action are equally without merit. In determining the materiality of the evidence sought to be obtained, reference may be had not only to the supporting affidavit, but as well to the pleadings. Union Trust Co. v. Superior Court, 11 Cal.2d 449, 455, 81 P.2d 150, 118 A.L.R. 259; Maclay Rancho Realty Co. v. Superior Court, 81 Cal.App. 471, 254 P. 287. All of the allegations of the amended and supplemental complaint are directly referred to and incorporated in the affidavit. This pleading sets forth the alleged rules, regulations and policies of defendant corporation. Manifestly, such rules, regulations and policies, if adopted and enforced by defendant corporation, contravene the provisions of Chapter 5 of the Labor Code, and more especially sections 1101 and 1102 thereof. The affidavit specifically sets forth that the materiality of the sought evidence lies in the fact that therefrom it can be determined whether plaintiffs were discharged because they violated said rules, regulations and policies.

A mere reading of the foregoing description of the documents sought to be produced at the deposition immediately suggests the sufficiency of such description. Surely it must be assumed that, in the ordinary conduct of its business, defendant corporation keeps personnel records of and concerning its employees, which reflect the term of their employment and the reasons for their discharge. Under the circumstances and general situation presented, viewed in the light of reason and common sense, the custodian of the documents and records should be able to recognize, distinguish and identify the particular records required. Such being the case, the description thereof is sufficient. Union Trust Co. v. Superior Court, supra, 11 Cal.2d at page 458, 81 P.2d 150, 118 A.L.R. 259. "Literal accuracy cannot be expected in the description of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document desired is enough." Burke v. Table Mountain Water Co., 12 Cal. 403, 408. In the case of Main v. Ring, 219 Iowa 1270, 260 N.W. 859, 862, 863, cited with approval in Union Trust Company v. Superior Court, supra, 11 Cal.2d at page 456, 81 P.2d at page 154, 118 A.L.R. 259, it was said: "The statute is clearly designed to help a party to a suit to discover material facts even though the documents evidencing such facts are in the possession of the adverse party, and it is a wholesome aid to the proper administration of justice."

[5] As to the competency of the evidence sought to be produced, we are satisfied that respondent court correctly disposed of that issue when the same was in question upon the motion to quash the supboena duces tecum re deposition. We, therefore, adopt as a part of our decision the following language used in the opinion prepared by Hon. Emmet H. Wilson, Judge of the respondent court, on the motion to quash: "Are the documents competent evidence? If the rules, regulations, and policies of defendant corporation are as alleged in the amended and supplemental complaint they would obviously be competent evidence that they were in violation of the statute, and if they are not as so alleged they would be competent for the purpose of defeating plaintiffs' several causes of action. If plaintiffs were discharged by reason of their violation of said rules, regulations, and policies the personnel records and other documents showing the terms of employment and the reasons for discharge would be competent for so proving, and they would likewise be competent if they showed other sufficient reasons unrelated to the alleged policies of defendant, if any such existed."

We have reviewed the cases cited by petitioner, but find nothing therein which militates against the conclusion at which we have arrived,—that the facts in the instant case do not warrant the stricture upon the affidavit here in question that it is a mere "fishing expedition or device" or a general omnibus order for the production of all defendant's books and records in the hope that, by drawing a dragnet of inspection through all of such records, plaintiffs might catch something which would aid their cause. Furthermore, to produce the documents here sought, defendant corporation would not be exposing its methods of conducting its business nor its dealings with any one other than plaintiffs themselves.

[6-9] Petitioner next urges that the issuance of a subpoena duces tecum herein is violative of Article 1, section 19, of the Constitution of the State of California, which is designed to protect and uphold the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. The reasonableness of the search or seizure is dependent upon its legality. It is only when the search is illegal that it is unreasonable. The cited constitutional provision recognizes that doctrine in providing that search and seizure warrants may issue "on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." In consonance with the spirit and intent of this constitutional provision, the legislature has ordained, by the enactment of section 1985 of the Code of Civil Procedure, that an application for a subpoena duces tecum shall be accompanied by an affidavit "specifying the exact matters or things desired to be produced, and setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control." Manifestly, it cannot be successfully maintained that, in adopting the constitutional provision, the people intended to unreasonably hamper, interfere with, impair or abrogate the inherent power of the courts to secure the production of evidence in the trial of an action. It was only intended that, in the exercise of their inherent power in that regard, judicial tribunals should be limited to the extent that they do not direct what could be termed an "unreasonable" search or seizure. Union Trust Co. v. Superior Court, supra, 11 Cal.2d pages 463, 464, 81 P.2d 150, 118 A.L.R. 259. In speaking of this protective constitutional provision in a case where it was urged as a bar to the issuance of an "order of inspection", the court in Dalton v. Calhoun County District Court, 164 Iowa 187, 145 N.W. 498, 502, Ann.Cas. 1916D, 695, stated that as a rule the provision "has reference to criminal or

quasi criminal proceedings, or to forfeiture and not the statutory methods for obtaining evidence." Section 1985 of the Code of Civil Procedure conforms to the constitutional requirements and the affidavit herein meets the test of the code section. The commands of the subpoena issued pursuant thereto cannot therefore be characterized as either "unreasonable" or "illegal".

[10] Petitioner insists that the amended and supplemental complaint herein fails to state a cause of action because section 1101 of the Labor Code, upon which the action is predicated, is a criminal statute; that the plaintiffs' cause of action is predicated upon the violation by petitioner of a penal law, and that the statute which makes certain conduct a crime does not create a new and theretofore nonexistent civil cause of action. That, therefore, the Labor Code section here in question does not vest plaintiffs with a civil cause of action. We are not impressed with this argument because, under the American philosophy of government, and indeed as the very essence of civil liberty, there exists the right of every individual to claim the protection of the laws whenever he receives an injury, and one of the foremost duties of government is to afford that protection. Blackstone, in the Third Volume of his Commentaries, page 23, in referring to the cases where a remedy is afforded by mere operation of law, says: "It is a general and indispensable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded". Even though we assume that, unless a criminal statute expressly sets forth a civil remedy, none exists, and notwithstanding there is credible authority to the contrary, nevertheless, in the case now before us we find that section 1105 of the Labor Code, which is part of the same chapter that includes sections 1101, 1102 and 1103, provides: "Nothing in this chapter shall prevent the injured employee from recovering damages from his employer for injury suffered through a violation of this chapter." Thus we have a legislative enactment expressly creating a civil remedy in favor of any employee injured by reason of a violation by his employer of sections 1101 and 1102 of the Labor Code.

[11] We deem it unnecessary to decide whether the amended and supplemental complaint fails to state a cause of action for the reason that it asks for injunctive relief reinstating plaintiffs as employees. Petitioner argues that this is not one of the cases wherein a contract for personal services may be specifically enforced by mandatory injunction (Sub. 5, Sec. 526, C.C.P.; Sub. 5, Sec. 3423, C.C. Suffice it to say that the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., which was held constitutional by the Supreme Court of the United States in National Labor Relations Board v. Jones & Laughlin S. Corp., 301 U.S. 1, 45, 57 S.Ct. 615, 81 L.Ed. 893, 916, 108 A.L.R. 1352; furnishes authority for the statement that legislative acts such as those contained in Chapter 5 of the Labor Code do not interfere with nor impinge upon the normal exercise of the right of the employer to select his employees or to discharge them. Such legislation merely prevents the employer, under cover of that right, from intimidating or coercing his employees and keeping them from engaging or participating in politics, becoming candidates for public office, or attempting by or through threats of discharge to control or direct the political activities or affiliations of his employees. However, in the case at bar, although it be conceded, but not decided, that the amended and supplemental complaint does not state a cause of action for injunctive relief, it does state a cause of action for damages. Consequently, there is not a total failure to state a cause of action and petitioner's challenge to the sufficiency of the pleadings on this ground is unavailing.

[12] The next contention of petitioner is that the amended and supplemental complaint fails to state a cause of action in that section 1101 of the Labor Code is unconstitutional for the asserted reason that the language thereof is not "of such clarity of explanation that any one of average intelligence would be able to understand what is prohibited and what he may do without violating the law". Sec. 24, Art. 4, Constitution of California. Petitioner urges that prior to the adoption of the challenged sections of the Labor Code, it was the settled law of this state that an employer had the right to hire or discharge his employees at will, with or without cause, in the absence of the existence of a contract to the contrary, and upon proper notice of termination in accordance with sections 2920 to 2928 of

the Labor Code, which prescribe the manner of termination and the requisite notice in connection therewith; but that the new limitation upon such rights, Sections 1101, 1102, Labor Code, and the standard of conduct imposed upon an employer by the last named sections are so indefinite, uncertain and ambiguous in their terms and language that it is impossible for an employer to determine therefrom what he may do and what he is prohibited from doing. Specifically, petitioner brands the terms "policy", "politics", and "political activities" appearing in the sections as uncertain, indefinite and ambiguous, and contends that the terms do not have a settled meaning understandable to a person of ordinary intelligence.

All of the cases cited by petitioner in support of this argument arose out of criminal prosecutions, and we are not directed to a single civil case which directly or by analogy supports petitioner's contention. However, even in criminal cases, statutes are upheld when the act prohibited is defined in ordinary language. When a penal statute employs words or phrases having a well settled common law meaning which would advise a reasonable person in the ordinary pursuit of his affairs of what is prohibited, the court will not decree that such statute is ambiguous or indefinite by resorting to a strained construction of the words used therein. Pacific Coast Dairy v. Police Court, 214 Cal. 668, 675, 8 P.2d 140, 80 A.L.R. 1217. In the case just cited, the word "diligence" is held to have a commonly accepted meaning. In Smulson v. Board of Dental Examiners, 47 Cal.App.2d 584, 587, 118 P.2d 483, 484, the words "tending to deceive or mislead the public" are held sufficiently definite. In People v. Lavine, 115 Cal.App. 289, 1 P.2d 496, 498, the court refused to declare subdivision 4, section 519, of the Penal Code ambiguous or uncertain because it contained the phrase "to expose any secret affecting him or them". In this case, the question arose as to the meaning of the word "secret". In commenting thereon the court (at page 295 of 115 Cal.App., at page 499 of 1 P.2d) said: "In relation to point one, supra, we are of the opinion that the provisions of section 519, subdivision 4, of the Penal Code, are not so far uncertain or indefinite as to impair their validity. General terms may be used in a statute to describe things according to the common understanding of such terms." See, also, People v. Smith, 36 Cal.App.2d Supp. 748, 92 P.2d 1039; United States v. Ragen, 314 U.S. 513, 62 S.Ct. 374, 86 L.Ed. 383, and State of Minnesota v. Probate Court, 309 U.S. 270, 60 S.Ct. 523, 84 L.Ed. 744, 126 A.L.R. 530, sustaining the state court's construction of the term "psychopathic personality". Where, as here, the legislature was concerned with a problem of a more general nature than a specific limited act which ordinarily gives rise to penal statutes, necessarily the language of the act must be more general.

Returning to the words and phrases of the Labor Code challenged by petitioner in the instant case, we find, in Webster's International Dictionary, that "politics" is defined as follows: "The science and art of government; the science dealing with the organization, regulation, and administration of a state, in both its internal and external affairs; political science. * * * The theory or practice of managing or directing the affairs of public policy or of political parties; hence, political affairs, principles, convictions, opinions, sympathies, or the like."

From the definition of "politics", the meaning of "political activities" logically follows. The same dictionary defines "policy" as: "A settled or definite course or method adopted and followed by a government, institution, body or individual". Manifestly, people of common sense and reason would experience no difficulty in determining with a reasonable degree of certainty what the legislature intended by the sections contained in Chapter 5 of the Labor Code, and therefore, such sections cannot be held void for indefiniteness, uncertainty or ambiguity. County of Tulare v. City of Dinuba, 188 Cal. 664, 677, 206 P. 983; Drummey v. State Board of Funeral Directors, 13 Cal.2d 75, 80, 87 P.2d 848; Old Dearborn D. Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 106 A.L.R. 1476; Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182.

[13] We come now to a consideration of petitioner's contention that a writ of prohibition should issue because, to enforce the subpoena duces tecum here under consideration would compel petitioner and its president, Robert E. Gross, to be a witness against the corporation and himself in violation of Article I, Section

13, of the Constitution of the State of California. We are satisfied that this contention was correctly determined against petitioner when the issue was before respondent court on the motion to quash subpoena re deposition duces tecum. We therefore adopt as part of this decision the following language in the opinion rendered by Hon. Emmet H. Wilson, Judge of the Superior Court, when the matter was before that tribunal.

"Defendant claims that because the statute is penal a subpoena duces tecum cannot compel a citizen to produce documents that might tend to incriminate him. In so far as the motions to quash are based on this ground they must be denied. (a) The weight of authority is that a corporation cannot refuse to produce its corporate records in response to a lawful order or subpoena for the reason that the guaranties in the federal and state constitutions against compulsory self-incrimination do not extend to private corporations. See cases collected in 120 A.L.R. 1103. (b) Neither an officer of the corporation nor the witness is the judge as to whether the documents would incriminate it or him, but the liability to criminal prosecution and the privilege of refusing to answer questions or to produce documents must be determined by the court. Bradley v. Clark, 133 Cal. 196, 209, 65 P. 395; Overend v. Superior Court, 131 Cal. 280, 283, 63 P. 372; In re Rogers, 129 Cal. 468, 470, 62 P. 47; Ex parte Stice, 70 Cal. 51, 53, 11 P. 459; Mason v. United States, 244 U.S. 362, 364, 37 S.Ct. 621, 61 L.Ed 1198, 1199. The privilege cannot be claimed by the witness until he has been sworn and asked a question the answer to which would tend to incriminate him. Ex parte Stice, supra. If the tendency to incriminate is not disclosed by the question itself it is the duty of the witness to make it appear to the court that his answer might have such tendency. In re Rogers, supra. (c) If the witness should claim that his answer to any question or the production of any document would tend to incriminate him personally he may present the matter to the court in an appropriate manner, but not by a motion to quash the subpoenas."

[14] Petitioner next asserts that section 1101 of the Labor Code is unconstitutional because it deprives corporations and persons of the right to contest its validity due to the excessive penalties imposed, and which penalties, argues petitioner, are prohibitive of a constitutional test of the validity of the statute. It is insisted that the claimed drastic penalties imposed render the statute void upon its face as being a legislative deprivation of liberty and property without due process of law. However, it is section 1103 of the Labor Code and not section 1101 which creates the criminal penalty, and that section, or the penalties therein set forth, are in no way involved in these proceedings, which are civil in character.

[15-19] Petitioner next challenges the constitutionality of section 1101 of the Labor Code on the ground that it is an arbitrary and unjustifiable limitation and restriction upon the liberty and freedom of contract, and as such is violative of Article 1, § 13, of the Constitution of the State of California and of the Fourteenth Amendment to the Constitution of the United States. The main premise relied upon by petitioner is that section 1101 of the Labor Code is not a valid exercise of the police power and amounts only to an attempt by the legislature to prohibit an employer of 20 or more persons from making a free choice of those persons whom he desires to hire or retain in his employment, and is therefore an arbitrary and unjustifiable limitation upon the liberty of contract. The presumption is that the legislature had adequate and reasonable basis for its police regulations and that a statute providing for such regulations is constitutional. 5 Cal.Jur. 628, et seq. And, as pointed out in West Coast Hotel Company v. Parrish, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703, 108 A.L.R. 1330, the only question to be decided is whether the legislative body acted arbitrarily and capriciously. In connection with the relation of employer and employee, in order to protect the health and safety, *as well as to insure the promotion of peace and good order,* the legislature is clothed with a wide field of discretion in making regulations to insure wholesome conditions of work and *freedom from oppression.* Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 31 S.Ct. 259, 55 L.Ed. 328.

In the case of West Coast Hotel Company v. Parrish, supra, 300 U.S. at page 392, 57 S.Ct. at page 582, 81 L.Ed. 703, 108 A.L.R. 1330, the Supreme Court of the United States said: "This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (Holden v. Hardy, 169 U.S. 366, 18 S.Ct. 383, 42 L.Ed. 780); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (Knoxville Iron Co. v. Harbison, 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55); in forbidding the payment of seamen's wages in advance (Patterson v. The Eudora, 190 U.S. 169, 23 S.Ct. 821, 47 L.Ed. 1002); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U.S. 539, 29 S.Ct. 206, 53 L.Ed. 315); in prohibiting contracts limiting liability for injuries to employees (Chicago, B. & Q. R. Co. v. McGuire, supra); in limiting hours of work of employees in manufacturing establishments (Bunting v. Oregon, 243 U.S. 426, 37 S.Ct. 435, 61 L.Ed. 830, Ann.Cas.1918A, 1043); and in maintaining workmen's compensation laws (New York C. R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A. 1917D, 1, Ann.Cas.1917D, 629; Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, [13 N.C.C.A. 927], Ann.Cas.1917D, 642)."

It is noteworthy that the constitution does not speak of "freedom of contract". It speaks of "liberty" and prohibits the deprivation of liberty without due process of law. In its provisions outlawing that deprivation of liberty, the Constitution does not establish or recognize a liberty that is absolute or uncontrollable. The liberty guaranteed by the Constitution is liberty in an organization of social beings which requires the protection of law against those evils which demoralize and menace the health, safety, morals and welfare of the people. Therefore, regulation which is reasonable in relation to the subject to which it is applied and which is adopted in the interests of the communty is in itself due process. Through the years, now more than twenty-five in number, the courts have recognized and declared that freedom of contract is a qualified and not an absolute right. No one is vested with the absolute freedom to do as he pleases or wills or to contract as he chooses. It is the absence of arbitrary restraint, and not immunity from reasonable regulations and prohibitions adopted in the interests of the community, that liberty implies.

Another reason why employees should be protected in the matter of employment contracts with their employer is the inequality in the footing of the parties. This situation was encountered and decisively met more than 40 years ago in Holden v. Hardy, 169 U.S. 366, 397, 18 S.Ct. 383, 390, 42 L.Ed. 780, 793, wherein the Supreme Court of the United States, in directing attention to the inequality in the positions of the respective parties, said:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may promptly interpose its authority.

"* * * But the fact that both parties are of full age, and competent to contract, does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'"

The principles just stated have a peculiar and significant application in regard to employees whose political activities and affiliations are sought to be directed and controlled by employers. If the American philosophy of government is to be preserved, founded as it is on the recognition of the dignity of the individual as a natural right, it would seem necessary that each person should have absolute freedom to pursue the particular course of political action or political activity that he chooses, and the state owes to the individual the duty of making him secure in that right. That is all Chapter 5 of the Labor Code does. It protects the employee from oppression by the employer in the former's inherent right to freedom of political thought and action. It inhibits the employer from attempting to dictate the employee's political action under threat of economic pressure through discharge from employment if the employee refuses to follow the political course of action charted for him by the employer. To us this seems a wholesome exercise of the legislative power to protect each individual in his freedom of political thought and action. Since the employer has no constitutional right to interfere with the freedom of the employee in the latter's political affiliations and activities, the employer cannot complain of the statute on constitutional grounds.

[20] Petitioner's contention that section 1101 of the Labor Code is unconstitutional in that it deprives employers of the right to free speech in violation of Article I, section 9, of the State Constitution, and the Fourteenth Amendment to the Constitution of the United States is without merit. Section 1101 does not in any manner or form either directly or indirectly impinge upon the freedom of speech. Nowhere is the employer prohibited from freely expressing his views. In fact, the section prohibits discrimination against the employee because he exercises his right to freedom of expression in regard to his political beliefs and does not in the slightest degree impair the employer's right in the same regard.

That petitioner will suffer no prejudice through compliance with the subpoena duces tecum in re deposition herein is further indicated by the special defenses interposed in the action and hereinbefore narrated. If the documents sought by the subpoena duces tecum show that the plaintiff employees were discharged by reason of disloyalty to the United States or for other reasons assigned in the special defenses, then it is manifest that no prejudice or damage will ensue to petitioner.

From that which hereinbefore has been said, it follows that the alternative writ hereinbefore issued should be discharged and that a peremptory writ should be denied. It is so ordered.

YORK, P. J., and DORAN, J., concur.

WEST KEY NUMBER SYSTEM

67 Cal.App.2d 288

OIL TOOL EXCHANGE, Inc., v. SCHUH et al.

Civ. 3275.

District Court of Appeal, Fourth District, California.

Dec. 13, 1944.

Hearing Denied Feb. 8, 1945.

1. Mortgages 🔑25(3)

The dismissal of an action, extension of time for payment, release of attachment and other agreements and acts of forbearance constituted a sufficient consideration for note and mortgage securing it. Civ. Code, §§ 1605–1614.

2. Husband and wife 🔑268(5)

Where attachment was levied on property of husband and wife, at least a portion of which was community property, promise of wife to pay note given in consideration of release of attachment was supported by ample consideration.

3. Appeal and error 🔑843(2)

Where trust had parted with all interest in property subsequent to execution of mortgage and prior to action to foreclose it and mortgagors who were the real beneficiaries under the trust had become owners of the property as tenants in common and no personal judgment was ordered against the trust or the trustees, whether the mortgage which was also executed by the trustees was supported by an adequate consideration as to them was immaterial.

4. Mortgages 🔑25(3), 78, 83

Where after execution of guarantee and suit brought thereon, defendants with full knowledge of claimed fraud executed note and mortgage and secured a dismissal of the action based upon the guarantee, a release of attachment, and extension of time within which to pay and obtained a release of part of property from lien of mortgage and other considerations, the court was justified in holding that there was no fraud or that there was a waiver of any claimed misrepresentation leading up to the execution of note and mortgage or claim of lack of consideration.

5. Appeal and error 🔑1008(1)

Trial court's findings are binding on appellate court.

6. Guaranty 🔑63

Where the guarantee is joint and several failure to proceed against one co-guarantor or the release of one co-guarantor does not necessarily release the remaining guarantor.

7. Judgment 🔑4

A judgment is an evidence of debt.

8. Release 🔑29(1)

The bar arising from payment of sum in consideration of release of one of several joint tort-feasors does not arise from any particular form but from the fact that the injured party has actually received satisfaction.

9. Guaranty 🔑63

Where one on execution of a guarantee received 2½ per cent. participating royalty interest in a well then being promoted as well as interests in other wells, he was not a "mere guarantor" within the Civil Code, and satisfaction of a judgment against another on her separate guarantee in consideration of $300 note which was never paid did not release the first guarantor. Civ.Code, § 1543.

See Words and Phrases, Permanent Edition, for all other definitions of "Mere Guarantor".

10. Payment 🔑16(1)

The giving and acceptance of a promissory note is not payment of a debt in the absence of an agreement to that effect.

11. Guaranty 🔑63

Where guarantee provided that liability of guarantor should not be impaired by acceptance of notes or other evidences of debt by creditor until finally paid in cash and that guarantee might be enforced either by single proceeding against all or any of the parties, a satisfaction of judgment obtained against a separate guarantor in consideration of $300 note which was never paid did not operate as a bar to foreclosure of mortgage given by guarantor to secure payment of indebtedness.

12. Judgment 🔑114

In suit to foreclose mortgage, where answers and cross-complaints were filed by those in default, without objection, and all parties proceeded to trial on the issues raised thereby, there was a waiver of the default of such defendants by the plaintiff and acceptance of waiver by the defendants.

13. Appeal and error 🔑1073(1)

In suit to foreclose mortgage where defaulting defendants admitted in their answer that property involved no longer belonged to them as trustees but that it had been conveyed to the beneficiaries, any error in decree granting relief beyond that prayed for in the complaint was not prejudicial to such defendants. Code Civ.Proc. § 580; Civ.Code, § 2930.

14. Appeal and error 🔑223

Objection to decree cannot be made for the first time on appeal.

15. Appeal and error 🔑201(1)

That an attorney had represented both parties to litigation could not be urged for first time on appeal when all parties had full knowledge of all the facts at the time of the trial and had failed to make any point of it at the time.

16. Appeal and error 🔑891

Application for leave to add additional documentary evidence to the record would be denied where evidence was only cumulative and concerned matters and issues previously presented at the trial of the action.

17. Evidence 🔑317(2)

A letter concerning a conversation claimed to have been had with an agent of the plaintiff was hearsay as to plaintiff.

18. Appeal and error 🔑891

An application to add additional documentary evidence to the record would be denied where it appeared that if competent and material to the issues the evidence would not cause appellate court to reverse or modify the judgment as given.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action to foreclose a mortgage by Oil Tool Exchange, Inc., against John E. Schuh, Blanche Schuh, Fidelity Foundation, Ltd., Smith Williams and G. M. Lovejoy, as trustees, and others wherein John E. Schuh and Blanche Schuh, and Smith Williams and G. M. Lovejoy, as trustees, filed answer and cross-complaint asking that mortgage and note be canceled, that money paid thereon be returned and for damages in the sum of $15,000. From a judgment foreclosing mortgage and decreeing that the named defendants take nothing by their cross-complaint, the named defendants and cross-complainants appeal.

Judgment affirmed.

D. R. Gustaveson, Dee Holder, and Entenza & Gramer, all of Los Angeles, for appellants.

Raphael Dechter, of Los Angeles, for respondent.

GRIFFIN, Justice.

This action, filed on December 17, 1939, was a complaint to foreclose a mortgage on certain real property in San Bernardino County, which mortgage was given by defendants Schuhs and Fidelity Foundation, Ltd., a trust, by Smith Williams and G. M. Lovejoy, as trustees, the then owners, as security for the payment of a promissory note in the sum of $15,204.07, payable to plaintiff Oil Tool Exchange, Inc. and executed on October 20, 1937, by defendants John E. Schuh and Blanche Schuh and payable in installments over a period of two years. No payments were made thereon except $2500. Default of defendant Fidelity Foundation, Ltd., a trust, Smith Williams and G. M. Lovejoy, as trustees, and other party defendants, was duly entered. On November 21, 1941, the Schuhs and the trustees filed their answer and cross-complaint and admitted the signing of the note by the Schuhs and the mortgage by the named defendants, but alleged that they were never executed or delivered to plaintiff or that defendants ever received any consideration for them. They then alleged that on June 15, 1937, defendant John E. Schuh signed a pretended written guarantee of credit of "Louis C. Simmel Organization" to guarantee the payment of certain indebtedness to be incurred by that organization to plaintiff in a sum not to exceed $6,000; that Louis C. Simmel signed that guarantee as a co-guarantor; that Simmel represented to defendant John E. Schuh that the object of the guarantee was to procure delivery to the organization, upon credit, of certain oil well casing for use in an oil well then being drilled by the said organization in Kern County; that Simmel misrepresented the facts to him as to the oil well and its ability to produce oil and led defendants to believe that Schuh would never be called upon to make good his guarantee. It is then alleged that plaintiff corporation and Simmel had a secret agreement between them that they would never attempt to enforce the guarantee as to Simmel but would enforce payment thereof only from defendants Schuh; that on July 17, 1937, plaintiff, through its agent, agreed to cancel the guarantee; that in September, 1937, plaintiff here commenced an action in the Superior Court of Los Angeles County against defendant Schuh, alleging an amount of $13,722.11 due plaintiff by reason of indebtedness of Simmel to plaintiff and a guarantee by John E. Schuh of such amount. The unlimited, continuing guarantee signed by Schuh on June 15, 1937, guaranteed the payment of all of the Simmel organization debts "now, heretofore, and/or hereafter incurred or due" and was to remain in force until written revocation was given, and that such revocation should only affect indebtedness thereafter incurred. A similar guarantee was signed by Mr. Schuh as to any debts of the Simmel organization and/or "H. C. L. and associates" owing to plaintiff, but this guarantee had a limitation of $2750. Simmel was not made a defendant in that action.

It is further alleged in the answer that defendant John E. Schuh was in such financial difficulty that in order to protect his entire holdings from threatened involuntary bankruptcy proceedings to be filed by plaintiff, he and his wife, acting under the threat, executed the note and mortgage set forth in this action; that he therefore paid $2500 on it unwillingly and under threats of foreclosure.

As a further defense it is alleged that the principal sum of the mortgage had been fully paid and discharged by the payment by Louis C. Simmel or Elma C. Simmel of their respective indebtedness to plaintiff for the purchase of the oil well machinery.

In an amended answer it is alleged that on April 6, 1939, plaintiff sued Elma C. Simmel upon a similar unlimited continuing guarantee of the Simmel organization debts to plaintiff in the sum of $11,223.11 plus costs and attorney's fees. That guarantee was dated April 26, 1937. It is then alleged in the answer that Mrs. Simmel, in that action, interposed the defense of payment of the indebtedness by reason of the acceptance of the note and mortgage here involved; that plaintiff there contended that said note and mortgage was only held as security and was not accepted as payment; that the trial court so held and rendered judgment against Mrs. Simmel for $14,589.97.

It is further alleged in the answer that the material sold to the Simmel organization by plaintiff was sold on a conditional sales contract and was later repossessed and returned to plaintiff. Defendants then pray that plaintiff take nothing; that the mortgage and note be delivered up and cancelled; for the return of the $2500 paid; and for damages in the sum of $15,000.

The trial court found that the Fidelity Foundation, Ltd. was a trust; that John E. and Blanche Schuh were trustors and that they, as individuals, prior to November 17, 1939, transferred all of their title to the lands here involved to the trust and that they were the beneficiaries under it; that prior to the commencement of this action the trustees, in accordance with the terms of the trust, transferred all their title and interest as trustees in the trust to the Schuhs as tenants in common; that the Schuhs, for a valuable consideration, made, executed and delivered the promissory note here involved as well as the mortgage securing it; that Schuh made and executed for a valuable consideration the guarantee in writing which had a limitation of $2750 as well as the unlimited guarantee above mentioned; that Elma C. Simmel executed the guarantee in writing alleged in the answer but that the guarantee was executed as a "separate independent contract from the guarant*ys*" of Schuh. It then found that at the time of the execution of the unlimited guarantee of April 12, 1937, and concurrently therewith Schuh received from Simmel a 2½ per cent participating royalty interest in a certain oil well which was being promoted for drilling by Simmel; that about the same time there was executed between the same parties an agreement in writing whereby Simmel agreed to transfer to Schuh a 20 per cent participating interest in oil to be produced on certain additional premises described, by which agreement Schuh personally agreed to pay for water string casing theretofore purchased by the parties from plaintiff, and to relieve Simmel from any liability thereon and to further finance the expedition for which Schuh was to have a one-fourth interest in every future well to be drilled on a particular leasehold.

The court found that the guarantee was an unlimited one and not only for the sum of $6,000 as claimed by defendants; that the action was brought in Los Angeles County on the guarantees here involved; that attachments were issued on defendants' property and defendants, through their attorneys, in consideration of the release of the attachment, dismissal of the action, and the extension of time for payment of the indebtedness, executed the note and mortgage here involved as additional security; that subject to the execution and delivery of the note and mortgage here sued upon and at the request of defendants, plaintiff corporation executed and delivered to them an agreement of subordination whereby the said note and mortgage were to be subrogated to an assignment of a 3½ per cent landowners' royalty interest in the real property described in the mortgage; that upon the payment of the $2500 on the mortgage plaintiff released from the lien of the mortgage certain real property belonging to defendants Schuh, and that they placed a new loan thereon in the sum of $5,000; that since the note and mortgage were executed defendant owners executed an oil and gas lease on the property here involved which was expressly made subject to the mortgage in question; that a wildcat well was drilled thereon but no gas or oil was discovered and the lease had been abandoned; that defendants were represented by their attorneys when the documents herein mentioned were executed; that they were aware of and had knowledge of the facts as set forth in their answer; that all of the tools sold by plaintiff to the Simmel organization were actually sold to it and not on a contract of sale; that plaintiff did cause an action to be brought against Elma C. Simmel in Los Angeles County on her guarantee of the indebtedness of Louis C. Simmel; that judgment went against her and that the trial court there found that the note and mortgage here sued upon were taken and accepted as additional security only and not in payment of the indebtedness; that subsequent to that judgment Elma C. Simmel went into voluntary bankruptcy; that she was insolvent and had no assets; that the judgment against her was listed as an obligation; that since the adjudication and the return of no assets, plaintiff herein and Mrs. Simmel entered into an agreement that upon the execution of a note for $300 the judgment against her would be satisfied and the bankruptcy proceedings dismissed; that judgment was, on February 24, 1941, satisfied (more than three years after the execution of the note and mortgage here involved). Mrs. Simmel made no payment on the judgment and the $300 note still remains wholly unpaid. Except as expressly found to be true, the trial court generally found all other claimed defenses to be untrue and rendered judgment foreclosing the mortgage and decreeing that defendants take nothing by their cross-complaint.

[1] Defendants appealed and now argue first that there was, as a matter of law, no consideration for the execution of the note and mortgage; that if defendant John E. Schuh was already indebted on the guarantee his written promise in the form of a note to pay what he was then already obligated to pay would constitute no new consideration for the execution of the note and mortgage. We see no merit to this contention. The trial court properly found that the dismissal of the original action, the extension of time for payment, release of attachment and other agreements and the acts of forbearance constituted a sufficient consideration. Long v. Thompson, 45 Cal.App.2d 161, 113 P.2d 698; Civ.Code, secs. 1605–1614; McClure v. McClure, 100 Cal. 339, 34 P. 822; Fairchild v. Cartwright, 39 Cal.App. 118, 178 P. 333.

[2, 3] The attachment was levied on the property of the defendants. The record tends to show that at least a portion of the property was community property. The promise of the wife to pay the obligation is supported by ample consideration. Smith v. Hernan, 40 Cal.App. 217, 180 P. 640; McDonald v. Randall, 139 Cal. 246, 72 P. 997; First National Bank v. Williams, 54 Cal.App. 537, 202 P. 164. The execution of the mortgage by the trustees was supported by a consideration. The trust parted with all interest in the property subsequent to the execution of the mortgage and prior to this action. The mortgage being in writing, a sufficient consideration is presumed. Civ.Code, sec. 1614. Schuh and his wife, mortgagors, were the real beneficiaries under the trust and are now owners of the property as tenants in common. No personal judgment was ordered against the trust or the trustees. The consideration was adequate, and, as to them, it would seem that that question now is immaterial.

[4, 5] After the execution of the guarantee, which defendants claim was obtained by fraud, and after suit was brought thereon, with full knowledge of the claimed fraud, defendants executed the note and mortgage, secured a dismissal of the action based upon the guarantee, a release of the attachment, and extension of time within which to pay, obtained a release of part of the property from the lien of the mortgage, secured a subrogation agreement for 3½ per cent landowners' royalty on the mortgaged premises, executed an oil lease fully recognizing the mortgage herein sued upon, and in addition thereto made a payment of $2500 on the note. It appears that the trial court was fully justified from the evidence in holding that there was no fraud or that there was a waiver of any claimed misrepresentation leading up to the execution of the note and mortgage, or claim of lack of consideration. Schmidt v. Mesmer, 116 Cal. 267, 48 P. 54; Hutchins v. Security Trust, etc., Bank, 208 Cal. 463, 281 P. 1026, 65 A.L.R. 1059; Dool v. First National Bank, 107 Cal.App. 585, 589, 290 P. 478. The court's finding is binding on this court. Albaugh v. Mt. Shasta Power Corporation, 9 Cal.2d 751, 73 P.2d 217.

[6, 7] It is next argued that the satisfaction of the judgment against Elma C. Simmel, based upon her separate guarantee of the same account, had the effect of releasing Schuh from liability on his guarantee. We do not so construe its effect. The action against her was an entirely separate action and defendants were not parties thereto. Furthermore, she was insolvent and had no assets. The $300 note was never paid. Where the guarantee is joint and several, the failure to proceed against one co-guarantor, or the release of one co-guarantor would not necessarily release the remaining guarantor. Davenport v. Stratton, Cal.Sup., 149 P.2d 4. The guarantee provides by its terms that the liability of the guarantor shall not be impaired by acceptance of notes or other evidences of debt by the plaintiff "until finally paid in cash" and that "this guarantee may be enforced either by a single proceeding against all of us, or any proceedings against us separately". A judgment is an evidence of debt. McLaughlin v. Alexander, 2 S.D. 226, 49 N.W. 99.

Defendants cite many cases to the effect that payment in full of a judgment by one of several persons against whom it operates extinguishes the judgment citing such cases as Ash v. Mortensen, Cal.Sup., 150 P.2d 876, a malpractice case, where it was held that in some cases involving unliquidated tort demands, the payment of any sum in consideration of the release of one of several *joint tort feasors* will be presumed to have been made and accepted as full compensation.

[8] The fundamental rule is that the bar does not arise from any particular form but from the fact that the injured party has actually received satisfaction. Urton v. Price, 57 Cal. 270. The defendants herein were not parties to the Simmel guarantee nor were they made parties to that action. It was not an action respecting the rights of joint tort feasors but was strictly contractual, based upon separate and independent contracts of liability. Section 1543 of the Civil Code provides that "A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors * * *." In the instant case there is no claimed release of one joint debtor but only of one of the guarantors.

In Brown v. Pacific Coast Agency, 53 Cal.App. 788, at page 791, 200 P. 977, at page 978, where the history and effect of that section is fully analyzed, it was said: "But it may be said that the proper construction of section 1543 would seem to be that a release of one of two or more joint debtors does not extinguish the obligations of the others, unless they (the others not included in the release) are mere guarantors. Such construction would treat the section in harmony with section 2819, Civil Code, which specifies the manner in which a guarantor may be released. There is no reason why two or more joint guarantors (whose relation among themselves is of the nature of cosureties) should be discharged by the release of one from a joint judgment on the guaranty. But if the principal on the original obligation is released by the creditor, then under the section the guarantor is discharged." See, also, Northern Insurance Co. v. Potter, 63 Cal. 157; French v. McCarthy, 125 Cal. 508, 58 P. 154; E. A. Strout W. R. A., Inc. v. McCloud, 29 Cal.App.2d 400, 84 P.2d 533.

In Dougherty v. Cal. Kettleman Oil Royalties, Inc., 13 Cal.2d 174, 88 P.2d 690, our Supreme Court reiterated the *joint tort feasor rule* but said that the rule has no application to joint contract debtors under section 1543 of the Civil Code. See, also, Forbes v. Board of Missions, 17 Cal.2d 332, 338, 110 P.2d 3; Bee v. Cooper, 217 Cal. 96, 17 P.2d 740.

In Elizalde v. Murphy, 146 Cal. 168, 79 P. 866, 867, it was held that the provisions of section 1543 of the Civil Code that "A release of one of two or more joint debtors does not extinguish the obligations of any of the others" are universal, and include all releases, however effected.

[9] In fact, Schuh's relationship to Simmel was, it seems to us, more than a "mere guarantor" under section 1543 of the Civil Code. He was financially interested in the organization and in the venture when the credit was extended. On the execution of the guarantee he received a 2½ per cent participating royalty interest in a well then being promoted as well as interests in other wells to be drilled. The satisfaction of the Elma C. Simmel judgment in the manner stated did not operate as a release of Schuh's liability under the guarantee. Pollak v. Staunton, 210 Cal. 656, 666, 293 P. 26; Brown v. Pacific Coast Agency, 53 Cal.App. 788, 790, 200 P. 977; Northern Insurance Co. v. Potter, 63 Cal. 157; Board of Com'rs of Sacramento County v. Bird, 31 Cal. 66; Williams v. Riehl, 127 Cal. 365, 370, 59 P. 762, 78 Am.St.Rep. 60; Bank of America v. Duer, 47 Cal.App.2d 100, 117 P.2d 405.

[10, 11] It is conceded that the giving and acceptance of a promissory note is not the payment of a debt in the absence of an agreement to that effect. Hammond Lumber Co. v. Richardson Building, etc., Co., 209 Cal. 82, 285 P. 851; Farmers', etc., National Bank v. Peterson, 5 Cal.2d 601, 55 P.2d 867. Under the provisions of the written guarantee and the facts and circumstances of this case, the satisfaction of the Simmel judgment did not operate as a bar to the foreclosure of the mortgage here in question.

The defendants next argue that the default of the Fidelity Foundation, Ltd., a trust, and Williams and Lovejoy, trustees, having been entered by the clerk about two years before the filing of their answer and cross-complaint, rendered the decree of foreclosure erroneous because, it is claimed the decree granted relief beyond that prayed for in the complaint, citing sec. 580 of the Code of Civil Procedure.

[12, 13] In the first place, the judgment does not transcend the relief sought

in the complaint. Secondly, answers and cross-complaints were filed by those in default, without objection, and all parties proceeded to trial on the issues raised thereby. Such procedure constituted a waiver of the default of those defendants by the plaintiff and the acceptance of that waiver by those defendants. Madison v. Octave Oil Co., 154 Cal. 768, 99 P. 176; Nicholls v. Anders, 13 Cal.App.2d 440, 56 P.2d 1289; Hestres v. Clements, 21 Cal. 425. Thirdly, the defaulting defendants admitted in their answer that the property involved no longer belonged to the trust but had been conveyed to the Schuhs. No prejudice resulted. Civ.Code, sec. 2930.

[14] Other similar points raised for the first time on appeal will not be considered. White v. City of San Diego, 126 Cal.App. 501, 14 P.2d 1062.

Since this action was submitted, after argument on appeal, defendants have made two separate applications for leave to add additional documentary evidence to the record.

The first petition recites that certain letters, copies of which were set forth, "had become misplaced at the time of trial" and that petitioners did not discover them until after the case had been submitted on appeal. Their prayer is that those letters now be admitted as additional evidence in the case. One letter, dated August 26, 1937, is directed to Louis C. Simmel from attorney Dechter, counsel for plaintiff, and refers to an assignment of ten per cent of gross production from the Simmel lease as security for his indebtedness to one J. D. Rush, and refers to a certain Superior Court action in Los Angeles County based upon a note signed by Simmel and payable to Rush in the sum of $2,520. The letter then states that Dechter would take no further action in that case if Simmel would permit the income from ten per cent of the production per month, or a minimum of $200, to apply on said account, otherwise, he would proceed to judgment. Simmel signed the letter "Accepted". A copy of the complaint and default judgment taken on December 8, 1938, for $2790.90 is also attached, as well as a copy of a letter dated November 12, 1937, from Schuh to Dechter, which recites that Schuh had employed Dechter also as his attorney to "prosecute my claim against Louis C. Simmel based upon * * * monies paid out by me on guarantees for the benefit of * * * Simmel". In this letter Schuh acknowledges that Dechter is also attorney for "Oil Tool Exchange, Inc., who have claims against me". It is claimed that plaintiff, through its attorney, Dechter, had intimate knowledge of Schuh's affairs and therefore this confidential relationship has a great bearing upon his claim of fraud and misrepresentation; and that the Rush claim was an item of, or a part of the judgment rendered against defendant under his guarantee.

[15] Dechter, attorney for plaintiff, in reply recites that he was attorney in the Rush action and that the note there sued upon was given in payment of oil well equipment different from that set forth in the judgment here entered, and that there was no connection between the two transactions; that nothing was received from certain fire insurance policies referred to in one of the letters and that affiant at the time of trial was fully aware of the fact that he, Dechter, was employed by Schuh and the Oil Tool Exchange, Inc., and further that no point was made of that fact at the time of trial. If Dechter, who may have acted as attorney for both litigants at some stage of the proceedings, has wrongfully taken advantage of his dual position, this is not the proper forum for rebuke nor can this question be raised for the first time on appeal when all parties had full knowledge of all the facts at the time of trial and failed to make any point of it at that time.

[16] It appears from our examination of the other evidence here attempted to be presented that it is but cumulative and covers matters and issues previously presented at the trial of the action.

The second petition sets forth copies of two quitclaim deeds. One is from a Johann Schuh to Blanche Schuh, conveying one thousand fractions of expectancy in the property herein involved under the trust. John E. Schuh now claims in his affidavit that the signature to that deed is forged and that plaintiff knew it to be forged. Defendant Schuh does not recite how he knows it to be forged or how the admission of such claimed deed in evidence at this time would be material to the issues here presented.

He next claims that his signature on the other quitclaim deed, which was a quitclaim deed of Mr. and Mrs. Schuh's interest in the property, as trustees, to themselves individually, was placed on it believing at the time that he was signing a lease to the property. In view of admissions of ownership of the property in their answer, the written acknowledgment attached to the deed and the absence of a supporting affidavit of Mrs. Schuh, the merits of this offer, if material under any theory, is not very convincing.

[17] The next offer refers to a letter dated March 16, 1943, from a man named Mills, directed to "Whom it May Concern", concerning some conversation he claims to have had with an agent of plaintiff. The letter is purely hearsay as to plaintiff.

[18] Upon the showing made, we are not convinced that the evidence proffered, which is competent and material to the issues, would cause us to reverse or modify the judgment as given.

Applications to add additional documentary evidence denied. Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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67 Cal.App.2d 225

DE HAVILAND v. WARNER BROS. PICTURES, Inc.

Civ. 14643.

District Court of Appeal, Second District, Division 3, California.

Dec. 8, 1944.

Hearing Denied Feb. 1, 1945.

1. Master and servant 🔑10½

The statute providing that personal service contract could not be enforced against employee beyond term of seven years from commencement of service thereunder, but that contract for service of special or intellectual character might be enforced against employee for term not beyond seven years from commencement of service, did not authorize enforcement of contract for exceptional services against employee for seven years of actual service during period of more than seven calendar years. St. 1937, p. 259, § 2855; Civ.Code, § 3423.

2. Master and servant 🔑10½

The Labor Code section substituting words, "may not be enforced", for words, "cannot be enforced", in statutory provision that personal service contract cannot be enforced against employee beyond seven years from commencement of service thereunder, confers no discretionary power on courts in matter of enforcing such contracts. St.1937, p. 259, § 2855.

3. Statutes 🔑181(1), 184

While purpose sought to be accomplished by statute may be considered as aid to interpretation thereof, question whether Legislature has acted at all in given particular must find answer in statute itself.

4. Master and servant 🔑8(1)

Extensions of motion picture actress' employment contract because of her suspensions by employer for refusing certain roles, as authorized by contract, were ineffective to bind her beyond maximum statutory period of seven years after commencement of services under contract. St.1937, p. 259, § 2855.

5. Constitutional law 🔑48

Legislation enacted with object of promoting welfare of large classes of workers, whose personal services constitute their means of livelihood, and calculated to confer direct or indirect benefits on people as whole, such as statute fixing seven years as maximum period of personal service contract, must be presumed to have been enacted for public reason and as expression of public policy in field to which legislation relates. St.1937, p. 259, § 2855; Const. art. 20, § 17½.

6. Constitutional law 🔑89(1)

The validity of legislation infringing on right of contract must be judged from its tendency to promote welfare of general public rather than that of small percentage of citizens.

7. Constitutional law 🔑89(1)

The power to restrict right of private contract does not exist independently of power to legislate for purpose of preserving public comfort, health, safety, morals and welfare.

8. Master and servant 🔑10½

Employees' rights, declared by statute prohibiting enforcement of personal service contracts against employees beyond seven years from commencement of services thereunder, are within statute providing that rights created in public interest may not be contravened by private agreement. St. 1937, p. 259, § 2855; Civ.Code, § 3513.

9. Master and servant ⚷10½

The statutory limitation of life of personal service contract to seven years from commencement of services thereunder and employees' rights under such statute cannot be waived by them. St.1937, p. 259, § 2855.

10. Action ⚷6

Where parties to action sought only declaration of their rights under personal service contract, proof was not addressed to any other issue, and court found only essential facts as to making and meaning of contract and absence of violation thereof by plaintiff, injunction against defendant's enforcement of contract was improper as unsupported by pleadings, proof, or findings. St.1937, p. 259, § 2855.

11. Appeal and error ⚷1071(6)

The trial court's failure to find specifically on issues raised by defendant's answer was not harmful to defendant, where parties' stipulation covered all material facts on which defendant relied.

12. Injunction ⚷11

An injunction is not proper to restrain commission of acts in future, unless there is good reason to believe that they will be committed if not restrained.

13. Injunction ⚷11

There is no occasion for or right to injunction restraining commission of acts in future, where no similar acts have been committed in past, and none are threatened to be committed in future, and it appears reasonable to believe that they will not be committed.

14. Action ⚷6

A motion picture actress was not entitled to injunction restraining producer from enforcing contract for her services after expiration of statutory maximum life of contract, in absence of anything in record to justify belief that producer would not abide by court's final declaration as to parties' rights under contract and final decree terminating it, though producer openly insisted that actress was still bound by contract. St.1937, p. 259, § 2855.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Olivia De Haviland against Warner Bros. Pictures, Inc., to terminate a contract for plaintiff's services as a motion picture actress. Judgment for plaintiff, and defendant appeals.

Modified, and affirmed as modified.

Froston & Files, Ralph E. Lewis, and Charles A. Loring, all of Los Angeles, for appellant.

Gang, Kopp & Tyre, of Los Angeles, for respondent.

SHINN, Justice.

Defendant has appealed from a judgment declaring at an end its contract for the services of plaintiff as a motion picture actress. The ground of the decision was that the contract had run for seven years, the maximum life allowed such contracts by former Civil Code section 1930, now section 2855 of the Labor Code, St.1937, p. 259. It was executed April 14, 1936, for a term of fifty-two weeks and gave the employer the right to extend the term for any or all of six successive periods of fifty-two weeks each. These options were exercised from time to time by the employer so as to cover the entire contract period. The services commenced May 5, 1936, and, except as interrupted by certain periods of suspension, were continued to August 13, 1943. The present action was commenced August 23, 1943. The contract gave the Producer, defendant, the right to suspend plaintiff for any period or periods when she should fail, refuse or neglect to perform her services to the full limit of her ability and as instructed by the Producer and for any additional period or periods required to complete the portrayal of a role refused by plaintiff and assigned to another artist. Plaintiff was to receive no compensation while so suspended or thereafter until she offered to resume her work. It was provided that the Producer had the right to extend the term of the contract at its option, for a time equal to the periods of suspension. There were several such suspensions after December 9, 1939, and one suspension of 30 days which plaintiff agreed to and which was occasioned by her illness. In each instance defendant exercised its right to extend the term of the agreement. The several periods of suspension totaled some twenty-five weeks. The facts as to the suspensions are not in dispute; defendant's right to impose them is not questioned. Plaintiff's reason for refusing the several roles was that they were unsuited to her matured ability and that she could not faithfully and conscientiously portray them. Her good faith and motives are not in issue, but according to the contract the Producer was the sole judge in such matters and she had to do as she was told. The sole question is whether the provisions for suspension, and for extension of the term of the agreement, were lawful and effective insofar as they purported to bind plaintiff beyond seven years from the date her services were commenced. If they were lawful, plaintiff still owes twenty-five weeks of service; otherwise the contract came to an end May 5, 1943.

As enacted in 1872, section 1980 of the Civil Code read as follows: "A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation."

In 1931, page 1493 section 1980 was amended to read as follows:

"A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, and other than a contract entered into pursuant to the proviso hereinafter in this section contained cannot be enforced against the employee beyond the term of seven years from the commencement of service under it;

"Exceptional services. Provided, however, that any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not beyond a period of seven years from the commencement of service under it.

"Presumptive measure of compensation. Notwithstanding the provisions hereinabove in this section contained, if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation."

In 1937 the section was repealed and section 2855 of the Labor Code was enacted, as follows: "A contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4 of this division, may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation."

Section 2 of the Labor Code provides: "The provisions of this code, in so far as they are substantially the same as existing provisions relating to the same subject matter, shall be construed as restatements and continuations thereof and not as new enactments."

It is clear that section 2855 of the Labor Code is a restatement and continuation of former Civil Code section 1980 and not a new enactment.

[1, 2] It is the contention of defendant that under section 1980, as amended in 1931, a contract for "exceptional services" could be enforced against an employee for seven years of *actual* service, even though the employee would thereby be required to render services over a period of more than seven calendar years. Defendant's argument, in substance, is as follows: "If it had not been the intention to take contracts for exceptional services out of the seven years' limitation, there would have been no occasion for the 1931 amendment, since employers holding contracts for the exclusive services of artists (a term we use to denote all of those who contract to render "exceptional services") could enjoin the rendering of the services of their employees to others during the term of the contract (Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Rep. 749; Civil Code, sec. 3423); section 1980 of the Civil Code had always made an exception of contracts of apprenticeship; the 1931 amendment, in addition to changing the term of seven years, created another exception expressed in the first paragraph by the words "other than a contract entered into pursuant to the proviso hereinafter in this section contained." The effect of this language, it is claimed, was to take

contracts for "exceptional services" out of the general limitation of seven years and to state a special rule for them as found in the proviso. Our attention is then directed to the wording of the proviso that contracts for exceptional services "may nevertheless be enforced against the person contracting to render such service, *for a term not beyond a period of seven years* from the commencement of service under it." It is argued that the phrase "for a term not beyond a period of seven years" in the proviso, instead of the phrase "beyond the term of seven years" which was retained in the paragraph relating to contracts for services of a general nature, had a peculiar significance. The rule is cited that "when different language is used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning and effect" (McCarthy v. Board of Fire Com'rs, 1918, 37 Cal.App. 495, 174 P. 402, 403), and it is said in defendant's brief: "Under the rule above stated, such a distinctive choice of different words in two parts of the same statute must have indicated a different meaning and a different intent, and among other things, it indicates that 'term' was not used in the sense of mere lapse of time, since 'period' was also used, but referred to a 'term' established by the contract."

If we are to accept defendant's construction of the section as amended, we must add words to the phrase used in the proviso so that it would read "for a term not beyond a period of seven years *of actual service* from the commencement of service under it." In fact, the words "of actual service" could have been used appropriately after the word "term" and also after the words "seven years" if it had been the intention to do away with the limitation of seven calendar years from the commencement of service. It is true that the exception in the first clause of contracts for exceptional services, to which the proviso relates, suggests a possible intention to take such contracts out of the general rule, but the proviso itself is the enacting clause and the controlling one. It is the clause which determines whether the general limitation was intended to be removed as to contracts for exceptional services. Defendant's contention is that there could have been only one purpose in amending the section, namely, to allow the enforcement against employees of contracts for personal services to the extent of seven years of actual service, regardless of the time over which such services might extend. With this we cannot agree. The difficulty with the argument, and which we think is insurmountable, is that the legislature has not used the words "of service," and the failure to use those or equivalent words is far more significant as indicating the purpose of the enactment than the entire amendment as written. We cannot believe that the phrase "for a term not beyond a period of seven years" carries a hidden meaning. It cannot be questioned that the limitation of time to which section 1980 related from 1872 to 1931 was one to be measured in calendar years. It is conceded that contracts for general services are limited to seven calendar years. The substitution of years of service for calendar years would work a drastic change of state policy with relation to contracts for personal services. One would expect that such a revolutionary change, even as applied to a particular class of contracts, would be given expression in clear and unmistakable terms. It is difficult—in fact, too difficult—to believe that a purpose which could have been expressed so simply and clearly was intentionally buried under the camouflage of uncertainty and ambiguity. That the 1931 amendment of section 1980 was ineptly phrased may not be doubted. Confirmation of this fact is to be found in the changes of phraseology that were made when the section was carried into the Labor Code. The obvious redundancy in the phrase "for a term not beyond a period of seven years" was corrected and the innocuous phrase "other than a contract entered into pursuant to the proviso hereinafter in this section contained" was eliminated. The words "cannot be enforced" in the first clause were changed to "may not be enforced." This latter change, we might say, was obviously in the interest of grammatical purity and was not intended to confer any discretionary power upon the courts in the matter of enforcing personal service contracts. The words "may not" as used are mandatory.

Although as a rule legislative enactments are drawn under expert guidance and with much care, it is inevitable that ambiguity will be encountered occasionally. But the ambiguities found in the 1931 amendment amounted to no more than imperfections of phraseology and fell far short of working any change in the substantive law. The language of section 1980, Civil Code, was carefully revised in the drafting of the Labor Code section. The ambiguous language which was suggestive of a possible meaning that contracts of artists might be enforced for seven years of actual service was eliminated. The result, we think, was to state in the Labor Code section the true meaning of amended section 1980 and to state it in more carefully chosen terms. Again the phraseology which was used clearly indicated that the limitation applied to calendar years; otherwise the phrase "term of service" or "years of service" would have been used. The later enactment, we think, may be regarded as an interpretation by the legislature of the meaning of section 1980, that is to say, that the phrases which were eliminated from that section were merely redundant and had added nothing to its meaning.

What we have said does not fully answer the question why section 1980 was amended, if it was not to make a special rule for the enforcement of contracts of artists. Defendant's argument is that if it did not serve that purpose it served no purpose at all. The amendment would seem to have been unnecessary, for it worked no change in the substantive or procedural rights of either the employer or the employee. It is not questioned by either party that before the amendment was adopted, employers who had contracted for the exclusive services of artists could enforce their contracts for the term limited by section 1980 by means of injunction restraining the rendering of services of their employees to others. Both plaintiff and defendant cite Lumley v. Gye, supra, in support of this proposition. Prior to 1919, section 3423 of the Civil Code provided that an injunction may not be granted to prevent the breach of a contract which would not be subject to specific performance. In 1919, p. 328, the section was amended so as to except contracts for exceptional services such as the one in issue, which provide a rate of compensation of not less than $6,000 per annum. But even though the amendment of section 1980 did not enlarge the rights of employers to enforce such contracts other than to extend the term to seven years, the amendment was nevertheless desirable because it constituted a statement of a well established rule of equity and there is a good purpose served by the codification of established rules of law or equity. Even after the 1919 amendment of section 3423, there was in the codes no specific, affirmative statement of the right of an employer to enforce any kind of contract for personal services, by injunction or otherwise. The amendment of section 3423 inferentially gave the employer the right to an injunction in certain cases. The amendment of 1980 stated the right in affirmative terms. It had the effect at least of correlating the two sections and removing any doubt as to what was intended by the amendment of section 3423, which, by inference only, extended the right of injunction in certain cases to the contract rights of the employers of artists. It was undoubtedly to the advantage of all those who might be affected, to have the law put in statutory form. These were sufficient reasons, and we believe the real reasons, for the amendment of section 1980.

[3, 4] We have not overlooked the earnest arguments of counsel as to whether a producer of motion pictures should or should not have the right to the exclusive services of an artist for a period of seven years of service. It is to be presumed that the legislature considered such matters in legislating upon the subject, but the arguments do not aid us in determining what the code sections mean. While the purpose sought to be accomplished in the enactment of a statute may be considered as an aid to interpretation, the question whether the legislature has acted at all in a given particular must find answer in the statute itself. We think the expressions of the various enactments cannot be bent to a shape that will fit defendant's argument, and that the several extensions of plaintiff's contract due to her suspensions were ineffective to bind her beyond May 5, 1943, seven years after her services commenced.

A second contention is that if defendant had not the right under the code to demand seven years of service, plaintiff has waived the right to question the validity of the extensions, which carried beyond the seven year period. By her breaches of the contract, it is claimed, she brought into operation the provisions for extension and is now estopped to avoid them. Defendant relies upon section 3513 of the Civil Code, reading as follows: "Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." Defendant insists that the limitations of said sections 1980 and 2855 were enacted solely for the benefit of employees and not for a public reason, and may be waived. Reliance is placed upon Stone v. Bancroft, 1903, 139 Cal. 78, 70 P. 1017, 72 P. 717, as a supporting authority. But the case went no further than to hold that the statute, section 1980, as it then read, was not available to the employer as a defense to an action for salary earned after the (then) two years statutory period, for the reason that the limitation applied to actions by the employer but not to those brought against him by the employee. It was in that connection that the court held the limitation to be for the benefit of the employee only. No question of waiver or of public policy was involved or mentioned.

[5, 6] The fact that a law may be enacted in order to confer benefits upon an employee group, far from shutting out the public interest, may be strong evidence of it. It is safe to say that the great majority of men and women who work are engaged in rendering personal services under employment contracts. Without their labors the activities of the entire country would stagnate. Their welfare is the direct concern of every community. Seven years of time is fixed as the maximum time for which they may contract for their services without the right to change employers or occupations. Thereafter they may make a change if they deem it necessary or advisable. There are innumerable reasons why a change of employment may be to their advantage. Considerations relating to age or health, to the rearing and schooling of children, new economic conditions and social surroundings may call for a change. As one grows more experienced and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation. Legislation which is enacted with the object of promoting the welfare of large classes of workers whose personal services constitute their means of livelihood and which is calculated to confer direct or indirect benefits upon the people as a whole must be presumed to have been enacted for a public reason and as an expression of public policy in the field to which the legislation relates. It was said in Re Miller, 1912, 162 Cal. 687, 695, 124 P. 427, 429: "The courts must always assume that the Legislature in enacting laws intended to act within its lawful powers, and not to violate the restrictions placed upon it by the Constitution." The validity of legislation infringing upon the right of contract is to be judged from its tendency to promote the welfare of the general public rather than that of a small percentage of citizens. In re Kazas, 1937, 22 Cal.App.2d 161, 70 P.2d 962.

[7, 8] The power to restrict the right of private contract is one which does not exist independently of the power to legislate for the purpose of preserving the public comfort, health, safety, morals and welfare. The power to provide for the comfort, health, safety and general welfare of any or all employees is granted to the legislature by Article XX, section 17½ of the state Constitution. Enactments exercising the power have been upheld in many instances. In re Twing, 1922, 188 Cal. 261, 204 P. 1082; In re Petition of Ballestra, 1916, 173 Cal. 657, 161 P. 120; Sears v. Superior Court, 1933, 133 Cal.App. 704, 24 P.2d 842; In re Samaha, 1933, 130 Cal.App. 116, 19 P.2d 839; People v. McEntyre, 1938, 32 Cal.App.Supp.2d 752, 84 P.2d 560. In Re Oswald, 1926, 76 Cal.App. 347, page 351, 244 P. 940, page 941, the court said of an act making it a misdemeanor to refuse in certain circumstances to pay wages when due: "We are persuaded that the public has an interest in the prevention of wrongs of this character, just as much as it is interested in the prevention of some other of those wrongs against property or wrongs against persons which are commonly regarded as being properly within the scope of operation of criminal law." Penal statutes, within constitutional limitations, are conclusive evidence that the prohibited acts would be against the public interest. The several statutes which were involved in the cases last cited were enacted for the benefit of employees and also to regulate the employer-employee relationship in the interest of the public at large. The code sections we are considering are no less closely identified with public interest. Under the same principles, a law of Louisiana limiting the term of personal service contracts was upheld as a proper exercise of the police power and an expression of state policy in Shaughnessy v. D'Antoni, 5 Cir., 1938, 100 F.2d 422. See also Hill v. Missouri-Pac. Ry. Co., D.C. 1933, 8 F.Supp. 80; Page v. New Orleans Public Service, Inc., 1936, 184 La. 617, 167 So. 99; Caldwell v. Turner, 1911, 129 La. 19, 55 So. 695. The rights of employees as now declared by section 2855 of the Labor Code fall squarely within the prohibition of section 3513 of the Civil Code, that rights created in the public interest may not be contravened by private agreement.

[9] Finally, it may be pointed out that the construction of the code sections contended for by defendant would render the

law unworkable and would lead to an absurd result. If an employee may waive the statutory right in question by his conduct, he may waive it by agreement, but if the power to waive it exists at all, the statute accomplishes nothing. An agreement to work for more than seven years would be an effective waiver of the right to quit at the end of seven. The right given by the statute can run in favor of those only who have contracted to work for more than seven years and as these would have waived the right by contracting it away, the statute could not operate at all. It could scarcely have been the intention of the legislature to protect employees from the consequences of their improvident contracts and still leave them free to throw away the benefits conferred upon them. The limitation of the life of personal service contracts and the employee's rights thereunder could not be waived.

[10] One of the conclusions of law was the following: "Defendant may not enforce the Contract against plaintiff and defendant should be enjoined and restrained from enforcing the Contract or attempting to enforce the Contract against plaintiff or interfering with the rendition by plaintiff of services for persons, firms or corporations other than defendant." The judgment contained an injunctive provision in the same language. Defendant challenges this provision as unsupported by the pleadings, the proof or the findings. The objection is well founded. Both plaintiff and defendant sought a declaration of their respective rights under the contract. The proof was not addressed to any other issue. Plaintiff was the only witness and her testimony and the documentary evidence that was received related only to the services she had performed and to those she had declined to perform and which led to the suspensions. The facts were not in dispute. Plaintiff offered to prove, in claiming a right to an injunction, that defendant had sent out many letters to other producers stating its position with reference to the contract and its claim that plaintiff was still in its employ. The offer was rejected and the court in so ruling stated, "I think the objection should be sustained. You see it is not an action in which Miss DeHaviland is seeking relief from any threatened boycott or threatened action on the part of Warner Brothers. That is not in this case." The findings covered the essential facts as to the making of the contract, the dispute as to its meaning, and found that plaintiff did not violate the contract or default thereunder after May 5, 1943. There was no finding of facts which would justify an injunction.

[11] The last finding was: "All of the allegations of the answer of defendant inconsistent with the foregoing findings of fact are untrue." This was no finding at all upon the facts as to the several breaches of the contract and the extensions which were alleged in the answer. No point is made by defendant of the failure to find specifically upon the issues raised by the answer and no harm could have resulted from such failure in view of the stipulation made which covered all of the material facts upon which defendant relies.

[12-14] There is nothing in the record that would justify a belief or even a suspicion that defendant will not respect and abide by the final declaration of the court as to the rights of the parties in the premises. An injunction is not proper to restrain the commission of acts in the future unless there is good reason to believe they will be committed if there is no restraint. Where no similar acts have been committed in the past and none are threatened to be committed in the future, and where it appears reasonable to believe they will not be committed, there is no occasion for an injunction and no right to one. The fact that defendant has openly insisted that plaintiff is still bound to it by contract does not justify the belief that it will do so contrary to a final decree that the contract has ended. See Sunset Scavenger Corp. v. Oddou, 1936, 11 Cal.App.2d 92, 53 P.2d 188.

The judgment is modified by striking out all of paragraph 5 after the words, "Defendant may not enforce the contract against plaintiff," and as modified is affirmed, respondent to recover costs.

DESMOND, P. J., and PARKER WOOD, J., concur.

67 Cal.App.2d 250

WILLIAMSON v. PACIFIC GREYHOUND LINES.

Civ. 7104.

District Court of Appeal, Third District. California.

Dec. 12, 1944.

Rehearing Denied Jan. 10, 1945.
Hearing Denied Feb. 8, 1945.

1. Action ⚷27(4)
Carriers ⚷312

Where complaint alleged that through negligence of bus company employees in failing to inspect baggage rack and driving at excessive speed, passenger was injured as result of baggage falling from rack, action against bus company for such injury sounded in tort and not upon breach of contract of safe conveyance, though complaint incidentally alleged such contract and, in absence of allegation of county in which injury occurred, venue was properly changed from county where contract allegedly was entered into to county of defendant corporation's residence. Code Civ.Proc. § 395.

2. Action ⚷27(1)

The gravamen of cause of action determines whether it is based upon tort or breach of contract.

3. Action ⚷27(1)

In determining whether action sounds in contract or in tort, the character of the action is to be determined by the nature of the grievance rather than by the form of the pleadings.

4. Action ⚷27(1)

Whether action is based on breach of contract or sounds in tort is determined by the gravamen, or essential facts or grievance as alleged, to be ascertained from a consideration of the pleading as a whole.

5. Action ⚷27(1)

Actions based on negligence through failure to perform duties created by a contractual relation, though containing elements of both contract and tort, are regarded as actions ex delicto, since negligence is considered the gravamen of the action.

6. Pleading ⚷34(4)

A pleading before judgment is to be construed most strongly against the pleader.

7. Pleading ⚷34(4)

In determining whether action is founded on breach of contract or on tort as respects proper venue thereof, court may be justified in construing against pleader a complaint which is uncertain as to nature of the action. Code Civ.Proc. § 395.

8. Action ⚷27(4)

Where complaint alleges breach of duty by common carrier and consequent injury to passenger, such violation of its obligation by carrier is the gravamen of action, and action arises ex delicto and not ex contractu.

◆

Appeal from Superior Court, Napa County; Mervin C. Lernhart, Judge.

Action by Margaret Williamson against Pacific Greyhound Lines, a corporation, for personal injuries sustained by plaintiff while riding as a passenger in defendant's bus. From an order changing the place of trial to the residence of defendant corporation, plaintiff appeals.

Order affirmed.

Clarence N. Riggins, of Napa, for appellant.

Cooley, Crowley & Supple and Leighton M. Bledsoe, all of San Francisco, for respondent.

THOMPSON, Justice.

The plaintiff has appealed from an order changing the place of trial in a suit for damages for personal injuries from Napa County to the City and County of San Francisco, which is the residence of the defendant corporation.

The complaint alleges that while plaintiff was riding as a passenger in defendant's stage from Napa to San Francisco she suffered personal injuries as a result of baggage falling from a rack above her seat and striking her on the head. It is alleged that the accident occurred through the negligence of the employees of the defendant in failing to inspect the racks to see that the baggage was safely stored, and in driving the bus at an excessive rate of speed. The complaint incidentally alleges that plaintiff paid her fare and that the defendant agreed to exercise "utmost care" to safely convey plaintiff to her destination. The damages sought to be recovered are for plaintiff's personal injuries and incidental expenses incurred on that account for medical care and loss of wages. The complaint does not allege the name of the County in which the accident occurred, but defendant's affidavit, filed on motion for the change of venue, avers that the injuries, if any, were sustained in either Sonoma or Marin County. That averment was not contradicted. No counter-affidavit was filed by the plaintiff in rebuttal of defendant's affidavit.

The appellant contends the court erred in granting the change of venue for the reason that the complaint is founded on the contract of the defendant to safely convey plaintiff as a passenger to her destination, and that Napa County, the place where the contract was entered into, is the proper place of trial as provided by Section 395 of the Code of Civil Procedure. In support of her claim of right to waive the tort and rely upon a breach of contract for her cause of action, the appellant cites Justis v. Atchison, Topeka & Santa Fe Ry. Co., 12 Cal.App. 639, 108 P. 328, Sheldon v. Steamship Uncle Sam, 18 Cal. 526, 79 Am. Dec. 193, and 1 C.J.S., Actions, p. 1119, § 49 (5).

[1] The court did not err in granting defendant's motion for a change of venue to the City and County of San Francisco, which was the place of its residence. Sec. 395, C.C.P.; Basler v. Sacramento Electric, Gas & Ry. Co., 166 Cal. 33, 134 P. 993; Rushing v. Pickwick Stages System, 113 Cal.App. 240, 298 P. 150; Nathan v. Locke, 108 Cal.App. 158, 287 P. 550, 291 P. 286; Kings Laboratories, Inc. v. Yucaipa Valley Fruit Co., 18 Cal.App.2d 47, 62 P.2d 1054; Mansfield v. Pickwick Stages, etc., 191 Cal. 129, 215 P. 389; 1 C.J.S., Actions, p. 1121, § 49 (5).

Section 395 of the Code of Civil Procedure provides in part: "* * * If the action be *for injury to person,* or to personal property, or for death from wrongful act, or negligence, either the county *where the injury occurs,* or where the injury causing death occurs, *or the county in which the defendants, or some of them, reside at the commencement of the action, shall be a proper county for the trial of the action."* (Italics added.)

In the present case it is not contended the injuries to plaintiff occurred in Napa County. Defendant's affidavit for change of venue avers, on information and belief, that the injuries sustained by plaintiff, if any, did not occur in Napa County, but on the contrary that they were sustained in either Sonoma or Marin County. That averment is not controverted.

[2] The authorities last cited are uniform in declaring that the gravamen of the cause of action relied upon determines whether it is dependent upon tort or a breach of contract. The "gravamen" is defined in Webster's New International Dictionary, 2d Ed., p. 1094, as "The material part of a grievance, charge, etc." In the Basler case, supra, the plaintiff appealed from a judgment dismissing the action for want of prosecution. The sole question on appeal was whether the statute of limitations barred the action. That question required the court to determine whether the action was founded on a suit for breach of a contract or upon a tort. Like the present suit, the plaintiff alleged that his wife was injured as a result of defendant's negligence in operating the train, causing her to be violently thrown against a seat in the car in which she was riding and to be thereby injured. That complaint also alleged that plaintiff's wife was injured while riding as a passenger, for which privilege she had paid fare. It was contended the suit was based on the contract for safe conveyance and that the action was therefore not barred by the statute of limitations. The Supreme Court said [166 Cal. 33, 134 P. 994]: "It is true that the complaint avers the fact that Mrs. Basler paid her fare and the further facts that she was received as a passenger by defendant and was injured by the negligence of its servants while she was such passenger. * * * In such actions where, as here, *the breach of duty and the consequent injury to the passenger are set forth, such violation of its obligation by the common carrier is the gravamen of the action, which arises ex delicto and not ex contractu.* (Citing authorities.)" (Italics added)

[3] Likewise, the court says in the Rushing case, supra [113 Cal.App. 240, 298 P. 151]:

"In determining whether an action is on the contract or in tort, *the character of the action is to be determined by the nature of the grievance rather than by the form of the pleadings.* (Citing authorities.) '*If the complaint states a cause of action in tort and it appears that this is the gravamen of the complaint, the nature of the action is not changed by allegations in regard to the existence or breach of a con-*

tract.' 1 Cor.Jur., p. 1016. We had occasion to consider this same question in Nathan v. Locke [108 Cal.App. 158] 287 P. 550, 551 [291 P. 286], where we said: 'Illustrations of the latter class of actions are those for damages arising out of the contract relations between bailor and bailee, carrier and passenger, master and servant, innkeeper and guest, etc. In such cases the tort which is the basis of the claim for damages lies in the breach of the duty imposed by law, and *the allegations of the contract relations between the parties are merely for the purpose of showing that the plaintiff was not a trespasser or that he was lawfully in the position or situation at the time the defendant's breach occurred.* * * *'

"It must be evident from the language quoted that the injuries resulting from defendant's alleged negligence are the gravamen of the action pleaded, and the action is therefore one in tort." (Italics added.)

[4, 5] The authorities are uniform in holding that the nature of the action with respect to whether it is based on a breach of contract or sounds in tort must be determined by the gravamen, or essential facts or grievance as alleged, to be ascertained from a consideration of the pleading as a whole. 1 C.J.S., Actions, p. 1100, § 46; 1 Cal.Jur. 322, § 18. In the authority last cited it is said: "Actions based on negligence through failure to perform duties created by a contractual relation, such as the relation between a hospital and a patient, an employer and an employee, and a *common carrier and a passenger,* although containing elements of both contract and tort, *are regarded as actions ex delicto, since negligence is considered the gravamen of the action.*" (Italics added.)

[6, 7] It is the established rule that before judgment a pleading is to be construed most strongly against the pleader. 21 Cal.Jur. 51, § 29. If the complaint is uncertain as to the nature of an action, on a motion for change of venue the court may be justified in construing it against the pleader in determining whether the action is founded on a breach of contract or upon tort.

There is nothing in the case of Sheldon, supra, upon which the appellant relies, in conflict with what we have previously said regarding the rule in determining whether the action is founded on a breach of contract or upon tort. It is clear that the gravamen of that action was alleged fraud of the steamship company in advertising and contracting to safely and speedily convey Sheldon's wife as a passenger from San Francisco to San Juan del Sur. It appeared that the company previously had a charter from the Government of Nicaragua for transit across the Isthmus, which had been revoked. The contract for safe and prompt conveyance of Sheldon's wife was made in 1856. The company deceived plaintiff regarding its facilities for safe and prompt conveyance of passengers. Mrs. Sheldon suffered delay and hardship which caused inconvenience, expense and illness. The court said: "The complaint charges, and the jury find, that Mrs. Sheldon was taken to Panama without her consent, * * * that she was compelled to disembark in an open boat during a severe rain, and was transported to Aspinwall by railroad in a coal car; that she was detained at Aspinwall seventeen days, during which period she was abandoned by the company, and left without protection or assistance; that the food and accommodations at Aspinwall were bad, and the climate unhealthy," and that she suffered damages as a result thereof.

The court held that: "The treatment to which she was subjected upon her arrival at Panama, and the fraud and imposition which had been practised upon her, make out a gross and palpable wrong. For this wrong the law entitles her to compensation in damages."

Clearly the gravamen of that action was based upon a contract for conveying Mrs. Sheldon as a passenger from San Francisco to San Juan del Sur, which was procured by fraud, and which was not fulfilled. It was not a suit primarily founded on negligence. It was based on fraud and neglect. The court properly held, "It is immaterial that the injury is charged to have been committed in violation of a contract." The judgment was reversed on the ground that "Plaintiffs cannot recover jointly [as husband and wife] in an action ex contractu for a breach of the contract." The construction of the complaint in that case distinguishes it from the allegations in the present action.

We conclude that the Justis case, supra, upon which the appellant chiefly relies, is not in conflict with what we have previously said regarding the duty of the court to determine from the gravamen of the complaint whether the case properly sounds in contract or in tort. The main issue in the Justis case was the question as to whether the release of liability for the injuries sustained would become binding upon both the husband and wife without the husband joining therein since damages for injuries to a wife is community property under the statutes of California. The court said in that regard [12 Cal.App. 639, 108 P. 329]: "The right of action for injury to the wife and the money recovered therefrom being community property, the wife could not * * * of course, alone, execute a release or satisfaction of the obligation."

[8] The question as to whether the complaint was founded on contract to safely convey the wife to her destination based on a contract represented by the purchase and payment of a ticket on a railway train was only incidentally involved. The court merely determined that under Section 2100 of the Civil Code, "A carrier of persons for reward must use the utmost care and diligence for their safe carriage." Incidentally, the court did say, "The complaint here states a cause of action against the defendant for a violation of the obligation assumed by it to carry Mrs. Justis in safety to her destination." But the opinion fails to relate the allegations of the complaint upon which the court determined that "The facts alleged in the complaint sufficiently state a cause of action based upon the contract." In accordance with the well established rule that the question as to whether the gravamen of the allegations of the complaint indicate that the action is founded on contract or upon tort, we must assume that the complaint in the Justis case adequately shows that it was properly founded on contract. Each case must rest, in that regard, upon the construction of the facts related in the complaint taken as a whole. That case recognizes the fact that actions for damages to a passenger for negligence of the carrier usually sound in tort and not upon contract. Numerous cases in California and in other jurisdictions recognize that fact. Any other rule would lead to hopeless confusion regarding the proper venue of an action in ordinary negligence cases for personal injuries received. The later Supreme Court case of Basler v. Sacramento Electric Gas & Ry. Co., supra, determines that rule, wherein it is said: "Where, as here, the breach of duty and the consequent injury to the passenger are set forth, such violation of its obligation by the common carrier *is the gravamen of the action, which arises ex delicto and not ex contractu.*" Certainly the Justis case is not controlling of that issue in this case.

Considering the complaint in this case as a whole, we are convinced this is clearly an action for damages for personal injuries, based on alleged negligence of the employees of the Pacific Greyhound Lines, sounding in tort and not upon contract, in spite of the fact that incidentally it is alleged that the accident occurred while the plaintiff was riding in the bus as a paid passenger holding a ticket requiring the carrier to exercise utmost care and diligence for her safe conveyance.

The order is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

67 Cal.App.2d 218

HANCOCK OIL CO. OF CALIFORNIA et al. v. HOPKINS et al.

Civ. 13746.

District Court of Appeal, Second District, Division 3, California.

Dec. 8, 1944.

1. Mines and minerals 🔑79(3)

Under oil and gas lease providing for reduction of royalties "if it should hereafter appear" that lessors owned less than fee simple, "appear" was properly construed in ordinary and popular sense as that which is to be seen at first sight, and hence lessees could withhold royalty payments before and until determination in interpleader action of third party's adverse claims to the land. Civ.Code, § 1644; Code Civ.Proc. § 1861.

See Words and Phrases, Permanent Edition, for all other definitions of "Appear".

2. Mines and minerals 🔑79(3)

In construing oil and gas lease provision for reduction of royalty payments, court must look to the instrument in which the word "appear" was used rather than to lexicographers.

3. Mines and minerals ⚷79(3)

In oil and gas lease provision for reduction of royalty payments, if it should appear that lessor owned less than entire fee, "appear" must be given a meaning which would lead to a reasonable result.

4. Mines and minerals ⚷52

In action to enjoin forfeiture of oil and gas lease, whether letter from lessees amounted to a construction of disputed terms in lease was an evidentiary matter, on which trial court was justified in believing that letter did not have that effect because written in ignorance of relevant facts.

5. Appeal and error ⚷843(2)

Where reviewing court held with appellees as to meaning of word in oil and gas lease, trial court's finding concerning intentions of appellants was immaterial, and sufficiency of evidence to support it would not be reviewed.

6. Mines and minerals ⚷52

In action to enjoin forfeiture of oil and gas lease for failure to pay royalties because of third party's claim of interest in the land, evidence did not support finding that third party's claim was not without foundation.

7. Appeal and error ⚷1071(5)

A finding wholly outside of the issues pleaded or tried was a nullity which need not be stricken out on appeal, and judgment would be affirmed if otherwise correct.

◆

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by the Hancock Oil Company of California and another against W. L. Hopkins and others to enjoin forfeiture of oil and gas lease. From a judgment for plaintiffs, defendants appeal.

Affirmed.

See, also, 130 P.2d 490.

Schauer, Ryon & McMahon and Robert W. McIntyre, all of Santa Barbara, for appellants.

Pease & Dolley, of Los Angeles, for respondents.

SHINN, Acting Presiding Justice.

Plaintiffs, lessees under an oil and gas lease, brought this action to enjoin defendants, their lessors, from declaring a forfeiture of the lease for failure to pay landowner's royalties to defendants. The judgment was in favor of plaintiffs. It ordered plaintiffs to pay to the clerk of the court all landowner's royalties accruing under the lease and enjoined defendants from declaring a forfeiture of the lease for failure to pay royalties, pending the final determination of another action then pending in which third parties claimed title to the demised land and the royalties. Defendants appealed from the judgment.

The lease was entered into December 18, 1936. Wells were drilled and brought in, with production which proved the land to have great value. All royalties were paid to defendants until January, 1941, when plaintiffs received a letter from a Mr. Schaeffer, attorney for Independent Distributing Company, notifying them that his client claimed to be the owner of the land and would hold plaintiffs accountable for all royalties payable under the lease. It was not stated in this letter whether Independent Company claimed to have been the owner at the time the lease was made. Plaintiffs answered the letter, to the effect that they would have to continue to pay royalties to defendants, and sent a copy of the letter and their reply to defendants. Plaintiffs received a second letter from Mr. Schaeffer stating that an action had been commenced by Independent against defendants herein, asserting title to the land and the royalties as of the date of the lease and at all times thereafter. Upon request of plaintiffs, defendants furnished plaintiffs a copy of the complaint of Independent and shortly thereafter were advised by plaintiffs that it would be necessary to impound the royalties until the claims of Independent were disposed of. On February 27, 1941, defendants gave plaintiffs notice that they were in default in the payment of royalties for the month of January and that unless the default should be remedied within sixty days thereafter the lessors would terminate the lease in accordance with the provisions thereof. Plaintiffs then filed a suit in interpleader against defendants herein and Independent, paid into court royalties for the months of January, February and March, and ever since have deposited with the clerk all royalties accruing under the lease. The present action also was instituted seeking an adjudication of the rights of plaintiffs and defendants under the lease and an injunction against a forfeiture of the lease for non-payment of royalties. In the interpleader action a demurrer of the defendants herein was sustained without leave to amend and judgment was entered in their favor. Plaintiffs appealed from that judgment. That appeal and the one in the instant case were on the calendar of this court at the same time. Inasmuch as an affirmance of the judgment in the interpleader action would have made it necessary for plaintiffs herein to continue to pay royalties to defendants or to resist a claim of forfeiture for failure to make payment, submission of the present appeal was deferred pending a final determination of the appeal in the interpleader action. The judgment in that action has been reversed by the Supreme Court (Hancock Oil Co. v. Independent Distributing Co., 1944, 150 P.2d 463) and it has been finally determined that upon the facts alleged in the complaint therein plaintiffs have a right to interplead their lessors and the third party claimant, Independent Company.

[1] Although a judgment on the merits in the interpleader action, when it is rendered, will determine the conflicting rights to the royalties, the question whether the failure to continue royalty payments to defendants furnishes the latter with a ground for termination of the lease will not have been determined. That question is before us and calls for a construction of paragraph 17 of the lease, which reads as follows: "If it should hereafter appear that the lessor, at the time of making this lease, owns a less interest in the demised premises than the fee simple estate or the entire interest in the oil and gas under the demised premises, then the rentals and/or royalties accruing hereunder shall be paid to the lessor in the proportion which its interest bears to the entire fee simple estate or to the entire estate in said oil and gas." The trial court held that upon the facts alleged in the complaint, the substance of which we have stated, the lessees are justified in withholding royalty payments until a determination of the adverse claims thereto asserted by Independent Company. The parties agree that the case turns upon the meaning to be given to the word "appear" as used in the quoted paragraph —whether it justifies action from appearances or only from proven facts. "Appear" is synonymous with "seem." Bouvier, 1926. It may mean "have the semblance or aspect of being; seem or seem likely; without implying reality or unreality" (Funk & Wagnal's New Standard Dictionary, 1940), or it may mean "to be known as a subject of observation or comprehension, or as a thing proved; to be obvious or manifest" (Webster's New International Dictionary, 1929). In Leckliede r v. Chicago City Railway Company, 1912, 172 Ill.App. 557, the court said: "The word 'appears' is commonly used in two senses. In one sense, it has the same meaning as manifest, obvious or true; but in another sense it means only seems, or probably true. In legal documents, such as decrees, orders of court, etc., and among lawyers, it is commonly used as having the first of these meanings, such as in the phrase 'it appears to the court;' but to the layman the expression 'it appears to me' ordinarily carries no other significance than 'it seems to me,' in the sense that it is probable or likely." A more apt statement and one which better illustrates the meaning of the word as it is commonly used is found in Rice v. Palmer, 1906, 78 Ark. 432, 96 S.W. 396, 399, as follows: "'If it shall appear that a majority,' etc., is the language employed. The Century Dictionary gives six definitions of the word 'appear,' comprehending all shades of meaning attached to it, and none of them conveys the idea of judicial or final determination or decision, but all convey the thought of the surface, the apparent, the obvious, *that which is to be seen at first sight.*" (Italics ours.) The italicized words, we think, define "appear" as the parties used it in the lease. The trial court found that defendants, in entering into the lease, used the word in its ordinary or popular sense as meaning "seem" or "seem likely" and not in its technical or legal sense as meaning "appear by final judgment." While the word may be used correctly to denote something proved, it is ordinarily used in the sense of denoting "that which is to be seen at first sight."

[2, 3] The court did not err in taking the word in its ordinary and popular sense. There was nothing before the court indicating that the parties used it in a techni-

cal sense or that it had acquired a special meaning by usage. Civil Code, section 1644; Code of Civil Procedure, section 1861. This conclusion is fortified by a consideration of the purposes for incorporating paragraph 17. We must, of course, look to the instrument in which the word was used rather than to lexicographers in determining the sense in which it was used. Defendants represented the entire ownership as lessors and they were to receive the entire royalty. Plaintiffs were furnished a policy of title insurance of their leasehold, based upon the ownership of the land by the lessors. No exceptions as to ownership were noted in the policy. Plaintiffs were admittedly bona fide purchasers of their leasehold interest. Even the Independent Company recognized this. As to the several claimants of royalties, plaintiffs had a right to occupy and develop the land upon the terms stated in the lease; the consideration inuring to them under the lease was the share of oil and gas which they retained after paying the royalty. The amount of royalty was fixed. It was payable to defendants so long as they retained the right to receive it, but if someone else established a right to be paid the royalty, plaintiffs' obligation would run in his favor and their obligation to defendants would cease. Under no theory would plaintiffs be required to pay royalty to defendants after it had been determined that someone else was entitled to receive it. This would hold true if defendants lost a part only of the royalty, for they would then share in proportion to the interest which they retained. It was not necessary to provide for such contingencies in the lease. Under these circumstances paragraph 17 was incorporated in the lease. If its only purpose was to provide that the royalty would be prorated between defendants and any other person or persons who might establish a right by final judgment, it would have failed utterly to provide any protection to the lessees in the contingency which now confronts them. Five wells had been brought in prior to the trial of the action in November, 1941. The royalties have been impounded since January, 1941, and now amount to more than $112,000. After nearly four years of litigation nothing has been finally determined, so far as we are advised, except plaintiffs' right to interplead the various claimants to the royalty. Paragraph 17 was requested by plaintiffs and it seems altogether reasonable that the intention was to protect the lessees against the possibility of having to pay royalty twice. It may be doubted that the lessors would originally have insisted upon terms which would have compelled the lessees to take that risk, and it would seem even more unlikely that the lessees would have agreed to it. Under the construction contended for by defendants any sum paid to them as royalty during the course of the litigation would be lost to plaintiffs should title to the land and royalties be finally determined to be in third parties. The word "appear" must be given a meaning which would lead to a reasonable result rather than to one which would be unreasonable. If the lessees and not the lessors were to suffer the loss in the event the lessors' title should prove unsound, we would expect to find so unusual an undertaking expressed in explicit terms. The definition of "appear" for which defendants contend would lead to a confused result. Defendants' obligation "If it should hereafter appear," etc., is stated in the following language: "then the rentals and/or royalties accruing hereunder shall be paid to the lessor in the proportion which its interest bears to the entire fee simple estate or to the entire estate in said oil and gas." If the Independent Company, in the action which it has brought, should finally prevail, the judgment no doubt would cover royalties accruing after January, 1941, when plaintiffs were first notified of the claim of title. Defendants in the meantime would have received all of the royalty although they would have been entitled to none or perhaps only a portion of it. Clearly this would not be within either the letter or the spirit of the agreement. And finally, we might add that the history of the litigation between the parties, in which no ultimate result has been reached upon any of the matters in issue, fairly demonstrates the correctness of the trial court's interpretation of the lease. If plaintiffs had been obliged to continue the royalty payments since January, 1941, and should later be compelled to pay the same amount to Independent Company, defendants, under their construction of the lease, would be under no obligation to reimburse plaintiffs. But, as we have said, if the parties contemplated such a strange and unusual arrangement, they would no doubt have expressed that intention specifically and would not have permitted it to rest upon the tenuous definition of a single word in the lease.

[4] We have not overlooked the argument of defendants that the first letter sent to Mr. Schaeffer by Mr. Morgan on behalf of plaintiffs amounted to a construction of the disputed term by the parties. The court was justified in believing that the letter was written without knowledge as to the nature of the claims asserted by the Independent Company. After plaintiffs learned of the institution of the suit claiming ownership, the matter was given more careful consideration and plaintiffs withheld payment of further royalties to defendants. This was purely an evidentiary matter, as to which the trial court reached a satisfactory conclusion.

[5] Defendants challenge the finding to the effect that in executing the lease they used the word "appear" as meaning "seem" or "seem likely," contending that the finding is not supported by the evidence. Since we hold with plaintiffs as to the meaning of the word, the finding as to the intentions of defendants becomes immaterial.

[6, 7] There is, however, another finding which has no support in the evidence. It reads as follows: "No evidence having been introduced by defendants in support of their allegations that the claim of Independent Distributing Company is without foundation in fact or law and that said claim is without right, the court finds that it is not true that the claim of Independent Distributing Company is without foundation in fact or law and it is not true that said claim is without right." The judgment is otherwise supported by the findings and the one we have quoted was not within the issues. It is true that defendants by their answer alleged that the claims of the Independent Company were wholly without right, but this was not in response to any allegation to the contrary in the complaint. The court was not called upon to do more than interpret the lease and to give judgment accordingly. The finding, being wholly outside of the issues pleaded or tried, could determine nothing as to the justness of the claims of the Independent Distributing Company. Since it is a nullity, it is not necessary that it be stricken out.

The judgment is affirmed.

PARKER WOOD, J., and FOX, Justice pro tem., concur.

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67 Cal.App.2d 367

GARCIA v. YEDOR et al.

Civ. 14609.

District Court of Appeal, Second District,
Division 1, California.

Dec. 20, 1944.

Hearing Denied Feb. 15, 1945.

1. Appeal and error 🔑863

Where trial court rendered judgment for defendants on pleadings, only question to be determined on appeal was whether amended complaint stated cause of action.

2. Pleading 🔑34(1)

Complaint must be construed by taking it by its four corners.

3. Workmen's compensation 🔑2090

Fact that employee's accident was caused by a fellow employee upon employer's premises is not controlling on question of whether remedy under Workmen's Compensation Law is exclusive, the test being whether the particular act involving accident was reasonably contemplated by employment. St.1937, p. 269, § 3601.

4. Workmen's compensation 🔑2125

Amended complaint, alleging plaintiff entered employer's plant before time for work, and, when visiting employee operating certain machine, the machine was negligently started, spattering molten metal into plaintiff's eyes, stated facts showing injury occurred while plaintiff was at place and doing something not reasonably contemplated by employment, and his right to recover was not exclusively under Workmen's Compensation Law.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Meximino Molino Garcia against Samuel S. Yedor and another, copartners, doing business as Universal Die Casting Company, and others, for damages for personal injuries. From a judgment for defendants, plaintiff appeals.

Reversed.

Daly B. Robnett and Benjamin F. Kosdon, both of Los Angeles, for appellant.

George H. Moore, Hugh B. Rotchford, Myron J. Glauber, and Ralph L. Lupton, all of Los Angeles, for respondents Yedor and Howich.

George H. Moore, Hugh B. Rotchford, and Myron J. Glauber, all of Los Angeles, for respondent Day.

DRAPEAU, Justice pro tem.

[1] In this case the trial court rendered judgment on the pleadings. Therefore, the only question to be determined is whether the amended complaint states a cause of action. Union Flower Market v. Southern California Flower Market, 10 Cal.2d 671, 76 P.2d 503; Bradley Co. v. Ridgeway, 14 Cal.App.2d 326, 58 P.2d 194.

The amended complaint alleges that defendants operated a die casting plant, with employees, machinery, tools and equipment; that the plaintiff was an employee of the defendants; that the plaintiff entered the plant before it was time for him to go to work, and went to a part of the plant where there was located a die casting machine operated by another employee of the defendants to visit with that employee; whereupon the machine was negligently started, thereby spattering molten metal into plaintiff's eye, and upon parts of his body to his consequent injury and damage.

Judgment for defendants was rendered upon the assumption that the plaintiff employee having been injured upon the premises of the employer, his only remedy was before the Industrial Accident Commission, in accordance with the workmen's compensation provisions of our labor code. Labor Code, sec. 3601, St.1937, p. 269. This would be true if the only inference which may be drawn from the complaint is that the plaintiff was injured in the course of his employment.

With certain exceptions, it is settled law in this state that one injured coming or going to his work is not injured in the course of his employment. These exceptions are discussed in Freire v. Matson Navigation Co., 19 Cal.2d 8, 118 P.2d 809, 811. In that case the employee was injured while on his way to work, and while he was upon a bulkhead leading to a pier from which he was to embark to reach his place of employment. The bulkhead was under the control of the employer. It was held that while the employee was not under the employer's control or management at the time of his injury, the bulkhead was the "means of access" to the pier from which the employee had to embark to reach his place of employment, and his remedy was under workmen's compensation. A somewhat similar situation existed in Judson Mfg. Co. v. Industrial Accident Commission, 181 Cal. 300, 184 P. 1, where the employee was injured while using a path not controlled by the employer along a railroad right-of-way. His injuries were held to come within the provisions of the workmen's compensation act.

[2, 3] In the present case, taking the complaint by its four corners, as we must, the inference may be drawn that the plaintiff was not injured while following a necessary route on his way to work, but was hurt when he was engaged upon a venture of his own. The fact that the accident was caused by a fellow employee, upon the employers' premises, is not controlling. The test is whether or not the particular act involving accident and injury was reasonably contemplated by the employment. Whitting-Mead Commercial Co. v. Industrial Accident Commission, 178 Cal. 505, 173 P. 1105, 5 A.L.R. 1518. Thus when a messenger deviated from his route for the purpose of going home to lunch, his injury did not arise out of and in the course of employment. Red Arrow Bonded Messenger Corporation v. Industrial Accident Commission, 39 Cal.App.2d 559, 103 P.2d 1004. And an employee who returns after work to the employer's premises and is injured is not entitled to recover under workmen's compensation. State Department of Institutions v. Industrial Accident Commission, 46 Cal.App.2d 439, 116 P.2d 79.

[4] Under the facts alleged in the complaint the injury was occasioned while the employee was at a place and doing something not reasonably contemplated by his employment. The conditions of compensation do not concur, and the right in the plaintiff to recover is not exclusively under workmen's compensation.

The judgment is reversed.

YORK, P. J., and WHITE, J., concur.

Hearing denied; TRAYNOR and SPENCER, JJ., dissenting.

67 Cal.App.2d 320

TRIEST v. TRIEST.

Civ. 12728.

District Court of Appeal, First District, Division 1, California.

Dec. 18, 1944.

1. Divorce 🔑245(1)

Trial court has jurisdiction to modify an alimony order because of changed circumstances, and the propriety of such modification rests largely in the discretion of the trial court. Civ.Code, § 139.

2. Divorce 🔑245(2)

The existence of accrued and unpaid alimony, though a circumstance which may justify refusal to modify an alimony order, does not per se prevent court from granting a modification as to future instalments. Civ.Code, § 139.

3. Divorce 🔑245(2)

Modification of alimony order will not be denied, though husband is in default in payment of accrued alimony, where such denial would produce an inequitable result. Civ.Code, § 139.

4. Divorce 🔑262

If husband, though having a present ability to comply with alimony order, wilfully refuses to do so, he is in contempt and will not be granted a modification of such order. Civ.Code, § 139.

5. Divorce 🔑245(2)

Where husband is not in contempt and has not the present ability to comply with an alimony order, modification thereof should not be refused simply because husband is in arrears. Civ.Code, § 139.

6. Divorce ⚷245(3)

Evidence sustained implied finding that divorced husband acted in good faith in reducing alimony and support payments to former wife from $100 to $50 per month after death of minor child in belief that half of $100 a month he was ordered to pay wife was for child's support.

7. Divorce ⚷245(2)

That alimony and support payments were in arrears did not preclude modification of alimony and support order, where such arrearage resulted from good faith reduction in such payments without order of court after minor child's death in belief that half of payments ordered was intended for child's support, and husband had none with which to pay arrearage at time of hearing on application for modification and was earning less than former wife. Civ.Code, § 139.

8. Divorce ⚷245(2)

That husband had given valuable diamond ring purchased before marriage to second wife, to a granddaughter by a former marriage while in default as to payments due second wife under alimony and support order, did not preclude modification of such order. Civ.Code, § 139.

9. Divorce ⚷245(2)

That money necessary to pay accrued and unpaid alimony instalments could have been raised by sale of automobile owned by husband did not preclude modification of alimony and support order, notwithstanding existence of such arrearage, where automobile was necessary in husband's business. Civ.Code, § 139.

◆

Appeal from Superior Court, City and County of San Francisco; I. L. Harris, Judge.

Suit for divorce by Lorraine B. Triest against Frank Triest, wherein plaintiff obtained an interlocutory decree of divorce and defendant was ordered to pay her $100 per month for alimony and maintenance. From an order reducing the alimony payments to $1 per month, plaintiff appeals.

Order affirmed.

Clayton H. Garvey, of San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, of San Francisco, for respondent.

PETERS, Presiding Justice.

On November 8, 1940, plaintiff and appellant, Lorraine B. Triest, secured an interlocutory decree of divorce from defendant and respondent, Frank Triest. The custody of their minor child was awarded to the wife, and the husband was ordered to pay to his wife $100 a month for alimony and maintenance and support of the wife and child. On December 6, 1942, the minor child died. On December 10, 1942, the husband had the final decree entered.

From the date of the entry of the interlocutory decree, and until either January or February, 1943, the husband made all the required $100 per month payments. At that time, without court order, he reduced the monthly payments to his wife to $50. On October 1, 1943, the husband, upon affidavit, secured an order to show cause why he should not be entirely released from the payment of any further alimony because of changed circumstances in his financial condition. The wife filed opposing affidavits asking that the request be denied and requesting an increase for mortuary and funeral expenses. In her affidavit, and at the commencement, during, and at the conclusion of the hearing, the wife contended that the husband had unlawfully reduced the payments to $50 a month; that at the time of the hearing he was in arrears in payments to the extent of $500; that he was therefore in contempt; and that under such circumstances an equity court would and should grant no relief until he first purged himself of the assumed contempt. The trial court, at the inception of the proceeding, held that the fact that the husband was in default in payments (assuming that to be a fact) would not per se bar the court from reducing the future payments in a proper case, and proceeded to hear the evidence. During the course of the hearing the trial judge concluded that under the circumstances disclosed by the evidence the husband, even if in default, was not in contempt, and at the conclusion of the hearing ordered the alimony and support order reduced, prospectively, from $100 to $1 per month. From this order the wife appeals.

The appellant makes no challenge of the sufficiency of the evidence to support the reduced order, her sole contention being that the trial court erred in granting relief to the husband when he was in arrears in his alimony payments.

[1] The law is well settled that the court possesses power to modify an alimony order because of changed circumstances, § 139, Civil Code; that the propriety of such an order depends on the facts and circumstances of each case; and that the propriety of such a modification rests largely in the discretion of the trial court. See, generally, Wilder v. Wilder, 214 Cal. 783, 7 P.2d 1032; Wylie v. Wylie, 26 Cal.App. 2d 167, 79 P.2d 152; Willen v. Willen, 119 Cal.App. 483, 6 P.2d 554; Greene v. Greene, 86 Cal.App. 275, 260 P. 845; Mathews v. Mathews, 55 Cal.App. 661, 204 P. 27.

[2, 3] It is also a well settled proposition in most jurisdictions, including California, that the existence of accrued and unpaid alimony does not per se prevent the court from granting a modification as to future installments. Merritt v. Merritt, 220 Cal. 85, 29 P.2d 190; Weydeveld v. Weydeveld, 100 Colo. 301, 67 P.2d 72; Craig v. Craig, 163 Ill. 176, 45 N.E. 153; Wiseman v. Wiseman, 290 Ill.App. 535, 8 N.E.2d 960; Helkelkia v. Sonzinski, 223 Ill. App. 30; Erickson v. Erickson, 194 Minn. 634, 261 N.W. 397; Suozzo v. Suozzo, 16 N.J.Misc. 475, 1 A.2d 930; Williams v. Williams, 12 N.J. Misc. 641, 174 A. 423; Staples v. Staples, 206 App.Div. 196, 200 N.Y.S. 583; Wiseman v. Wiseman, 172 Misc. 114, 14 N.Y.S.2d 521; Kelly v. Kelly, 144 Misc. 302, 258 N.Y.S. 367; Smith v. Smith, Sup., 11 N.Y.S.2d 1015; Gloth v. Gloth, 154 Va. 511, 153 S.E. 879, 71 A.L.R. 700; see, 27 C.J.S., Divorce, § 239g p. 997. These cases hold that the existence of accrued and unpaid alimony is not conclusive on the court, but is merely one of the circumstances that may justify a refusal to modify, but that whether the order will be modified depends upon all the facts and circumstances of the particular case, and rests in the sound discretion of the trial court. They also establish that modification will not be denied even a husband who is in default when such denial would produce an inequitable result.

In Merritt v. Merritt, 220 Cal. 85, 29 P.2d 190, 191, this precise problem was presented to the Supreme Court. That court quoted with approval the following from Craig v. Craig, 163 Ill. 176, 45 N.E. 153 (220 Cal. at page 88, 29 P.2d at page 191): " 'If the existence of accrued and unpaid alimony should be held to absolutely prevent the court from altering, reducing, or altogether abrogating future installments of alimony, then it would result that, in cases of pecuniary inability of defendant to pay and discharge all arrearages of alimony, the court would be powerless to grant relief as to future and further alimony, no matter what the changed conditions of the parties in the property, or how loudly the facts and circumstances might call for the equitable intervention of the court. The hands of a court of equity are not thus bound.' " In the Merritt case the trial court had refused to entertain the motion for modification because of its belief that a husband in default was not entitled to such relief. This order was reversed.

[4, 5] Of course, if the husband has willfully refused to comply with the order of the court and has a present ability to comply, he is in contempt, and no order of modification will be granted. But all defaults in alimony payments do not constitute contempts. Where the husband is not in contempt and has not the present ability to comply with the order, a modification should not be refused simply because the husband is in arrears. To refuse such modification in a proper case would be inequitable and, in many cases, useless. See note 22 Cal.L.Rev. 699.

The factual situation in the present case was as follows: The original order did not fix separate amounts for alimony, and for the support and maintenance of the child. After the death of the child the respondent was of the opinion that he had been paying $50 a month as alimony and $50 a month for the support of the child. For this reason, he terminated the $50 payments for the support of the child upon her death. He testified that this was pursuant to an oral agreement with his wife, and produced a letter written by him to his wife referring to this agreement. The appellant denied the existence of such agreement.

Prior to the death of their child, and for some months thereafter, the parties were on friendly terms, and the record shows that both loved the child and did their best for her care and comfort. Early in 1943 the respondent saw appellant nearly every night, and finally proposed remarriage. This offer was refused by the wife. This litigation followed several months thereafter.

Respondent testified that he had expended between $2,500 and $3,500 in connection with the child's illness, over $1,000 of which he paid out after January, 1943, and that he still owed substantial sums to various doctors for the child's care. He had to borrow money to pay some of these expenses. He also testified that during the early months of 1943 he furnished food to his wife and her sister, and paid various bills, and loaned his wife money which has not been repaid, and that the total of these sums exceeded the $50 a month that had been deducted from the alimony-support payments.

The respondent is 65 years of age. For the past several years he has represented a shirt manufacturer and has made a substantial salary. During the first four months of 1943 he averaged over $500 a month income from this source. In June he drew from this company $156.67; July, $9.97; August, $325.87; September, $218.37, and October, $84. He had some office expenses. He had had a drawing account of $49 a week net with this company, and starting in July the amounts received partially represented overdrafts. At the time of the hearing he had overdrawn his earned commissions in excess of $300. The company had warned him that his drawing account must be reduced. The difficulty was that because of war conditions the employer was unable to furnish him with materials to sell. The respondent had taken employment with a haberdasher where he worked long hours two days a week, and from which source he earned about $60 a month. This was his only sure source of income at the time of the hearing. He had no bank account and no cash reserves—in fact, he still owed money to a bank borrowed to pay expenses in connection with the child's illness. He had expended all of his income earned in 1943 either in paying for the child's illness, or in paying past debts. He now lives in a back bedroom of a hotel. The appellant is employed at an assured salary of $108 per month, and, in addition, earns substantial commissions. She has some income from a nephew, and is the residuary legatee of her sister's estate. What she will receive from that estate is in dispute.

The evidence shows that the respondent, prior to his marriage to appellant, owned a diamond ring worth over $2,000. He testified that he had given this to his granddaughter prior to the hearing. He also owns an automobile worth $800, which he testified was indispensable in his business.

[6, 7] The theory of appellant is, that because respondent earned more than enough to pay the $100 a month up to September, and because he owned the ring and automobile on which loans could have been made, he was in contempt and should be denied relief. Aside from the question as to the legal effect of the agreement testified to by the husband to reduce the payments (on which question we announce no conclusion), and assuming without deciding that respondent was $500 in arrears in his payments, the evidence recited above sustains the implied finding of the trial court that respondent was acting in good faith. Rightly or wrongly, he honestly believed that all he owed was $50 a month. That sum he paid regularly. He paid far in excess of the arrearage in connection with the child's illness, and paid in excess of the claimed arrearage directly or indirectly to his wife. At the time of the hearing he had no money at all with which to pay the claimed arrearage. He had not squandered his money. The appellant earns as much, if not more, than does respondent. To deny respondent relief (and appellant admits the evidence supports the implied finding that such relief is warranted) would serve no useful purpose and would merely increase the arrearage far beyond respondent's ability to pay. That would be most inequitable and would serve no useful purpose at all. The trial court has power, if respondent's income increases, or that of appellant diminishes, to increase the award.

Appellant seeks to distinguish the Merritt case, supra, by pointing out that in that case during the period all the unpaid alimony accrued, the husband had no ability to comply, while in the instant case respondent could have paid the full $100 per month during most of the period. It is true that this is a factual distinction between the two cases. But the legal principle announced in the Merritt case is equally applicable to the factual situation here presented. The real issues in such cases are whether the husband has acted in good faith or whether he has deliberately flaunted the order of the court, and whether he has a present ability to comply with the order.

[8, 9] Appellant lays much stress on the fact that respondent owned the $2,000 ring and the automobile worth $800. The ring had been purchased by respondent long before he married appellant. He testified he had been keeping the ring intending ulti-

mately to give it to his daughter, but after she died he determined to give it to his granddaughter (a child of a child by a prior marriage), and that he delivered it to the mother of the child for this purpose in June of 1943. Thus, according to his testimony, respondent no longer has any interest in the ring. So far as the automobile is concerned, respondent testified it was necessary in his business. It would only injure both parties to compel its sale.

The order appealed from is affirmed.

KNIGHT and WARD, JJ., concur.

67 Cal.App.2d 327

PEOPLE v. SERPA.

Cr. 2303.

District Court of Appeal, First District, Division 1, California.

Dec. 18, 1944.

1. Robbery 🔑24(3)

In robbery prosecution, evidence was sufficient to establish that defendant was one of the robbers.

2. Criminal law 🔑572

In robbery prosecution, evidence was insufficient to establish defendant's alibi defense.

3. Criminal law 🔑741(1), 742(1)

It is within exclusive province of jury to pass upon credibility of witnesses and to determine weight that shall be given to alibi testimony.

4. Robbery 🔑24(3)

In robbery prosecution, positive testimony of prosecuting witness on issue of identity was not rendered insufficient by discrepancies between his testimony at trial and that given at preliminary examination relating to amount of money taken from him and to occurrences prior to robbery.

5. Criminal law 🔑1169(2)

In robbery prosecution, refusal to allow court reporter, called as defendant's witness, to read into record notes covering portions of testimony given by prosecuting witness at preliminary examination was not error, where such testimony had been previously read into record from the transcript during cross-examination of prosecuting witness.

6. Criminal law 🔑1170(4)

In robbery prosecution, sustaining objection to question as to whether prosecuting witness had ever been examined by a psychiatrist was not prejudicial, where witness immediately thereafter stated that he had not been examined by doctor, mentally.

7. Witnesses 🔑282½

In robbery prosecution, where prosecuting witness on cross-examination gave name and address of his employer with reluctance because of claim that since robbery he had been followed, and defendant's counsel cross-examined prosecuting witness concerning the particular circumstances, trial court did not abuse its discretion in eventually sustaining objection to further cross-examination on the point.

8. Witnesses 🔑329

Wide latitude should be allowed in cross-examination to test accuracy or credibility, especially if witness is a reluctant one, or is a witness against defendant in a criminal prosecution.

9. Criminal law 🔑1153(4)
Witnesses 🔑267

The trial court has discretionary power over cross-examination which will not be disturbed on appeal unless such power has been abused.

10. Witnesses 🔑225, 268(1), 270(1), 282½

The trial court may confine an examination within reasonable limits, or may curtail a cross-examination which is unduly protracted, frivolous, or relates to irrelevant matters, or matters already covered.

11. Criminal law 🔑1178

An assignment of error concerning misconduct on part of trial court and assistant district attorney would be disregarded where unsupported by any argument, citation of authority or transcript references.

12. Criminal law 🔑1124(2)

The denial of motion for new trial would not be considered by reviewing court where motion was made orally, no grounds therefor were specified and no attempt was made on appeal to point out wherein trial court's order was erroneous.

◆

Appeal from Superior Court, San Francisco County; Alfred J. Fritz, Judge.

William Serpa was convicted of the crime of second-degree robbery and he appeals from the judgment of conviction and an order denying his motion for a new trial.

Judgment and order affirmed.

Alfred J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and Harold B. Haas, Deputy Attys. Gen., for respondent.

KNIGHT, Justice.

The appellant, William Serpa, was found guilty by a jury of the crime of second-degree robbery, and he has appealed from the judgment of conviction and the order denying his motion for a new trial.

[1] The robbery was committed in the Mission district, San Francisco, by two men. The identity of one of the men was not ascertained, and so far as the record shows he has never been apprehended. Appellant was taken into custody on the same day the crime was committed, and later charged with the commission thereof. As a defense to the charge he sought to prove an alibi, but it was rejected by the jury; and the first point urged by appellant in support of the appeal is that the evidence is insufficient to support the jury's finding on the question of his guilt. There is no merit in the point.

Appellant was a shipyard employee; and at the time of the robbery he was on parole from San Quentin prison wherein he had served part of a sentence for second-degree burglary. At the time of his arraignment he answered that his true name was William Serpa, but at the trial he testified that his true name was Herbert William Serpa. The victim of the robbery was Adolph M. Lapsic. Less than two months prior to the date on which he was robbed he had received an honorable discharge from the United States Marine Corps on account of a fractured spine sustained by him while filling an assignment as instructor of engineering at a training camp near San Diego; and it was mainly on his testimony that the conviction herein was obtained. While his testimony was conflicting on some points, it is beyond question legally sufficient to support the finding of the jury that appellant was one of the robbers.

Among the essential facts established thereby were the following: During the latter part of the month of December, 1943, Lapsic was living on Valencia Street, and a few days before Christmas, about 10:30 o'clock in the evening, he visited a so-called tavern located on Valencia Street between 16th and 17th Streets. Among those present were a number of sailors, and the appellant and a companion whose identity was not ascertained, but who was described as "a heavy set man." During the evening Lapsic made the acquaintance of appellant and his companion, and at closing time a party consisting of appellant, his companion, Lapsic, and two or three of Lapsic's friends, one of whom was a woman, left the tavern together and went to a nearby apartment house wherein liquors were sold. Upon arriving there, however, they found that the place was filled. It was then past midnight, and rather than wait around to get into the place, Lapsic's friends went away, and he remained with appellant and his companion. After the others had gone appellant and his companion invited Lapsic to go to appellant's apartment to have some drinks, and Lapsic consented. Soon afterwards, appellant and his companion leading the way, all three entered a blind alley, whereupon the heavy set man seized Lapsic from behind, and as he did so either he or appellant said: "This is a stick-up." The heavy set man then proceeded to pinion Lapsic's arms behind him, and press something against Lapsic's back which Lapsic took to be a weapon of some kind. Thereupon the two men took from Lapsic his wallet, a seventeen-jewelled gold wrist watch, and his Marine Corps insignia ring. They then proceeded to undress Lapsic to look for a money belt, after which they extracted the money from the wallet and gave him back the empty wallet, his ring and 50 cents for carfare. Appellant then ordered Lapsic to walk toward the farther end of the alley, and threatened that if he turned around during the next fifteen minutes they would blow his brains out. Lapsic waited about five minutes and then notified the police. Meanwhile appellant and his companion disappeared. About 8 o'clock that evening Lapsic again went to the tavern and looking through the doorway saw appellant standing at the bar. Lapsic immediately went across the street and phoned to the police. Two officers responded in a patrol car, and Lapsic pointed out appellant as one of the men who had robbed him. One of the officers said to Lapsic, "Are you positive?" and Lapsic replied, "Absolutely, that is the man." The officers then placed appellant under arrest and took him to the police station. There appellant denied having participated in the robbery; but according to the officer's testimony appellant went on to say that he was "behind the eight ball" because he was on parole from San Quentin, and that if he was arrested on the charge of robbery he knew "he was a cinch to go back"; and that if he could "do it" he would "pay the man off so much a week, to get out of this fuss." Later, at the trial, Lapsic again positively identified appellant as one of the men who had robbed him. In view of the foregoing facts it would seem that no argument is required to demonstrate that the evidence is legally sufficient to sustain the verdict.

[2, 3] The witnesses by whom appellant sought to prove an alibi were, besides himself, his sister and a girl then living with his sister, and the substance of their testimony was that on the night of the robbery appellant was visiting his mother at her home in San Rafael; that he arrived there about 8 o'clock in the evening and did not leave until about 2 o'clock the next afternoon. It is evident, however, that the jury was not convinced of the truth of the testimony thus offered by appellant to establish an alibi; and under well-settled rules it is within the exclusive province of the jury to pass upon the credibility of the witnesses and to determine the weight that shall be given to this testimony. In other words, the alibi testimony offered by appellant and his witnesses at the most merely raised a conflict in the evidence. Moreover, in addition to Lapsic's positive testimony that appellant was one of the men who robbed him, the bartender of the tavern testified in rebuttal to the effect that he believed that he saw appellant on the night of the robbery sitting in a restaurant across the street from the tavern; that while he was not sure appellant was the man he saw, he was "pretty positive of it"—that he "looked like the man."

[4] In further support of the appeal counsel for appellant calls attention to portions of Lapsic's cross-examination showing discrepancies between the testimony given by him at the trial and that given by him at the preliminary examination, relating to the amount of money of which he was robbed and as to what occurred in the tavern during the evening before closing time. Appellant was doubtless entitled to cross-examine as to those matters for the purpose of impeachment, but obviously, even though such discrepancies were shown, the subject matter thereof was not of vital importance to the prosecution's case, for the reason that the determinative issue of fact the jury was called upon to decide was not as to how much was taken from appellant nor what occurred in the tavern, but was whether appellant was one of the men who committed the robbery; and the record shows that the positive testimony given by Lapsic on that issue was neither self-contradictory nor weakened by cross-examination.

[5] Appellant complains of the trial court's refusal to allow the court reporter, who was called as appellant's witness, to read into the record his notes covering portions of the testimony given by Lapsic at the preliminary examination as to whether he had spoken to appellant in the tavern the night of the robbery. The record shows, however, that all such testimony had been previously read into the record by counsel for appellant, from the transcript, during the cross-examination of Lapsic, and that no question was raised as to the correctness of the transcript. Consequently there was no error committed in refusing to allow the testimony to be read into the record a second time.

[6] Appellant also contends that the trial court unnecessarily limited the cross-examination of Lapsic as to his mental condition, but the rulings made in this behalf are not of such serious nature as to serve as a basis for the reversal of the judgment. There was no claim made nor offer to prove that Lapsic's mental condition was such as to render him incompetent as a witness. In this connection the record shows that on some points Lapsic seemed to be affected with poor memory, but that factor was doubtless taken into consideration by the jury in determining whether it could rely on the positive testimony given by him that he was robbed, and that ap-

pellant was one of the men who robbed him. In particular, the ruling assigned as error was the sustaining of an objection to appellant's question as to whether Lapsic had ever been examined by a psychiatrist; but the record shows that immediately following the challenged ruling the witness was asked whether he had ever "been examined by a doctor, mentally," and he answered "No." Even assuming, therefore, that the trial court should have permitted the witness to answer the first question, the adverse ruling did not operate to appellant's prejudice.

[7–10] Another matter about which appellant complains arises out of the following situation: On cross-examination, with some reluctance, Lapsic gave the name and address of the firm by which he was then employed, and upon further questioning he stated that his reason for desiring to withhold the information was that since the robbery he "had been followed." Counsel for appellant then entered upon and pursued a line of cross-examination as to the particular circumstances under which Lapsic claimed to have been followed, evidently in an attempt to show that no such thing had ever happened, and eventually the trial court sustained the prosecution's objection to further cross-examination on that point. As stated in California Jurisprudence (vol. 27, pp. 96–98) the rule governing in matters of this kind is that while wide latitude should be allowed in cross-examination for the purpose of testing accuracy or credibility, especially if the witness is a reluctant one, or is a witness against a defendant in a criminal case, nevertheless the trial court has discretionary power over cross-examination which will not be disturbed on appeal unless it appears that there has been an abuse of such discretionary power; that thus the trial court may confine an examination within reasonable limits, or may curtail a cross-examination which is unduly protracted, frivolous, or which relates to matters which are irrelevant, or have already been covered; and that likewise "the court may properly limit the number of questions which may be asked upon a given point." After reading the record herein, it becomes apparent that no legal ground exists upon which it may be held that the trial court abused its discretionary power.

[11, 12] The final assignment of error is misconduct on the part of the trial court and the assistant district attorney. The assignment, however, is not supported by any argument, citation of authority, or transcript references; and consequently may be disregarded. (See 4 Cal.Jur. 10-Yr. Supp. p. 941.) Nor is it necessary to devote any attention to the appeal from the order denying the motion for new trial for the reason that to all intents and purposes it has been abandoned. The record shows that the motion was made orally; that no grounds whatever were specified as the basis therefor; nor on this appeal has appellant made any attempt to point out wherein the trial court's order is erroneous. In that state of the record the motion cannot be made the subject of review on appeal. People v. Johnston, 37 Cal.App. 2d 606, 100 P.2d 307.

The judgment of conviction and the order denying the motion for new trial are affirmed.

PETERS, P. J., and WARD, J., concur.

67 Cal.App.2d 360

PEOPLE v. TENNER.

Cr. 2319.

District Court of Appeal, First District, Division 2, California.

Dec. 20, 1944.

Rehearing Denied Jan. 4, 1945.

Hearing Denied Jan. 18, 1945.

1. Criminal law 🔑507(7)

A woman participating willingly with man in sex perversion was "accomplice", corroboration of whose testimony as to act charged was required to sustain conviction of man for such offense. Pen.Code, § 288a.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law 🔑507(7)

A woman resisting and preventing commission of sodomy by man was not "accomplice", so that corroboration of her testimony was not required to sustain conviction of man for attempt to commit sodomy. Pen.Code, § 286.

3. Criminal law 🔑1172(2)

The application of instruction concerning accomplice to count of indictment, conviction on which is reversed on appeal, is immaterial.

4. Criminal law 🔑1172(2)

The application of instruction concerning prosecutrix as accomplice to count of indictment for attempt to commit sodomy, which was prevented by prosecutrix' resistance, was not prejudicial to defendant. Pen.Code, § 286.

5. Criminal law 🔑1172(2)

The application of instruction concerning accomplice to count of information on which dismissed appeal was based was harmless.

6. Criminal law 🔑1171(1)

Defendant was not prejudiced by deputy district attorney's improper remarks to jury in praise of trial judge's ability and integrity and commendation of such attorney's long experience and unselfish devotion to public interest and prevention of crime generally.

7. Criminal law 🔑200(1)

Defendant's conviction of and sentence on misdemeanor charge of contributing to minor female's delinquency did not place him once in jeopardy and foreclose his prosecution on felony charges of sex perversion and attempt to commit sodomy with same female on same night in same room, as acts charged were not identical in time or circumstances and hence were not same offenses. Pen.Code, §§ 286, 288a; St.1937, p. 1033, § 702.

8. Criminal law 🔑200(1)

A putting of person in jeopardy for one criminal act does not bar his prosecution for separate act merely because two acts are so closely connected in point of time that it is impossible to separate evidence relating to both on trial for first act, so that plea of former jeopardy will not be sustained, where it appears that two distinct crimes were committed in one transaction.

9. Criminal law 🔑161

The statutory bar against "double jeopardy" prohibits criminal proceedings against one who has once been placed in jeopardy for offense charged or offense necessarily included therein.

See Words and Phrases, Permanent Edition, for all other definitions of "Double Jeopardy".

10. Criminal law 🔑165

The fact that defendant might have been tried for misdemeanor of contributing to minor female's delinquency because of acts charged in indictment for sex perversion and attempt to commit sodomy with same female did not place him in "double jeopardy." Pen.Code, §§ 286, 288a; St. 1937, p. 1033, § 702.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Joseph Tenner was convicted of sex perversion and attempt to commit sodomy, and he appeals.

Reversed and remanded for a new trial on count of indictment for sex perversion, and conviction of attempt to commit sodomy affirmed.

William F. Herron and Nathan C. Coghlan, both of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried before a jury upon an information charging a violation of section 702 of the Welfare and Institutions Code, St.1937, p. 1033, and upon two counts of a grand jury indictment, one charging a violation of section 288a of the Penal Code, the other charging an attempt to commit sodomy. The indictment also charged two prior convictions and the service of sentence under each. The jury found the defendant guilty on all three counts. After the record was filed and prior to the submission the defendant voluntarily dismissed his appeal from the portion of the judgment based upon section 702 of the Welfare and Institutions Code and is serving sentence upon that charge. His briefs which were filed before such dismissal contain matters addressed to that count commingled with arguments on the remaining counts. It is difficult to treat these briefs of appellant logically because they do not comply with rule 15a of the Rules on Appeal.

It may be assumed from the lengthy recital of the testimony of the prosecutrix and the insinuations inserted therein that the appellant contends that the evidence was insufficient to support the verdict and that some members of the San Francisco police department were instrumental in procuring the prosecutrix to testify falsely in order to procure a conviction. It is unnecessary to recite the sordid testimony of the prosecutrix. It is sufficient to say that it was complete in every detail to support a conviction on all three counts. As to the activities of the police the appellant does not cite any material evidence in the record, and we, of course, are not concerned with the conjectures or suspicions of counsel.

A brief statement of the facts will suffice. The prosecutrix was an unmarried woman of the age of nineteen years who for sometime prior to the acts complained of had been a prostitute. The defendant met her through a pimp who was known to both, took her to a room in the Manx Hotel, and there committed the act denounced by section 288a of the Penal Code, followed this with a separate act tending to produce delinquency, and then unsuccessfully attempted to commit sodomy.

[1] As to the charge coming under section 288a of the Penal Code the prosecutrix was unquestionably an accomplice and, since her testimony of what occurred in that regard was not corroborated, the judgment on that count must be reversed. People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Reynolds, 26 Cal.App.2d 219, 222, 79 P.2d 150, and cases there cited. The application of the rule of these cases is clear. By her own testimony the prosecutrix disclosed that she accompanied the appellant to the hotel room willingly and that they were both aware of her physical condition which would prevent natural intercourse. The only reasonable inference from her testimony is that she intended to commit the act charged and participated willingly in its commission.

[2] The evidence relating to the second count of the indictment presents a different kind of case. Here the evidence showed that after the other acts were committed the appellant attempted an act of sodomy. The resistance of the prosecutrix and her prevention of the act removed her from the roll of an accomplice and hence the cases cited do not apply.

[3-5] Appellant's criticism of the instructions relating to an accomplice does not require extended comment. Its application to count 1 of the indictment is immaterial in view of the reversal of the judgment on that count. Its application to count 2 of the indictment was not prejudicial for the reasons above stated. Its application to count 1 of the information is not debatable because of the dismissal of the appeal based on that count.

[6] We are unable to find that the appellant was prejudiced by the remarks of the deputy district attorney which are assigned as misconduct. It is true that the statements complained of had no place in the presentation of this case to the jury. They consisted mainly of high praise of the ability and integrity of the trial judge and commendation of the long experience and unselfish devotion of the deputy district attorney to the public interest and the prevention of crime generally. These remarks may have influenced the votes of some of the jurors at the approaching general election, but could have had no influence upon their action in the jury room.

[7] Finally it is argued that the appellant has been placed in double jeopardy by reason of his conviction and sentence on the misdemeanor charge under section 702 of the Welfare and Institutions Code. People v. Krupa, Cal.App., 149 P.2d 416, is cited as the latest expression of authority on the subject. The argument of appellant seems to take two different lines, though this is not made clear in the briefs. First, that the conviction and sentence under 702 of the Welfare and Institutions Code placed him once in jeopardy and foreclosed prosecution on the two felony charges. Second, that, since the indictment in both counts charged that the acts were committed upon a minor of the age of nineteen the district attorney might have charged him under section 702 of the Welfare and Institutions Code, and since the acts charged in the indictment would also have been triable under 702, he was thus put in double jeopardy. Neither point carries any merit.

The acts charged in the two counts of the indictment are covered by sections 288a and 286 respectively of the Penal Code. The acts alleged and proved under section 702 of the Welfare and Institutions Code, and now admitted by the dismissal of the appeal, are not covered by any other penal statute. Section 288 of the Penal Code relates to a minor under fourteen and does not apply here. The conviction on this count was for a separate offense than those charged in the other two counts, and, though the acts were all committed on the same night and in the same room, they were not identical in time or circumstances and therefore were not the same offenses either in law or in fact. People v. Bevans, 19 Cal.App.2d 288, 65 P.2d 92. Under these circumstances, we are of the opinion that the decision in People v. Krupa, supra, is not controlling here.

[8] The decision in that case, as pointed out on page 420 of 149 P.2d, was based upon the conclusion of the majority of the court that "exactly the same facts were required to prove an offense under count one as to establish a crime under count two." Such is not the case here. While as above stated the three separate and distinct acts of appellant were closely related in point of time and were all committed on the same night and in the same room, they were not identical in point of time or circumstances and were therefore not the same offenses either in law or in fact. The decisions in People v. Stangler, 18 Cal.2d 688, 117 P.2d 321, and People v. Bevans, supra, are more nearly in point and those decisions were distinguished in People v. Krupa, supra, 149 P.2d at page 422. The rule stated in 15 Am.Juris. at page 65 relating to separate trials for distinct acts would seem to have equal force here where appellant was prosecuted in one proceeding under separate counts for the several distinct acts. It is there said: "A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had. Consequently, a plea of former jeopardy will not be sustained where it appears that in one transaction two distinct crimes were committed." Our review of the record indicates that it would have been possible to separate the evidence as to each of the separate and distinct acts of appellant and we find no support for appellant's position either in People v. Krupa, supra, or any other case which he has cited.

[9, 10] The second point is of less merit. It is that double jeopardy arises because the appellant might have been charged for the misdemeanor as well as for the felony. The statutory bar against double jeopardy prohibits criminal proceedings against one who has once been placed in jeopardy for the same offense, or for an offense necessarily included therein. Such is not the case here. The appellant has been tried and convicted but once. The fact that he may have been tried for the lesser offense of contributing to the delinquency of the minor, but was not, does not place him in jeopardy more than once. Thus it has been held that every battery, mayhem, rape and robbery includes the lesser offense of assault, and that murder includes manslaughter. But when a defendant is informed against and tried for the major offense, the fact that he might have been tried for the lesser offense does not place him in double jeopardy. A charge of statutory rape upon a minor necessarily includes acts contributing to the delinquency of the minor under section 702, but the fact that the party might have been tried for a misdemeanor under 702 does not prevent his trial upon the felony charge under the Penal Code section. We find nothing in People v. Krupa, supra, which supports appellant's argument that the plea of double jeopardy is available under these circumstances. In that case there was but one transaction, and a conviction for the lesser offense was held to bar a later conviction for the major offense. It was not because the indictment on the felony charge stated that the defendant employed a minor for the procurement of narcotics. It was because the defendant had been convicted on the misdemeanor charge of contributing to the minor's delinquency upon proof of the identical acts with which he was charged in the subsequent charge of felony. It is for these reasons that we stated heretofore that the point now raised by appellant is without merit and is not supported by the decision in the Krupa case.

The judgment based upon the first count of the indictment is reversed and the cause is remanded for a new trial on that count. The judgment based upon the second count of the indictment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

67 Cal.App.2d 347

J. G. BOSWELL CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 3168.

District Court of Appeal, Fourth District, California.

Dec. 19, 1944.

1. Workmen's compensation ⚷1854

Failure of employer and insurance carrier to object to referee to whom application for compensation had been referred on ground of bias until petition for rehearing did not constitute a waiver of such objections, where bias of referee did not appear until case was well under way and it was not disclosed by one incident, but by a succession of matters appearing throughout the hearings. St.1937, p. 293, § 5311.

2. Workmen's compensation ⚷1730

An award holding that claimant's leg condition and diabetes were proximately caused by head injury sustained in course of employment, and that as a result thereof claimant had sustained a 100 per cent permanent disability, was annulled on ground that bias of referee to whom case had been referred prevented employer and insurance carrier from having a fair and impartial trial.

◆

Proceeding by J. G. Boswell Company and Associated Indemnity Corporation to review an award of the Industrial Accident Commission of the State of California in favor of Jack Owings.

Award annulled, and matter remanded for new hearing.

Keith & Creede, of San Francisco, for petitioners.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is a proceeding to review an award of the Industrial Accident Commission in favor of Jack Owings, holding that he sustained a 100% permanent disability and awarding him $5,445.60, payable over 240 weeks, $13.96 a week thereafter for the duration of his life, and also medical and hospital care, including insulin, for the treatment and relief of diabetes for the remainder of his life.

Owings, who was 33 years old, was employed as a caretaker and repair man in cotton gins operated by J. G. Boswell Company. In May, 1939, before any injury occurred, both of his ankles became swollen and diabetes was suspected. Hospital tests did not indicate the existence of excess sugar and the condition cleared up in a few weeks. On August 22, 1939, he was struck on the head by a pulley which had broken loose and suffered a fracture of the right cheek bone and concussion of the brain. He did not return to work until August 16, 1940, and then was usually given light work, although occasionally doing some heavy lifting. He complained of nervousness and fatigue, and other troubles, when overheated or doing heavy work and occasionally laid off for a few days. On March 25, 1943, he carried some heavy sacks of sand in some emergency work during which he collapsed. On April 1, 1943, he felt something wrong with his left foot, and this seems to have developed into a partial paralysis of the left leg. He continued to work until April 10, 1943, and shortly thereafter was examined by Dr. Howard Brown, a brain specialist of San Francisco, who reported that the condition of the left leg was due to pressure on a nerve caused by a ruptured intervertebral disc, and that this condition was not related to the injury of 1939.

Thereafter, an application was filed with the Industrial Accident Commission and hearings were held over a considerable period, the applicant being represented by two able attorneys of Hanford. Finally, on April 10, 1944, an award was made as above indicated. A rehearing was asked for largely on the ground of bias on the part of the referee who had conducted the hearings and that a fair and impartial hearing had not been had. A rehearing was denied and this proceeding followed.

While the petitioners concede that there is some evidence in the record to sustain the findings made, it is earnestly contended that the award should be annulled and a rehearing ordered because the record clearly discloses such bias on the part of the referee as prevented them from having a fair and impartial trial, and that in certain respects they have never had their "day in court." We think this contention must be sustained.

At the first hearing, the applicant testified and a report by Dr. Rosson was introduced which described the conditions found but did not express any opinion as to the relation between the disability and the injury of August 22, 1939. The report of Dr. Brown was also introduced. Before any other evidence was introduced the referee remarked that this last report was "a surprising report to me", and criticised it "with all due respect to Dr. Brown's eminence as a specialist in this line" because it failed to comment on the significance of the fact "that this man's brain was injured on the right side and there is an affection of his left lower extremity." In reply to counsel's suggestion that he was not a doctor and a question as to what was his diagnosis the referee replied: "My diagnosis is that he got an injury to the right side of his brain, and that there is some involvment there in the brain that has affected the other side of his body, affected his leg." The referee then stated: "I have just as much right to deal with conjectural language as Dr. Brown" and that when "you see a man that's got an injury like that, and he claims symptoms that are reasonably attributable to that injury, and in the general nature of things, then, you don't have to speculate and guess at three or four other things that could possibly be the cause of it, when the most reasonable cause of it is right before you." When reminded that Dr. Brown stated that these were not the centers that were affected the referee remarked, "I am simply not impressed by Dr. Brown's report." The referee then remarked that you don't have to be a nerve specialist in a case like this but that "you are liable to get a better report from a general practitioner than a specialist." He then suggested that the applicant should be examined by Dr. Mathias of Tulare.

The applicant was examined by Dr. Mathias, who filed a report stating that he had suffered a recent partial paralysis of the left leg and expressing the opinion that this was an after-result of his original head injury. At the next hearing Dr. Mathias was cross-examined. He expressed the opinion that specialists should be consulted. It then developed that the insurance carrier had arranged for the applicant to be again examined by Dr. Brown but that the applicant had refused because he was told by an office assistant that Dr. Brown intended to make another spinal test. The applicant had had three such tests previously, and the referee interrupted the proceedings several times to express himself very forcefully that the applicant did not have to subject himself to a spinal puncture. Dr. Mathias then testified as to why he thought the present leg condition was related to the old head injury and said that any use of alcohol was not advisable for a patient in this condition. The referee then attempted at some length, but without much success, to get him to confirm the fact that such a brain injury might later lead to diabetes. The doctor stated that he knew nothing about it. This is the first mention of diabetes in the record. At this hearing a report from Dr. Eidenmuller of San Francisco was introduced. He attributed the present condition of the left leg of the applicant to the accident of August 22, 1939. He attributed some of the applicant's symptoms and complaints to diabetes, which he said became severe in January, 1943. He further stated that it would be natural to believe that the onset of the severe diabetes and the leg condition which developed some months later may have a common cause in the brain injury sustained in 1939; that, on the other hand, it is possible that the severe diabetes caused the leg condition; and that if the records of two hospitals failed to show the presence of diabetes at the times the applicant was in these hospitals then the connection of the diabetes with the accident would be more remote (it was later shown that the records of these hospitals failed to show this situation).

It appears that sometime before, when the applicant went to San Francisco at the request of the insurance carrier for further examination by Dr. Brown and refused to be so examined, he had gone to see the referee at his San Francisco office. The referee sent him to Dr. Eidenmuller and talked to that doctor before the report was made. This general situation and the surrounding circumstances resulted in considerable controversy at the subsequent hearings.

At the next hearing, Dr. Eidenmuller was cross-examined. He testified that he had examined a clinical report on the applicant made in May, 1939, about three months before the first accident, and that this indicated to him that at that time the applicant might have had a mild case of diabetes and that when the applicant came to him in San Francisco the first thing he did was to make an investigation with respect to the presence of diabetes. He further testified that tests could be made which would determine whether this diabetes was a result of the injury suffered in 1939 or whether it came from other causes.

At an earlier hearing counsel for the insurance carrier had attempted to introduce evidence of intoxication on the part of the applicant over several months preceding April 1, 1943, and of his arrest and conviction for disturbing the peace on March 26, 1943. Under the testimony of the doctors this had a bearing on the diabetes situation, and also on the leg condition. The referee had then stated that this evidence was not material but had later stated that at a subsequent hearing he would admit any such evidence because "it's conceivable that a man might, through some melee that occurred, injure himself in some way, so I can't refuse it without jeopardizing the record." Also, at an earlier hearing one of the attorneys for the applicant had expressed great confidence in Dr. Shepardson of Stanford as an expert on diabetes and had requested that the applicant be examined by him, which was done.

At a subsequent hearing petitioners had witnesses present and attempted, by questions and by offers of proof, to show intoxication and arrest for intoxication on the part of the applicant over the period in question. The referee refused to permit any evidence along this line as immaterial, and stated that it had no relevancy either on the issue as to the condition of the applicant's leg or on the issue of whether or not his diabetes was the sole result of his head injury. The referee remarked, "I don't propose to have you read into this record a lot of matter about intoxication that might lead to someone reviewing the record—make him perhaps believe that the man is a chronic drunkard." In refusing to permit an officer from the applicant's home town to testify in this regard the referee said: "Corcoran is a small place, and they may have high moralism down there. Maybe if a fellow makes a misstep and smells like he'd been hit with a beer towel, they throw him in the can." The hearing was then adjourned to wait for the report of Dr. Shepardson.

Subsequently Dr. Shepardson's report was filed. He stated that he had examined the applicant with regard to the relationship between his diabetes and his 1939 head injury, that the applicant was suffering from diabetes but was making "no serious effort to keep it under adequate control" in that he was not following the diet prescribed for him by Dr. Eidenmuller, and that he was not taking insulin as he had been directed. He expressed the opinion that this diabetes was not related to the 1939 injury and gave his reasons for that opinion, the main one of which was that in cases where trauma causes diabetes or changes a potential diabetic into an acute diabetic the diabetes should become apparent within three or four months of the time of the injury. He also referred to the possibility of alcoholism contributing to diabetes.

There is some mention in the record of a report by Dr. Addis, another expert on diabetes, who is said to have confirmed Dr. Shepardson's views, but if this report is in the record we have not found it.

About this time the referee met Dr. Olsen of San Francisco in the office of the Commission and told him about this as a very interesting case and said he was going to send the applicant to him for examination. The referee stated at the next hearing that he was not satisfied with Dr. Shepardson's report; that he "didn't like the way it read"; that he sent the applicant to Dr. Olsen "because I wanted a report from a doctor that I believed was—capable of giving him a thorough examination"; that he wanted to check on Dr. Eidenmuller; and that "I wanted to see what *another good man* had to say about it." (Italics ours.)

After examining the applicant Dr. Olsen called the referee and told him that "My examination would confirm Dr. Eidenmuller." He then filed a report expressing the opinion that heavy lifting preceding April 1, 1943, had "precipitated more hemorrhage into the brain injury of August, 1939." With respect to diabetes the report states that there is considerable controversy as to whether a brain injury can cause diabetes, that he believes it did do so in this case, but that further investigation should be made to locate the cause of the trouble. On cross-examination, Dr. Olsen testified that since diabetes is sometimes caused by a brain injury and since there was no history of diabetes in the applicant's family he concluded that this diabetes was due to the brain injury; that ordinarily diabetes comes on within a few weeks after a brain injury; that the applicant could have had a "low grade diabetes" for a long time; that sometimes this occurs and later the disease becomes active; that when it becomes severe and recognizable, as in this case, you cannot say when it started; that the applicant's diabetes preceded, and was not caused by, the further hemorrhage in April, 1943; and that a latent diabetes could be brought on and developed by a man's indiscretion in his diet and also by the use of alcohol.

Counsel for the insurance carrier then asked the referee to refer this case to the medical department of the Commission for an impartial opinion. This request was denied. The referee then filed his findings and award. A petition for a rehearing was filed, and apparently the question as to whether a rehearing should be granted was referred to another referee for a report. The report of this other referee is before us. With commendable frankness and honesty this report briefly, but fairly, reviews the evidence and the proceedings and points out that the findings and award to the effect that both the leg condition and the diabetes were proximately caused by the injury had been entered despite the fact that Dr. Eidenmuller had merely given a tentative opinion that the injury was the proximate cause of the diabetes; that Dr. Eidenmuller had also stated that it could be determined by certain tests whether or not the diabetes was the result of the brain injury; and that "these final tests were not made at the time of issuance of the findings and award." The report then points out that the disability in the applicant's left leg developed immediately after "the applicant was incarcerated in jail as a result of a drunken brawl"; that the record discloses that the defendants were prepared to offer proof of other incidents of intoxication; and that the referee refused to admit such evidence "because, as he stated, even if the doctor said that these conditions were caused by alcoholism he would not believe it." The report then states that whatever may be said as to the possibility of bias on the part of the referee it seems certain that the defendants had not been allowed their day in court and were entitled, especially in view of the medical evidence including that of Dr. Eidenmuller and Dr. Olsen, to produce evidence with respect to the use of intoxicating liquors and that it was at least necessary to grant a rehearing on that ground. The report then contained the following:

"As to the bias of the referee in favor of applicant and the incidents cited by the defendants in reference thereto, I believe that it would be dangerous to present this picture to our Appellate Courts because of the very nature of our work and our general desire to aid the injured workman as it is necessary for each referee from time to time to render assistance to the applicant and advise him as to his rights and in respect to the evidence that he should produce. A curtailment of this practice by all our references would result in great danger to all workmen who appear before this Commission for redress on account of their industrial injuries. Therefore, as the active participation of the referee in this case seems to go beyond the usual bounds of aid and assistance rendered to applicants when the burden is put upon the referee to make a decision in the case, there is a danger that a writ in this case would result in some particular law in respect to the laudible practice of all referees in rendering aid and assistance to the injured workmen.

"It must be understood that in this case I am in no way commending the actions taken by the referee in this case. The intent of the referee was laudible in every respect and the most that can be said is that perhaps he was a little indiscreet in going as far as he did and in allowing the record to so plainly indicate from the very beginning that it was his intention to issue the most favorable award to the applicant, no matter what the evidence might disclose."

The report concludes with a recommendation that a rehearing be granted, and that the matter be assigned to another referee for such hearing. This recommendation was not followed and a rehearing was denied.

This case is a close one, especially with respect to the question as to whether or not the applicant's diabetes is related to the 1939 injury. It clearly appears that the petitioners were entitled to produce and have considered evidence as to the use of intoxicants in connection with that question. It also appears, from the testimony of the doctors chosen by the referee, that the question as to whether the development of the diabetes was to be attributed to the head injury could be determined by tests which were suggested but that this was never done. Moreover, we think bias on the part of the referee who made the findings clearly appears. Whatever the actual facts and the final decision may be, it would be a travesty on justice to say that the petitioners have had a fair and impartial hearing. Before any medical evidence to that effect had been introduced the referee jumped to the conclusion that because the injury was to the right side of the head and the subsequent trouble appeared in the left leg it must follow that they were directly connected. When it later appeared that the applicant was also suffering from diabetes this theory was extended to cover that. When two experts in that field later gave a contrary opinion the referee, not liking the way that report read, sought the advice of another doctor. When a report more to his liking was obtained he decided the case without requiring the determinative tests which had been suggested, and after shutting out a line of evidence which even the testimony of his own doctors had shown to be most material. In effect, he took the case away from the applicant's attorneys and proceeded to seek out for himself the sort of evidence he desired. While this might not be entirely improper in some cases, it rather clearly appears here that this was done not for the purpose of bringing out the true facts but rather to confirm and support the position originally taken by the referee. As the other referee aptly expresses it, the record here plainly indicates that from the very beginning it was the intention of the referee who heard the matter "to issue the most favorable award to the applicant, no matter what the evidence might disclose."

The second referee expressed the fear that, because bias so clearly appears here, an appeal in this case might result in the laying down of rules which would be harmful in other cases. While this case is a flagrant one, we think it is unusual, and that it is unnecessary to suggest any general rules. It may be conceded, for present purposes, that a referee may at times properly advise an applicant with reference to a matter of procedure and that he may, under some circumstances, furnish him assistance in the presentation of his case, but such activities, should be carried on only for the purpose of bringing out the true facts and to the end that a fair and impartial hearing may be had. In the instant case, the referee was not only a partisan but an intense partisan at all times after he gave his own diagnosis in opposition to the only medical testimony then in the record. This is disclosed not only by the portions of the record to which we have referred, but by innumerable other portions which we have not attempted to set out because to do so would make it necessary to unduly prolong this opinion by including many pages of explanatory matter.

We feel confident that not one of the Commissioners would have voted against a rehearing in this matter if he had read the full transcript of the proceedings.

[1, 2] The respondents argue that the petitioners should have voiced their objection to the referee in accordance with the provisions of section 5311 of the Labor Code, St.1937, p. 293; that this was not done; that the first effort to show bias on the part of the referee before the Commission itself appears in the petition for a rehearing; and that they should not now be allowed to raise this point. Section 5311 relates only to objections to the appointment of a particular referee and does not cover the situation which here arose. The bias on the part of this referee in no way appeared until the case was well under way and it was disclosed not by one incident but by a succession of matters appearing throughout the hearings. On several occasions, late in the proceeding, counsel for the petitioners suggested to the referee that he should disqualify himself, which he refused to do. As a practical matter, the petitioners were in a difficult position, and under the circumstances they should not be held to have waived their rights by allowing the matter to proceed until they could seek relief through a petition for a rehearing. In any event, it is to the interest of both the public and the Commission that this decision be not allowed to stand and that the entire matter be considered and decided after a fair and impartial hearing.

For the reasons given, the award is annulled and the matter is remanded for a new hearing.

MARKS and GRIFFIN, JJ., concur.

DE HART et al. v. ALLEN.

Civ. 12744.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1944.

Rehearing Denied Jan. 27, 1945.

Hearing Granted Feb. 19, 1945.

Landlord and tenant ⚿109(2, 7, 8)

Where tenant discussed with landlords change in tenants, landlords said nothing regarding their intention to relet for purpose of protecting original tenant, a tripartite agreement was made by which original tenant surrendered lease and landlords made modification thereof and accepted another as a tenant, original tenant could not be held liable for alleged subsequent breach of lease, notwithstanding he had been given notice seven months after his surrender of premises that premises would be relet for his benefit.

Appeal from Superior Court, City and County of San Francisco; Sylvain J. Lazarus, Judge.

Action by Rosemond T. De Hart and another against Joseph Allen for alleged breach of a lease of real estate. Judgment for plaintiffs, and defendant appeals.

Reversed with directions.

Walter F. Lynch and Ernest Spagnoli, both of San Francisco, for appellant.

Carl E. Day and Abraham Setzer, both of San Francisco, for respondents.

STURTEVANT, Justice.

In an action for damages for an alleged breach of a lease of real estate the plaintiffs had judgment and the defendant has appealed.

This is the second appeal taken in the above entitled action. On the first appeal (De Hart v. Allen, 49 Cal.App.2d 639, 122 P.2d 273), the facts are fully stated and each issue presented was fully considered and decided. After the remittitur went down the plaintiffs did not amend their complaint but the defendant amended his answer setting up the statute of limitations and tendering some other issues. Except as hereinafter noted, neither party introduced any new evidence. The record consists of a transcript of the evidence taken at the first trial and a transcript of the proceedings had on the second trial. On an examination of the transcript last mentioned it appears that the transcript first mentioned was introduced in evidence and that certain witnesses were called and examined. The plaintiffs produced a copy of a written notice attached to a purported affidavit purportedly signed by Edward O'Gara and which in terms purported to state that on the 18th day of July, 1934, he served the said notice on the defendant Joseph Allen. The purported affidavit did not show that O'Gara ever swore to the same. There was proof that the signature was in the handwriting of Edward O'Gara. There was no other evidence supporting the document as an affidavit. At the time of the trial O'Gara was dead, but plaintiffs offered said documents in evidence as O'Gara's "report." At all times the defendant objected to the document but the trial court overruled his objections and admitted it in evidence.

On the 17th day of May, 1943, the trial court signed findings of fact and conclusions of law. One of the recitals in the findings is "now admits in evidence the written report of Edward O'Gara to the effect that on July 18, 1943 he served upon defendant the notice dated July 16, 1934 referred to in paragraph V of plaintiffs' complaint, that plaintiffs would relet the premises at 6th and Mission Streets, San Francisco, California, for the account and benefit of defendant, and also admits in evidence the copy of said notice dated July 18, 1934 attached to said report. * * *"

The defendant contends that the trial court committed prejudicial error in allowing the plaintiffs to introduce said report in evidence. In view of the conclusions which we have reached on the principal claim of the plaintiff we need not pause to discuss the point. We may assume, without deciding, that the ruling of the trial court was correct.

The defendant Allen was sued for an alleged obligation arising on the lease made to him July 3, 1931. The plaintiff's case rests on the assumption that said lease was still extant and binding. For that assumption we think there was no basis whatever. The record shows no question of pleading was presented except as noted in De Hart v. Allen, 49 Cal.App.2d 639, 122 P.2d 273. However, the parties presented evidence showing without contradiction that July 3, 1931, the owner leased said property to this defendant for five years. About December 1, 1933, the defendant commenced to make different arrangements. He entered into an agreement with the lessors to assign his lease to Gammons. Allen brought forward Gammons as a proposed assignee and asked the lessors to consent to an assignment by Allen to Gammons. The lessors consented in writing. At the same time they executed a satisfaction of a chattel mortgage which Allen had executed as security for the payment of rent by him. That satisfaction contained a recital as follows: "The mortgage dated the 3rd day of July, 1931, made and executed by Joe Allen * * * to Mary Tracy * * * together with the debt thereby secured is fully paid, satisfied and discharged. * * *" That mortgage was on the furniture contained in the leased building. Allen then sold his lease and the furniture to Gammons. The latter executed a chattel mortgage on the furniture to the lessors as security. He also put up a cash deposit of $100 additional security. Gammons was doubtful about his being able to carry the lease. After a talk with the lessors they agreed that as to him the rent should be reduced from $250 per month to $175 per month "until business picked up." To secure the payment of the reduced rental the lessors took from Gammons $100 in cash as a deposit to secure future payments. Later they collected from Gammons all rentals until he vacated the premises. After the lease was sold to Gammons and after Allen sold his furniture to Gammons, the latter executed a mortgage on the furniture to the lessors. At the time the lessors were accepting Gammons as a tenant and making a lease to him, they did not serve any notice on this defendant that they were so acting to protect him and would hold him for any losses of rentals. No such notice was served on this defendant until May 18, 1934, as shown in O'Gara's report hereinabove noted. At no time whatever did they serve such notice on Gammons. All of these proceedings took place in the office of Madison & Burke, realtors acting as agents of the lessors. The defendant stood by. When directly asked to guarantee the payment of rent by Gammons he refused and stated that he wanted the contract so drawn that he would be wholly relieved from any responsibility. The record presents no conflict in the evidence on any of the foregoing statements of fact. However, the trial court made findings against the defendant.

In De Hart v. Allen, 49 Cal.App.2d 639, 122 P.2d 273, this court cited and quoted from Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am.St.Rep. 145, and Rehkopf v. Wirz, 31 Cal.App. 695, 161 P. 285. In the case last mentioned, commencing on page 696 of 31 Cal.App., on page 286 of 161 P., the court said:

"Where a tenant abandons the leased property and repudiates the lease, the landlord may accept possession of the property for the benefit of the tenant and relet the same, and thereupon may maintain an action for damages for the difference between what he was able in good faith to let the property for and the amount provided to be paid under the lease agreement. Bradbury v. Higginson, 162 Cal. 602, 123 P. 797. But a lessor who chooses to follow that course must in some manner give the lessee information that *he is accepting* such possession for the benefit of the tenant and not in his own right and for his own benefit. If the *lessor takes possession of property* delivered to him by his tenant and does so unqualifiedly, he thereby releases the tenant. Baker v. Eilers Music Co., 26 Cal.App. 371, 146 P. 1056; Welcome v. Hess, 90 Cal. 507, 27 P. 369, 25 Am.St.Rep. 145. An unqualified *taking of possession by the lessor* and reletting of the premises by him as owner to new tenants is inconsistent with the continuing force of the original lease. If done without the consent of the tenant to such interference, it is an eviction, and the tenant will be released. If done pursuant to the tenant's attempted abandonment, it is an acceptance of the surrender and likewise releases the tenant.

"In this case the plaintiff's testimony presents the facts clearly and without conflict. The defendants informed the plaintiff that they were going to leave the ranch. They did leave, and omitted payment of the installment of rent which, according to the terms of the lease, fell due April 1, 1914. Without making any further demand upon the defendants or in any manner informing them as to the course which he would pursue, the plaintiff took possession and made a new lease of the land as above stated. Upon these facts the plaintiff failed to establish any right of action for the damages claimed by him." (Italics ours.)

So in the instant case. When on December 1, 1933, the defendant Allen was discussing with the lessors a change in tenants, the lessors said nothing whatever regarding their intention to relet for the purpose of protecting Allen and that they would hold him responsible for the rentals accruing under the lease. No such expression was made until the notice dated July 16, 1934. That notice was too late. The surrender was completed December 1, 1933, and could not be changed by a notice given seven months thereafter.

Moreover the facts hereinabove stated show that the parties did, on December 1, 1933, make a tripartite agreement by the terms of which Allen surrendered and the plaintiffs accepted his lease. They then made modifications thereof and accepted Gammons as a tenant thereunder.

The judgment appealed from is reversed and the trial court is ordered to remake its findings in accord with what we have said and to enter judgment in favor of this defendant.

NOURSE, P. J., and SPENCE, J., concur.

Hearing granted; SPENCE, J., not participating.

* * *

67 Cal.App.2d 369

In re NEWMARK'S ESTATE.

FARMERS & MERCHANTS NAT. BANK OF LOS ANGELES v. ANDERSON et al.

Civ. 14709.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1944.

1. Executors and administrators ⇨87

The settlement of claim due estate is within discretionary powers of executor and of superior court sitting in probate, and upon appeal judgment will not be disturbed, in absence of clear showing of abuse of discretion by executors or approving court. Probate Code, § 578.

2. Executors and administrators ⇨87

A compromise of claim due estate may be authorized by court when it appears to be just and for best interests of estate. Probate Code, § 578.

3. Executors and administrators ⇨87

There was no abuse of discretion by court in approving compromise of debt due estate in the amount of $43,923.24 for only $1,164.23, where trust officers of bank acting as executor, after thorough investigation, had recommended compromise because of debtor's desperate financial plight and the liabilities of guarantors of obligation, although two of them had substantial incomes. Probate Code, § 578.

W. J. WOOD, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Proceeding in the matter of the estate of Alfred Newmark, deceased, wherein the Farmers & Merchants National Bank of Los Angeles, executor, sought permission to compromise a debt. From an order authorizing the compromise of the debt over the objection of Ruby W. Anderson, the widow of the deceased, but with the consent of Myra G. Newmark, guardian ad litem of George Alfred Newmark, minor, the contestant appeals.

Order affirmed.

W. L. Engelhardt, of Los Angeles, for appellant.

Jerry Giesler and Meyer M. Willner, both of Los Angeles, for respondent Farmers & Merchants National Bank of Los Angeles.

MOORE, Presiding Justice.

Contestant appeals from the order authorizing the compromise of a debt by the executor. She grounds her appeal upon the proposition that the evidence does not show that the compromise is to the best interest of the estate.

Contestant is the widow of decedent Alfred Newmark, who created a testamentary trust with respondent, The Farmers and Merchants National Bank of Los Angeles, as trustee. He nominated the same bank as executor of his estate. Among the assets of the estate is a promissory note which at the time of its execution on February 18, 1932, was for the principal sum of $70,000. Payments upon it had been made until the time of the hearing when the balance due was $43,923.24. The note was executed by the Kaspare Cohn Company, Ltd., herein referred to as Cohn Company.

The petition for authority to compromise alleges that the note was secured by a trust established by the Cohn Company on May 1, 1935. The maturity date of the note had been extended to May 1, 1940, and had been guaranteed by the joint and several indorsements of the following persons: Ben R. Meyer, Ray C. Meyer, Milton E. Getz, Estelle C. Getz. The amount which had been agreed upon by the executor and the Cohn Company in discharge of the latter's liability was the sum of $1164.23. The reasons which it assigned for its decision to compromise were (1) that in the event of liquidation of the assets held in the trust, executor would receive substantially less than the compromised sum; (2) that the possibility of collecting from the guarantors was remote and doubtful; (3) in the event of litigation to enforce payment the cost of such litigation weighed against the possibility of recovery would be prohibitive.

The only objection to the compromise was made by the widow of decedent, who is now Ruby W. Anderson. She alleged that she is the beneficiary of the testamentary trust to the extent of two thirds of its income. The guardian of the minor son of decedent consented to the approval of the compromise.

[1, 2] The settlement of a claim due the estate of a deceased person is within the discretionary powers of the executors and of the superior court sitting in probate. Upon appeal the judgment will not be disturbed in the absence of a clear showing of an abuse of discretion by the executors or the approving court. In re Estate of McAllister, 134 Cal.App. 349, 353, 25 P.2d 507; Probate Code, Sec. 578. A compromise may be authorized by the court when it appears to be just and for "the best interest of the estate." Probate Code, Sec. 578.

[3] There is nothing in the record to indicate an abuse of discretion or authority by the court below. The findings of fact are liberally supported by undisputed proof. The trust officer, who is vice president of the bank, had during the preceding two years made a thorough investigation of the financial responsibility of the Cohn Company and of the guarantors of the note and had rejected two offers as full payment of the note. The compromise sum agreed to by the trust officer was approved by the trust committee composed of all the officers of the trust department and of the president, vice president and three assistant cashiers of the bank. Also it was approved by the bank's finance committee. No specific objection to the compromise was alleged by appellant; neither did she deny the substantial allegations of the petition. She rested her case upon the proposition that she was opposed to the compromise regardless of the present financial responsibility of the Cohn Company or of the guarantors and upon her opinion that it is not to the best interest of the estate to accept the compromise offer.

The Cohn Company is in a desperate financial plight. As of March 31, 1944, its total liabilities were $2,877,743.79 while its assets were valued at $1,105,280.76. Those assets to the extent of $738,412.68 are held as security for specified indebtedness in the sum of $735,923.74. Payment of the latter sum must be made in full before those assets can be applied to the payment of any other indebtedness of the Cohn Company. Other assets consisting of corporate shares valued at $356,868.08 were pledged to secure other debts in the sum of $348,960. The latter indebtedness must be paid before any of such corporate shares may be applied to the satisfaction of other creditors. If such assets of both groups should all be utilized in the discharge of the debts which they secure, there would then remain assets of a value of $31,600 with which to pay liabilities in excess of $1,750,000. In such event there would be sufficient assets to pay not to exceed two per cent of the other indebtedness of the Cohn Company.

The income of the Cohn Company for the last fiscal year was $66,762. All of this was paid out to creditors holding secured claims except $3,300. Out of the latter sum income tax in the sum of $2,286.29 was paid and $900 was disbursed for miscellaneous corporate expenses. This left a net surplus for the year in the sum of $113.71. Although the Cohn Company derives a taxable income from its Seventh Street property in the sum of $22,000 annually such sum must be paid to the holders of the first and second liens upon the property, leaving no provision for federal and state income taxes. The continuous pressure of such income taxes renders extremely doubtful the cohesiveness of the company's precarious assets. If the latter should vanish, the unsecured creditors would suffer a total loss.

The guarantors upon the Cohn Company note afford no basis for brighter hopes of realizing a greater sum than that of the compromise settlement. Mrs. Getz has already deceased leaving no estate. Mrs. Meyer has nothing. Some nine years ago she and her husband conveyed to the creditors of the Cohn Company all of their non-exempt assets. Both together are obligated to pay an income tax compromise settlement in the sum of $30,000. Should they default in the payment of any installment due upon this sum, the entire original liability in the amount of $220,000 would be restored to its incipient effectiveness. Both are indebted on numerous obligations besides the sum of $84,000 on which Mr. Meyer alone carries the liability. The total assets of Mr. Meyer are $7,284.30, while his liabilities exceed $89,000. In addition thereto he is liable as guarantor on the debts of the corporation in excess of $2,100,000. While he has an annual salary of $39,079.76 he is obligated for all of that except the sum of $9,079.76 which is his only fund for the maintenance of himself and family and the payment of personal obligations.

As to Mr. Getz, he likewise receives a fairly generous salary of $32,000 annually. Like Mr. Meyer he is also about 65 years of age. At the time of the compromise his assets aggregated about $11,500. His debts are about $28,000. Such debt is in addition to his liability as indorser of the notes which are secured by trust deeds on the Seventh Street property, and a repurchase agreement. He became indebted on account of his income tax to the federal government in the sum of $180,000 which by compromise was reduced to $34,000, of which there is still due the sum of $20,000. A default in the payment of any installment due the government on that balance would result in a rescission of the compromise and the revival of the original debt. To the foregoing liabilities must be added his current taxes on his income to the federal and state governments as well as his property taxes.

Other complications were disclosed by the evidence but in view of the handicaps of the Cohn Company above detailed and the opinions of the trust committee and the finance committee of the bank the court below was in full measure warranted in approving of the compromise.

The order is affirmed.

McCOMB, J., concurs.

W. J. WOOD, Justice (dissenting).

I dissent. In my opinion it is an abuse of discretion to approve the compromise of a debt of $43,923.24 for only $1,164.23 when the debt is guaranteed by two men one of whom has a capacity to earn, and actually is receiving, a salary of $39,079.76 and the other the more than "fairly generous" salary of $32,000 per year. The extent of the income taxes being paid by the two guarantors weighs against the compromise rather than in its favor.

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67 Cal.App.2d 274

WILLIAMS v. DAVIS.

Civ. 14617.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1944.

Rehearing Denied Jan. 3, 1945.

Hearing Denied Feb. 8, 1945.

1. Appeal and error 🔑801(4)

Where the issues presented on a motion to dismiss an appeal are identical with those presented on appeal itself, the motion will be denied.

2. Appeal and error 🔑801(4)

A motion to dismiss an appeal as frivolous, which would require a determination of the ground of the appeal itself and an examination of judgment roll and appellant's brief, was denied.

3. Appeal and error 🔑786

An appellate court has inherent power to dismiss an appeal wherein mere examination of the judgment roll demonstrates that appeal is frivolous.

4. Appeal and error 🔑110

Generally, an appeal does not lie from an order denying a motion for new trial in a civil case.

5. Appeal and error ⚷110

An appeal lies from an order denying a motion for new trial made pursuant to provisions of statute authorizing new trial where court reporter is dead or suffers a disability as the result of which he is unable to prepare a manuscript of his notes. Code Civ.Proc. § 953e, as added by St. 1943, p. 2957.

6. New trial ⚷93

Trial court is without jurisdiction to grant motion for new trial pursuant to statute relative to death or disability of reporter, unless reporter is dead or suffers a physical or mental disability as a result of which he is unable to prepare a transcript of his notes. Code Civ.Proc. § 953e, as added by St.1943, p. 2957.

7. Appeal and error ⚷786
New trial ⚷93

Where judgment roll showed that phonographic reporter was alive and able to prepare a transcript of his notes and did in fact prepare a transcript, which may or may not have been accurate, trial court was without jurisdiction to grant new trial on ground of death or disability of reporter, and appeal from order denying new trial was dismissed as without merit. Code Civ.Proc. § 953e, as added by St. 1943, p. 2957.

8. Appeal and error ⚷767(1)

A motion to strike appellant's opening brief on ground that it contained language disrespectful and abusive of the trial judge must be denied, where the brief was prepared by appellant herself who was a layman not schooled in the law or the ethics of the profession, and the professional integrity and unimpeachable character of trial judge was known.

Appeal from Superior Court, Los Angeles County; William J. Palmer, Judge.

Action by Edna I. Williams against Everly M. Davis, Sr. From order granting defendant's motion to terminate proceeding for the preparation of a transcript on appeal and from order denying plaintiff's motion for a new trial under provisions of Code Civ.Proc. § 953e, as added by St.1943, p. 2957, plaintiff appeals. On defendant's motion to dismiss the appeal as frivolous.

Motion to dismiss appeal from order terminating proceedings for preparation of transcript denied, motion to dismiss appeal from order denying motion for new trial granted, and motion to strike plaintiff's opening brief denied.

Edna I. Williams, in pro. per., for plaintiff and appellant.

Young & Kelly and E. T. Sherer, all of Los Angeles, for defendant and respondent.

McCOMB, Justice.

This is a motion to dismiss appeals from orders (1) granting respondent's (defendant in the trial court) motion to terminate proceedings for the preparation of a transcript on appeal, (2) of the superior court denying appellant's (plaintiff in the trial court) motion for a new trial pursuant to the provisions of section 953e of the Code of Civil Procedure, as added by St.1943, p. 2957, on the ground that the appeals are sham, frivolous and taken solely for the purpose of delay.

There is also a motion to strike appellant's opening brief from the files on the ground the brief contains language disrespectful and abusive of the trial judge.

I

The record discloses that after a trial resulting in a judgment in favor of respondent, appellant appealed, and a transcript was prepared by the court reporter which consisted of 4470 pages; that certain objections were made to the transcript; and that after various hearings the trial judge made an order terminating the proceedings for the preparation of the transcript on appeal. Appellant has filed a brief of 36 pages in which she contends that the trial court erred in granting respondent's motion to terminate the proceedings for the preparation of the transcript on appeal.

This is the sole question presented for our determination:

Under the foregoing facts will an appellate court in California dismiss an appeal upon the ground that the appeal is sham, frivolous and taken solely for the purpose of delay?

[1, 2] This question must be answered in the negative. It is the general rule in California that where the issue presented on a motion to dismiss an appeal are identical with those presented on the appeal itself, which is the case on the present motion, the motion will be denied. It is to be noted that the determination of the

questions on the appeal would require us not merely to examine the judgment roll but also to read appellant's opening brief. (In re Estate of Sayles, 212 Cal. 437, 438, 298 P. 971; Christin v. Story, 211 Cal. 381, 382, 295 P. 515; Kelso v. Ulrich, 66 Cal. App.2d 873, —, 153 P.2d 440.

For the foregoing reasons the motion to dismiss the appeal from the order terminating proceedings for the preparation of a transcript on appeal must be denied.

II

Subsequent to the trial, differences arose between appellant and the court reporter, Samuel Rappaport, the history of which is fully set forth in Williams v. Superior Court, 14 Cal.2d 656, 96 P.2d 334. After the decision in such case a transcript was prepared and filed with the clerk of the superior court. This transcript consisted of 4470 pages. Appellant at the time of the oral argument before this court conceded the foregoing facts, and also that the reporter, Samuel Rappaport, was in the county and that she had talked with him. There is no showing that he is either dead or disabled mentally or physically from preparing a transcript; in fact, it is conceded that he has prepared a transcript which may or may not contain inaccuracies.

This is the sole question presented for our determination:

Under the foregoing facts will an appellate court in California dismiss an appeal upon the ground that an appeal from an order denying a motion for a new trial is without merit?

This question must be answered in the affirmative, and is governed by these rules:

[3] 1) To the general rule stated in subdivision I of this opinion there is this exception: An appellate court has inherent power to dismiss an appeal where a mere examination of the judgment roll demonstrates that the appeal is frivolous. (Sonoma M. Co. v. National M. Products Corp., 189 Cal. 433, 434, 208 P. 962; Scarpel v. East B. S. Railways, Ltd., 42 Cal. App.2d 32, 33, 115 P.2d 862; Kelso v. Ulrich, supra.)

[4] 2) It is the general rule that an appeal does not lie from an order denying a motion for a new trial in a civil case. (Yetta C. Manoil, Inc., v. Gibson, 57 Cal. App.2d 620, 622, 135 P.2d 14; Also 2 McKinney's new California Digest, (1930), 129 Appeal and Error, sec. 74 and supplement thereto.)

[5] 3) To the general rule stated under rule 2, supra, there is this exception: An appeal lies from an order denying a motion for a new trial made pursuant to the provisions of section 953e of the Code of Civil Procedure, as added by St.1943, p. 2957. (Conlin v. Coyne, 15 Cal.App.2d 569, 570, 59 P.2d 884).

[6] 4) The trial court is without jurisdiction to grant a motion for a new trial pursuant to the provisions of section 953e of the Code of Civil Procedure unless the phonographic reporter (a) is dead or (b) suffers a physical or mental disability as a result of which he is unable to prepare a transcript of his notes. (Norris v. Norris, 50 Cal.App.2d 726, 734, 123 P.2d 847; Laumann v. Conner, 12 Cal.App.2d 631, 632 et seq., 55 P.2d 1225. See also Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, 664, 18 P.2d 82).

[7] Applying the foregoing rules to the facts of the instant case, since it is conceded that the phonographic reporter was alive and able to prepare a transcript of his notes and did in fact prepare a transcript, which may or may not have been accurate, the trial court under rule 4, supra, was without jurisdiction to grant a motion for a new trial under the provisions of section 953e, Code of Civil Procedure, and therefore properly denied such motion. It appears that the appeal is without merit and under rule 1, supra, the appeal from the order denying the motion for a new trial should be dismissed.

[8] Relative to respondent's motion to strike appellant's opening brief on the ground that the brief contains language disrespectful and abusive of the trial judge, such motion should be denied for the reason that the brief has been prepared by plaintiff herself who is a layman not schooled in the law or the ethics of the profession and who, no doubt, over a period of years has become thoroughly imbued with what she conceives to be the justice of her cause. We are further impelled to this course because of the known professional integrity and unimpeachable character of the trial judge whose orders are now subject to review.

For the foregoing reasons:

1) The motion to dismiss the appeal from the order terminating proceedings for the preparation of a transcript is denied. Respondent is allowed 20 days from and after the date of the filing of this opinion within which to serve and file a

reply brief, and appellant is allowed 15 days from and after the date of the filing of respondent's reply brief within which to serve and file her closing brief;

2) The motion to dismiss the appeal from the order denying a motion for a new trial pursuant to the provisions of section 953e, Code of Civil Procedure, as added in 1943, is granted; and

3) The motion to strike appellant's opening brief is denied.

MOORE, P. J., and W. J. Wood, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting; GIBSON, C. J., not participating.

67 Cal.App.2d 411

LOTTA v. CITY OF OAKLAND et al.

Civ. 12699.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1944.

1. Negligence 🔑4, 6

Where the standard of conduct of a reasonable man is expressly defined by legislative enactment or judicial decision, the failure to conform with the standard is "negligence per se", otherwise the standard is that of a reasonable man under the circumstances.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

2. Negligence 🔑136(14)

Where the standard of conduct of a reasonable man is not fixed by judicial decision covering the same situation or circumstances, jury must determine the issue of negligence and basis of standard of reasonable conduct, or degree of care which a reasonable person under similar circumstances would exercise to protect another from harm.

3. Automobiles 🔑245(4)

In action for death of five year old boy who, while playing on lawn of city park where his father was engaged in removing a tree, was run over by a stake truck, truck driver's negligence was for jury.

4. Death 🔑103(3)

In action for death of plaintiff's five year old boy who, while playing on lawn in city park where plaintiff was engaged in removing a tree, was run over by a stake truck, plaintiff's contributory negligence was for jury.

5. Automobiles 🔑245(66)

In action for death of plaintiff's five year old boy who, while playing on lawn in city park where plaintiff was engaged in removing a tree, was run over by a stake truck, issue of unavoidable accident was properly submitted to jury under evidence which would have supported an inference of ordinary negligence and also a contrary inference.

6. Negligence 🔑119(3)

A general denial of negligence permits a defendant to rely upon defense of unavoidable accident without special pleading.

◆

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by Robert C. Lotta against the City of Oakland and others to recover for the death of plaintiff's five year old son who was killed by a truck driven by Benjamin Millar while in the service of the other defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

Clarence DeLancey, of Oakland, for appellant.

F. Bert Fernhoff, City Atty., and Hagar, Crosby & Crosby, all of Oakland, for respondents City of Oakland and Lee Kerfoot, Supt. of Parks.

Weinmann, Quayle & Berry, of Oakland, for respondent Calif. Spring Garden Show, Inc.

NOURSE, Presiding Justice.

This is an appeal from a judgment on a jury verdict for defendants in an action for damages brought by the plaintiff, who was the father of a 5 year old boy who was killed by a truck driven by defendant Millar while in the service of the other defendants. The appeal is brought up on a bill of exceptions.

On March 3, 1942, plaintiff, who was employed in moving trees for the spring garden show in a public park owned by the city of Oakland, brought his son to the park at about 4:30 p. m. The day was clear and sunny. The boy spoke to the men who were moving the tree, and then his father took him to a spot about 30 feet away and told him to play in the sunshine. The tree was a large one, and a hole about 6 feet deep had been dug around the roots. The plaintiff got in the hole in order to work with the other men in boxing the tree. He could not see over the rim of the hole. After a few minutes the boy came to the rim of the hole. His father told him to stay away and took him out on the lawn again. There were two trucks parked on the lawn near the hole; one a winch truck and one a stake truck. When last seen by any of the witnesses the boy was playing on the lawn about 10 feet in front of the stake truck with some tennis balls which Millar gave him to play with. The foreman directed Millar to take the stake truck to the tool yard to get some planks which were needed in order to move the tree. He got into the truck from the left and drove it across the lawn, turning to the left to go to the tool yard. The boy was run over by the right rear wheel of the truck. No one had seen him for 5 minutes prior to the accident. No one witnessed the accident. The driver was unaware of the accident until he was informed of it on his return from the tool yard.

Appellant contends that the driver was negligent as a matter of law. He further contends that appellant could not, as a matter of law, be charged with contributory negligence and that, if he was negligent, his negligence was not a proximate cause of the accident. His final contention is that the giving of the instruction on unavoidable accident was error.

[1, 2] Negligence as a matter of law, and negligence per se, are terms of general use, but not easily defined. Where the standard of conduct of a reasonable man is expressly defined by legislative enactment or judicial decision, the failure to conform with that standard is called negligence per se. But, when the standard of obligatory conduct is not fixed by a legislative enactment, it is that of a reasonable man under the circumstances. Rest. Torts, § 285. Where the standard is not fixed by judicial decision covering the same situations or circumstances, the jury must determine the issue of negligence on the basis of the standard of reasonable conduct, or the degree of care which a reasonable person under similar circumstances would exercise to protect another from harm. Donnelly v. Southern Pacific Co., 18 Cal.2d 863, 869, 118 P.2d 465.

In support of his contention that this court should hold that respondents were guilty of negligence per se the appellant cites Cambou v. Marty, 98 Cal.App. 598, 277 P. 365, Parra v. Cleaver, 110 Cal.App. 168, 294 P. 6, and similar cases holding that the nature of the place, the surrounding circumstances, and the knowledge of the presence of the person injured all contribute to impose upon the actor a greater degree of caution and that under those circumstances the jury properly found negligence. But no one of these authorities has fixed a standard of care the failure to conform with which would be negligence per se. In each case all the surrounding circumstances are reviewed and the effect of the rulings is that under those particular circumstances the actor was guilty of simple negligence. There is a marked difference between such a holding and one that the evidence of one party alone established a case of negligence as a matter of law.

Applying these principles to the case at hand we find in the testimony of Millar the following explanation of his conduct preceding the accident: "After someone asked me to get these planks, I started around the hole and went around the front of the winch truck. It was daylight at this time. It was all clear and there was nothing to obstruct my view between where I was and the truck that I subsequently got on. I looked. When I looked, I couldn't see any one near the truck. As far as I could see it was all clear. I could see the other side of the truck because the truck was open. I couldn't see all the other side but I could see the part that wasn't obscured by the cab of the truck or the lowered portion of the truck. The body was raised so I could see through. I could see also underneath the truck. It was clear. That was clear before I got into the left hand side of the truck. As far as I know it was clear before I started out because it took me a minute or so to lower the body of the truck. I had not seen the youngster for some five minutes prior to the accident."

[3] This witness was the only one who knew what occurred. No other witness saw the boy under or near the truck immediately before the accident. The case is one where, upon the evidence recited, no standard of conduct was prescribed

either by statute or by judicial decision. The issue of negligence was therefore properly left to the jury.

[4] On the issue of contributory negligence the question was also one of fact. The appellant emphasizes that he had knowledge of many of the surrounding circumstances which he has cited as proof that respondent Millar was guilty of negligence per se. He contends that notwithstanding such knowledge he was free from negligence. Here again there is no fixed standard of conduct for the father of a child under those circumstances. A reviewing court cannot therefore say that contributory negligence does not exist where the evidence would support a finding that the father did not pursue a course which a reasonable and prudent person would have followed under the same circumstances.

[5] Finally, it is argued that the issue of unavoidable accident was improperly left with the jury. With this we cannot agree. The appellant rests his argument on the premise that since the injury was caused "by the gross negligence of defendant Millar" there was no evidence justifying the submission of the issue to the jury. The premise being wrong, the conclusion is also wrong. There was no evidence showing gross negligence. There was some evidence which would have supported an inference of ordinary negligence, but there was also evidence which would support a contrary inference. As no witness saw the boy within five minutes prior to the accident it was a reasonable inference that, after Millar looked under and about the truck, the boy ran to a position where he could not have been seen when the truck was started.

[6] Appellant also argues that the issue was not properly presented in the pleadings. The authorities hold that a general denial of negligence permits a defendant to rely upon the defense of unavoidable accident, without special pleading. Pearce v. Elbe, 98 Cal.App. 101, 105, 106, 276 P. 389; Sitkei v. Ralphs Grocery Co., 25 Cal.App.2d 294, 297, 77 P.2d 311; Stevenson v. Fleming, 47 Cal.App.2d 225, 232, 117 P.2d 717.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

JARKIEH v. BADAGLIACCO et al.

Civ. 12756.

District Court of Appeal, First District, Division 1, California.

Dec. 20, 1944.

Rehearing Granted Jan. 8, 1945.

1. Appeal and error ⚷607(1)

Under affidavit that there were no proposals of settlement under discussion when notice of plaintiff's motion to terminate proceedings to secure transcript on defendant's appeal was served, and that reason transcript had not been secured was because defendant did not pay for transcript, court was authorized to terminate proceedings five months after notice of appeal was filed, particularly where costs of procuring transcript were not deposited until four months after defendant was notified of amount of costs. Rules on Appeal, Part II, rule 4(a) (c), effective July 1, 1943.

2. Appeal and error ⚷985

An order granting or denying a motion to terminate proceedings to secure a transcript on appeal will not be disturbed unless it clearly appears that trial court's discretion has been abused. Rules on Appeal, Part II, rule 4(a) (c), effective July 1, 1943.

3. Appeal and error ⚷607(1)

A party should be held to strict performance under rules on appeal. Rules on Appeal, Part II, rule 4(a) (c), effective July 1, 1943.

4. Appeal and error ⚷117

An order terminating proceedings in preparation of a transcript on appeal is appealable. Rules on Appeal Part II, rule 4 (a) (c), effective July 1, 1943; Code Civ. Proc. § 963.

5. Appeal and error ⚷113(1)

An order refusing to vacate a judgment or special order made after final judgment may be appealable. Code Civ.Proc. § 963.

6. Appeal and error ⚷801(1)

Hearings on merits are favored by appellate courts.

7. Appeal and error ⚷629

The Code of Civil Procedure authorizes trial court to relieve a party from default in failing to file a transcript on appeal within time upon a proper showing.

8. Appeal and error ⚿14(2)

Where second appeal couched in different language is merely a repetition of matters upon which first order was based, and party is not prejudiced as result of mistake, inadvertence, surprise or excusable neglect in hearing on first order, party may not have two appeals from the ruling. Code Civ.Proc. § 473.

9. Appeal and error ⚿607(1)

Where grounds to set aside an order terminating defendant's proceedings to secure a transcript on appeal were known and available for presentation to court at time of ruling terminating proceedings and was precise question determined by ruling, defendant was not entitled to file a motion to vacate the order, particularly where on hearing on motion, a transcript on appeal from judgment was not offered for filing. Rules on Appeal Part II, rules 4(a) effective July 1, 1943.

10. Appeal and error ⚿14(2)

Where defendant's motion to set aside an order was unauthorized on ground same question had been determined in order, after defendant appealed from order, defendant's appeal from denial of motion was unauthorized. Code Civ.Proc. § 473.

11. Appeal and error ⚿874(1)

Any error claimed to have occurred on hearing of unauthorized motion could not be considered on appeal from another judgment and order.

◆

Appeal from Superior Court, San Francisco County; Hon. George W. Schonfeld, Judge.

Action by Albert Jarkieh against Emma Badagliacco, also known as Emma Jarkieh, and others for an interest in proceeds of savings accounts. Judgment for plaintiff, and named defendant appeals from judgment and from a judgment and order terminating proceedings to secure a transcript on appeal, and from a judgment and order denying defendant's motion to vacate and set aside the order terminating the proceedings to secure the transcript.

Judgment in accordance with opinion.

Emmett R. Burns, James A. Himmel, and James M. Thomas, all of San Francisco, for appellant.

O'Connor, Neubarth & Moran and Harold H. Cohn, all of San Francisco, for respondent.

WARD, Justice.

Two notices of appeal by defendant Emma Badagliacco appear in this record, the first, dated October 11, 1943, is from the judgment, and the second, dated April 18, 1944, is from (a) a judgment and order made on the 15th day of March, 1944, terminating proceedings taken by appellant to secure a transcript on appeal, and from (b) the "judgment and order made on the 7th day of April, 1944, denying the motion of * * * defendant to vacate and set aside the said order heretofore made on the said 15th day of March, 1944, terminating the said defendant's proceedings to secure said transcript on appeal." In each instance a request was made for a transcript of testimony, etc. Neither appeal is on the judgment roll alone.

Plaintiff and defendant are brother and sister and administrator and administratrix respectively of the estate of their deceased mother. It appears that the mother carried a savings account in one bank in her name as trustee for defendant daughter, and in another bank she had two savings accounts in the names of herself and daughter as joint tenants. Plaintiff, claiming to be entitled to one-half of the proceeds of each account, brought this action, and on July 13, 1943, a jury decided in his favor. On October 11, 1943 defendant filed a notice of appeal. On October 20, 1943 by a stipulation subsequently approved by the court, time for giving notice to prepare a transcript on appeal was extended ten days. The purpose of this stipulation was to give the parties an opportunity to adjust their differences and thus dispense with the appeal from the first judgment. On March 15, 1944 plaintiff moved to terminate the proceedings to secure transcript. The motion was accompanied by affidavits. Two days prior to the hearing the funds necessary to prepare the transcript were deposited, but according to the affidavit of the court reporter "said funds were deposited with the distinct understanding that preparation of the transcript was not to be commenced until after the determination of the motion to terminate proceedings to secure transcript on appeal." A counter-affidavit by the attorney for the defendant was also filed. The court granted plaintiff's motion to terminate proceedings, whereupon defendant filed a "notice of motion to vacate and set aside" the order. Affidavits, counter-affidavits, supplemental affidavits, affidavits that appear to be affidavits in rebuttal and others in surrebuttal upon many minor and trivial subjects were filed in connection with the motion, but these were merely cumulative on the main subject in dispute on the previous motion to terminate proceedings.

"When an appellant desires to present any point which requires a consideration of the oral proceedings * * * he shall serve on the respondent and file with the clerk of the superior court, within 10 days after filing of the notice of appeal, a notice to prepare a reporter's transcript of the oral proceedings and such oral or written instructions given or refused, as he shall desire copied or transcribed." "The notice given by the appellant under the foregoing provisions of this rule shall not be effective for any purpose unless, within 10 days after notification from the clerk of his estimate of the cost of preparing the reporter's transcript as designated by the notices of the parties, the appellant shall either deposit with the clerk an amount of cash equal to the estimated cost with directions to apply the same to the fees of the reporter or file with the clerk a waiver of such deposit signed by the reporter." (Rules on Appeal, Part II, Rule 4 (a) and (c) respectively, adopted by the Judicial Council effective July 1, 1943.) The attorney for the defendant in his affidavit states that he was notified on or about November 12, 1943 of the cost of preparing the transcript; the money was not deposited until four months later. His excuse that he was misled by statements of his opponent is disputed.

The real question involved on the motion to terminate and the motion to vacate was whether the attorney for plaintiff had orally agreed that he would not require the preparation of the transcript on appeal, but would "give you all the time you need to have your clerk and reporter's transcript written up after we finally and actually determine that we can go no further to settle this matter." The affidavit of the attorney for plaintiff set forth in substance that although the defendant had made many counter-proposals of settlement of the litigation, each and all of them had been promptly rejected and that there were no proposals of settlement under discussion at the time the notice of motion to terminate proceedings to secure the transcript on appeal was served; that at no time, in any shape, form or manner, did the attorney for plaintiff request the attorney for defendant to delay securing the transcript on appeal, but on the contrary the attorney for the defendant constantly advised the attorney for plaintiff that the reason he had not secured the transcript was because he was unable to pay for the same and that he, as said attorney, was under obligation by reason of contract with his client to advance the moneys necessary to finance said appeal.

[1-3] If the trial court believed the statements above made, that is the end of the matter. In Hohnemann v. Pacific Gas & Electric Co., 31 Cal.App.2d 692, page 694, 88 P.2d 748, 749, this court in considering a similar question said: "* * * whether the trial court grants or denies the motion therefor, its decision in the matter will not be disturbed by a reviewing court unless it clearly appears from the record upon which the trial court's decision is based that its discretionary power has been abused; also that it is seldom that the facts of any particular case can be used as a precedent for the determination of another proceeding of like character. (Citing cases.]" See, also, Beard v. Beard, 16 Cal.2d 645, 107 P.2d 385; Bonfilio v. Ganger, 60 Cal.App.2d 405, 140 P.2d 861; Cooke v. Cooke, 60 Cal.App.2d 451, 140 P.2d 989; Atowich v. Zimmer, 129 Cal.App. 193, 18 P.2d 370; Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468; Nicoll v. Weldon, 130 Cal. 666, 63 P.2d 63; Bodin v. Webb, 17 Cal.App.2d 422, 62 P.2d 155. Subsequent to the trial, that is after a litigant has had his day in court, he should be held to a strict performance under the rules on appeal. Rule 4(c) should be made effective. Lawson v. Guild, 215 Cal. 378, 10 P.2d 459; Bley v. Board of Dental Examiners, 101 Cal.App. 666, 282 P. 19; Ransome-Crummey Co. v. Beggs, 185 Cal. 279, 196 P. 487.

[4-7] An order terminating proceedings in the preparation of a transcript on appeal is appealable. O'Banion v. California C. P. Growers, 109 Cal.App. 328, 292 P. 975; Howland v. Howland, 11 Cal.2d 20, 77 P.2d 475. An order refusing to vacate a judgment or special order made after final judgment may be appealable. Code Civ. Proc. sec. 963; Estate of Barton, 20 Cal.App.2d 648, 67 P.2d 695. Hearings on the merits are favored by appellate courts. Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922. Upon a proper showing, the Code of Civil Procedure gives the trial court power to relieve a party from default in failing to file a transcript on appeal

within time. Manning v. Gavin, 14 Cal.2d 44, 92 P.2d 795.

[8] While an order terminating proceedings in the preparation of a transcript, an order denying a motion to vacate an order made after judgment and similar orders may, under certain circumstances, be appealable (Helbush v. Superior Court, 99 Cal.App. 501, 278 P. 1062; Title Ins. & Trust Co. v. California, etc., Co., 159 Cal. 484, 114 P. 838; California Delta Farms v. Chinese American Farms, 201 Cal. 201, 255 P. 1097; Funk v. Campbell, 15 Cal.2d 250, 100 P.2d 762; Gossman v. Gossman, 52 Cal. App.2d 184, 126 P.2d 178), it was not contemplated that an aggrieved party should have two appeals from a ruling of the court if a second, couched in different language, is in effect merely a repetition of matter upon which the first order was based, and it appears that the appealing party is not prejudiced as the result of mistake, inadvertence, surprise or excusable neglect in the hearing on the first order. Code Civ. Proc. sec. 473. In Lawson v. Guild, supra, it was held that if the grounds of the second appeal were the same as those of the first appeal, the second would not lie. See, also, Barker v. Ackers, 29 Cal.App.2d 162, 84 P.2d 264; Nagelmann v. McIntyre, 27 Cal.App.2d 621, 81 P.2d 466; Neighbours v. Neighbours, 62 Cal.App.2d 840, 145 P.2d 688; Home Owners', etc., Corp. v. Engelbertson, 54 Cal.App.2d 46, 128 P.2d 424; Estate of Richards, 17 Cal.2d 259, 109 P.2d 923; Nuckolls v. Bank of California, 10 Cal.2d 266, 74 P.2d 264, 114 A.L.R. 708; People v. Palmer, 49 Cal.App.2d 579, 122 P.2d 114.

[9] In the present case there is no legal basis for the second motion; it merely called upon the court to repeat or overrule its previous order. It is true that the notice of motion to vacate, etc., set forth that the previous order was the result of the mistake, inadvertence, surprise and excusable neglect of the defendant Emma Badagliacco. However, the mistake, etc., set forth in her affidavit was her reliance upon the attorney for plaintiff, whose alleged conduct caused her to believe that it would not be necessary to prepare the transcript on appeal. This is the precise question which was determined on the motion to terminate proceedings. It is true that the conduct of plaintiff is alleged to have caused the alleged error in granting the first motion. All matters set forth in the affidavits as grounds to set aside that motion were known and available for presentation to the court at the time of the ruling thereon. On the second motion it was stipulated that all affidavits used on the first motion could be used as part of the record on the second. On the hearing of the latter certain affidavits were filed indicating that a motion for continuance on behalf of defendant had been presented at the first hearing. It developed that this had not been a motion for a continuance but had been a suggestion that the attorney for defendant be permitted to file a reply affidavit. Subsequent events indicate that such affidavit would have been merely cumulative.

It should be noted that on the second hearing a transcript on appeal from the judgment was not offered for filing. The facts in Taft v. Security-First Nat. Bank, 139 Cal.App. 228, 33 P.2d 683, bear quite a resemblance, except as to time intervals, to those herein. A motion to terminate proceedings had been granted, and a motion under sec. 473 to vacate and set aside the previous order had been denied. The court said, pages 232, 233 of 139 Cal.App., page 685 of 33 P.2d: "We take it that the request for relief was not only insufficient but that it was, in fact, incidental to and a part of the motion to set aside the order of termination. Under these circumstances, the motion from which the second appeal is taken must be considered only as a motion to set aside the prior order, and the usual rule applies that, when an order is appealable, an order denying a motion to set the same aside is not appealable." In Merron v. Title Guarantee, etc., Co., 11 Cal.App.2d 565, 566, 567, 54 P.2d 61, it was held that "an appeal does not lie from an order denying a motion to vacate a judgment where such motion merely calls upon the court to overrule a former ruling on the same facts."

In Koshaba v. Koshaba, 51 Cal.App.2d 602, 125 P.2d 535, similar proceedings to the present were had, but there the time for appeal from the order terminating proceedings had elapsed, and the appeal from the order (page 604 of 51 Cal.App.2d, page 536 of 125 P.2d) "ostensibly made under section 473 of the Code of Civil Procedure, was nothing more nor less than an attempt by the appellants to secure a second hearing of the motion which had gone against them, and a 'reversal,' if possible, in the trial court of the first order, terminating the proceedings, which was itself appealable."

[10, 11] It is apparent that if appellants are entitled to any relief it must be based on the appeal from the order terminating proceedings. It does not appear that there was error in that proceeding. In the appeal from the judgment and order made on the 7th day of April, 1944, there is no legal basis for the motion which resulted in the making of the order, hence it is not appealable. Any error claimed to have occurred on the latter hearing, such as misconduct of the court, may not be considered.

The appeal from the judgment and order made on March 15, 1944 is affirmed. The appeal from the order made on April 7, 1944, not being an appealable order, is dismissed.

PETERS, P. J., and KNIGHT, J., concur.

WEST KEY NUMBER SYSTEM

67 Cal.App.2d 257

CORDELL v. CITY OF LOS ANGELES et al.

Civ. 14370.

District Court of Appeal, Second District, Division 1, California.

Dec. 13, 1944.

1. Municipal corporations 🔑200

Under city charter provision entitling widow to pension if fire truck driver "shall die as result of any injury received during performance of his duties", the quoted words mean that a causal relation, mediate or immediate, must be shown between duty performed by decedent and immediate cause of his death.

See Words and Phrases, Permanent Edition, for all other definitions of "Injury Received During Performance of Duty".

2. Mandamus 🔑168(4)

In mandamus proceeding by widow of fire truck driver to compel payment of pension, in determining whether there was causal relation between duty performed by decedent and immediate cause of his death, expert testimony was essential.

3. Appeal and error 🔑1011(1)

An appellate tribunal will not disturb trial court's findings because of conflict in evidence, even though reviewing court may feel that it would have found facts differently.

4. Appeal and error 🔑1010(1)

Where law requires proof of facts to be clear and convincing, sufficiency of evidence to establish given finding is primarily for the trial court and, if there is substantial evidence to support his conclusion, determination is not reviewable.

5. Appeal and error 🔑1010(1)

It being trial court's function to determine facts established by evidence, before its conclusion can be set aside for insufficiency of evidence, there must be clear showing that upon no hypothesis is there sufficient substantial evidence to support court's decision.

6. Appeal and error 🔑931(1)

District Court of Appeal must assume in favor of judgment existence of every fact which could reasonably have been deduced from evidence.

7. Appeal and error 🔑1010(1)

Only when appellate court can conclude that facts which may reasonably be deduced from evidence are insufficient to support judgment rendered may it interfere.

8. Evidence 🔑570

Expert testimony is to be given the weight to which it appears to trial judge in each case to be entitled, since law makes no distinction between that kind of testimony and evidence of any other character.

9. Pensions 🔑1

Pension legislation must be liberally construed and applied to end that beneficent results of such legislation may be achieved.

10. Mandamus 🔑168(4)

In mandamus proceeding by widow of fire truck driver to compel payment of pension, evidence was sufficient to support judgment for petitioner based on finding that decedent died as result of injuries received during performance of his duties.

11. Evidence ⚷553(3)

Assumption in hypothetical question propounded to physician that decedent was repeatedly subjected to exposure and to cold and wet weather and water from fire fighting, was warranted by the evidence.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Petition for writ of mandate by Helen S. Cordell against the City of Los Angeles and others to compel respondent to approve petitioner's application and pay a pension to her as widow of a deceased driver of a fire truck. From a judgment for petitioner, defendants appeal.

Affirmed.

Ray L. Chesebro, City Atty., and Robert J. Stahl and Edward J. Olstyn, Deputy City Attys., all of Los Angeles, for appellants.

Joseph Scott and J. Howard Ziemann, both of Los Angeles, for respondent.

WHITE, Justice.

This is an appeal from a judgment awarding a pension to the widow of a member of the Los Angeles Fire Department who died on the 10th day of September, 1940, following an operation for the removal of his appendix.

Respondent herein is the widow of Charles J. Cordell, who, for a period of about seventeen years immediately preceding his demise, had continuously served as an auto fireman and driver of a fire truck for the Fire Department of the City of Los Angeles. It is conceded that Mr. Cordell was, at all times during his service, a member of the Fire Department within the contemplation of the provisions of sections 180 to 189, inclusive, of the Charter of the City of Los Angeles, and that, had he lived and continued to serve for the requisite number of years, he would have been entitled to a pension.

Respondent widow's claim to a pension is based upon the provisions of section 183 of the City Charter, which entitles her thereto if her husband died "as a result of any injury received during the performance of his duty, or from sickness caused by the discharge of such duty."

Prior to the commencement of this action, respondent filed with appellant Board of Pension Commissioners of the City of Los Angeles her application for a pension pursuant to the terms of section 183 of the City Charter and which application was denied by said Board. She thereupon filed in the Superior Court of Los Angeles County her petition for a writ of mandate to compel the City and said Board to approve her application and pay the pension therein demanded. Following trial before the court, a judgment was rendered directing the issuance of a peremptory writ of mandate commanding said Board of Pension Commissioners to grant respondent herein a pension as the surviving widow of a member of said Fire Department.

From such judgment, the City of Los Angeles and its Board of Pension Commissioners prosecute this appeal.

For purposes of convenience, the City of Los Angeles and said Board will hereinafter be referred to as "appellants" and petitioner in the court below, Helen S. Cordell, will be designated as "respondent."

The particular findings of the trial court which are challenged on this appeal read as follows:

"That the said Charles J. Cordell died on the 10th day of September, 1940, as a result of injuries received during the performance of his duty and from sickness caused by the discharge of his duty as a member of the Fire Department of the City of Los Angeles;

"That the immediate cause of the death of Charles J. Cordell was a failure of his kidneys to function properly following an operation for appendicitis; and that the said failure of decedent's kidneys to function properly was directly and proximately caused by injuries received and sickness caused by and during the performance of decedent's duty as a member of the Fire Department of the City of Los Angeles; and by a pre-existing condition and disease of decedent's kidneys and appendix which was accelerated and aggravated by injuries received and sickness caused by and during the performance of decedent's duty as a member of the Fire Department of the City of Los Angeles."

And

"That Charles J. Cordell during and by the performance of his duty as a member of the Fire Department of the City of Los Angeles was repeatedly subjected to exposure and to inclement, wet and cold weather, and while fighting fire in the performance of his duty as a fireman he was on many occasions drenched by the fire hose and water used in fighting fires, and that said exposures and drenchings were detrimental to his health, and directly and proximately accelerated and aggravated a pre-existing condition and disease of his kidneys and appendix, and directly and proximately caused his death."

It is earnestly urged by appellants that the record is barren of any evidence establishing a causal connection between the fireman's death and his service in the Fire Department. It therefore becomes necessary to examine the evidence to determine whether, by a preponderance thereof, it was established that the immediate cause of Mr. Cordell's death, "a failure of his kidneys to function properly following an operation for appendicitis," was directly and proximately attributable to injuries received and sickness caused by and during the performance by him of his duties as a member of the Fire Department of appellant city. In that regard, the evidence reflects that Mr. Cordell entered the Fire Department in 1923, when he was about 28 years of age; that he was in good health until the 20th day of January, 1937. On this date, while cleaning fire apparatus at the fire house, he slipped from the running board of a fire truck and sprained his back, causing him such severe pain that it was necessary to relieve him from duty later in the day. He remained at home and suffered great pain. His condition was diagnosed as a sacral strain, for which treatment by way of short wave diathermy to the back, with massage, was administered. On February 24, 1937, he was "found O.K. for work." Three days before the occurrence of this injury, the decedent had received medical attention for an unlocalized pain in the abdomen.

On February 3, 1940, while running across the handball court at the fire station in response to an alarm, decedent slipped and fell so heavily upon his back that he was unable to arise, and had to be assisted to his feet. Decedent, however, responded to the alarm and drove the apparatus to a fire, but was unable to drive the fire truck on the return trip and a relief driver was assigned to that duty. In the fire station "log" this mishap to decedent was thus recorded: "It was a very hard fall".

On May 17, 1940, while taking part in the rescue of a boy on a cliff, decedent, during the performance of his duty, was lowered over the cliff with a safety belt to which a rope was attached in the front but which had no support around the hips or crotch, his entire weight being supported by the belt around his waist; the decedent was lowered over the cliff about 100 feet to the place where the boy was located, and he took the boy in one arm, held the rope with the other hand, and was then pulled up the cliff by the firemen on the top. About half way from the top the boy started to slip from decedent's grasp and decedent let go of the rope with his other hand to seize the boy to prevent him from falling, thus throwing his and the boy's entire weight upon the safety belt which was fastened around decedent's waist. Decedent called to the men at the top holding the rope, stating that he was hurt and asking them to wait before pulling him up further. After a few minutes' wait the ascent was completed. Upon reaching safety, decedent was in great agony and had to lie down and one of the firemen at the top of the cliff said, "He looked sickly, greenish and palish" and appeared to have to faint; decedent remained on the ground for awhile before he was taken back to the fire station, and from then on and until his death, he complained about pain in his side in the abdominal region. Decedent's widow, respondent herein, testified that from that time on he "got very bad" and that they tried in several ways to determine what the trouble was, but that no satisfactory diagnosis was ever reached.

With reference to decedent's condition following this accident, respondent testified: "After he pulled this boy up the cliff he was very exhausted, and said he didn't know whether he could make it or not, because it was a terrible haul up the bank, and he was very ill after that, and complained, and from then on he went down very fast. After 1937, after the fall from the truck, he had declined very much." When asked what the decedent said as to how he felt and as to where the pain was located, respondent testified that her husband told her "in his kidney and back and all through the abdominal region. * * *"

On September 6, 1940, decedent was stricken with an acute pain in the abdomen, accompanied by severe prostration and dyspnea, which was at first diagnosed as "possible coronary occlusion, or myocardial degeneration." However, on the following morning, after the visit of another physician, Mr. Cordell was removed to the Queen of Angels Hospital, where an appendectomy was performed. His immediate post-operative condition was good, but two days after the operation Mr. Cordell, according to his wife, "continued to go down" until he expired on the morning of September 10, 1940, because of the failure of his kidneys to function properly following the appendectomy.

[1, 2] It has been held that the words "shall die as a result of any injury received during the performance of his duty," as used in section 183 of the City Charter, mean that a causal relation, mediate or immediate, must be shown between the duty performed by the decedent and the immediate cause of his death. Lawrence v. City of Los Angeles, 53 Cal.App.2d 6, 10, 127 P. 2d 931. In the instant case, the existence of such causal connection is necessarily a scientific question, upon which it is necessary to obtain the scientific knowledge of experts trained in such scientific subject. Expert testimony is therefore essential. Wm. Simpson C. Co. v. I. A. C., 74 Cal. App. 239, 240 P. 58; Newton v. I. A. C., 204 Cal. 185, 267 P. 542, 60 A.L.R. 1279; State Compensation Insurance Fund v. I. A. C., 195 Cal. 174, 231 P. 996. With these rules before us, we find in the record the testimony of Dr. Thomas J. O. Volkmann, an osteopathic physician since 1907 and who also in 1927 qualified before the State Board of Medical Examiners for a physician's and surgeon's license. This doctor first treated the decedent in April 1937, following the injury sustained by the latter in the performance of his duties when he fell from a fire truck. The witness testified that it was his opinion that in 1937 the decedent had a spinal cord injury coupled with meningeal hemorrhages; that he had great difficulty in getting the patient onto the table. The witness further testified that he advised Mr. Cordell "You may not realize it, but in my reasoning and judgment you are more severely injured than what you think".

On August 27, 1938, decedent again called upon Dr. Volkmann, stating that "the work is rather strenuous for me, and I go home feeling just worn out sometimes." The doctor testified that he then found decedent suffering from "almost the same condition I experienced the first time" (April 1937), and again admonished the patient that his injury "was more serious than what he anticipated or contemplated."

After decedent's fall in the course of his employment on February 3, 1940, Dr. Volkmann again treated him professionally and, with reference to Mr. Cordell's condition on that occasion, the witness testified:

"On this occasion I found that he was injured very much more than he was on the previous occasion. In my opinion and in my reasoning, I think, going to the degenerative processes that were working in the body from 1937 to 1940, it extended to such an area that this fall, in my opinion, was the thing that created considerable degeneration in the whole nervous system and involving the plasmic fluids of the body.

"Q. All right. What did you notice about him in February, 1940? A. When he came in, he was almost carried in by Mrs. Cordell."

In July, 1940, following the injury sustained by decedent when rescuing the boy on the cliff, Dr. Volkmann again examined and treated him. With reference to his findings upon that occasion, the witness testified:

"A. When I saw Mr. Cordell at that visit when he was lying on his cot, he pulled up his under-garment, I just put my hand under the right costal arch—

"Q. Where is that? A. Under the lower ribs—and asked him to take a breath, and when he took the breath I could feel the kidney come down.

"Q. Where is the Kidney? A. Right at the lower pelvis.

"Q. In the front of the body or behind? A. In the front. I felt the kidney come down, when he said, 'Doctor, that is very very painful.' I felt it myself. I said 'Mr. Cordell, you had better get immediate attention.' I understand after that—

"Q. Never mind about that. You told him he should get immediate attention? A. Yes. Then I left him.

"Q. Why did you say that? A. Because I felt that he was dangerously sick.

"Q. Will you explain to us what you mean by saying the kidney fell down? Explain that more specifically, please. A. Well, it departed lower than its normal region.

"Q. In other words, the kidney is attached to some part of the anatomy? A. Yes.

"Q. Where? A. Up under the liver and diaphragm.

"Q. And what caused the kidney to fall? A. As he breathed, the diaphragm came down and lowered the kidney some. Stretched it from the membrane."

The doctor also explained on cross-examination that normally the kidney is not a movable organ and that "it is a fixed organ, except by some pathological condition." The witness also testified that in his opinion decedent never had recovered from the condition in which he found him in April, 1937, and which ailment was occasioned in the performance of decedent's duty as a fireman when he fell from a fire truck.

Another expert witness was Dr. Harry H. Wilson, whose qualifications included graduation in 1915 from the College of Medicine of the University of Illinois; Fellow of the American College of Physicians; teacher in medical schools; six years secretary of the Los Angeles County Medical Association and president for one year; Councillor of the California Medical Association for ten years and president for one year. There was propounded to this witness a lengthy hypothetical question embodying all of the facts elicited in the testimony concerning the decedent from the time he entered the Fire Department until his death. After this witness testified that the decedent died from failure of his kidneys to eliminate the toxin after the appendectomy, the record discloses the following testimony:

"Q. Failure of the kidneys. An operation for appendicitis, would that in any way contribute to it? A. It brought about the failure of the kidneys, a predisposing factor which threw shock upon the kidneys.

"Q. Were the kidneys in bad condition? A. Apparently not.

"Q. It must not have developed before that? A. I don't think so, and sometimes the actual tissue changes are not an indication of how things work, and Dr. Zeiler in his examination did not find many actual tissue changes, not sufficient, as he states, to account for death. The facts are, however, that at one time the patient was given 500 cc of citrate of blood, and they could only get 20 cc from his bladder, so the kidneys could not filter through his circulatory system into his bladder, so taking into consideration what the pathologist found, the man died from failure of his kidneys to eliminate the toxin.

"Q. That is what I want to know. A. Yes.

"Q. Can you explain a little further in detail, Doctor, how the condition of his kidneys could be aggravated by exposure or strain or abnormal activity, or the life of this man in his duties as a fireman? A. Well, assuming that the statement contained in the history, that he had had a severe Bright's disease, I think it said 25 years before, is true in this hypothetical man, then that hypothetical man should not have been exposed to fatigue, wet, or colds, he should have adapted his life to one of relative sedentary work, protected from either the elements or artificial wetting, and should have worn the types of clothing that did not allow surface changes of temperature to occur repeatedly, and to moderate his diet is very important, and to have avoided the use of alcohol and to have attempted in every way to protect the elimination and the metabolic processes of the body."

In discussing the causes which led to appendicitis, the witness testified:

"We do not know for a fact what causes one person to have an excitation and infection in his appendix. In foreign bodies, trauma does play a relatively important part. Fatigue and lowered resistance play a more important part, I think, the same as it does in a cold in our nose. If we do anything that lowers our resistance and bacteria are available to pounce upon us when we are down, they will do so."

This same witness testified as follows:

"Q. Do you think, Doctor, wouldn't the several normal urinalyses made at the time of the dates that I have stated, rule out the possibility or probability certainly of there being any results of the Bright's disease in the kidneys? A. Not at all.

"Q. Not at all? A. Not at all. We see women who have a very severe kidney damage, nearly lose their lives in childbirth and recover and their blood pressure and urine remain entirely normal until through some later experience in life there is strain on them."

[3-8] While it is true there was other expert testimony from which the conclusion might be drawn that there was no causal connection between the immediate cause of decedent's death and his duties in the Fire Department, the rule is too well established to require citation of authorities, that an appellate tribunal will not disturb the findings of fact of a trial court because of a conflict of evidence, and that is true even though the reviewing court may feel that it would have found the facts differently had it been the trier thereof. Where the law requires proof of a fact or

facts to be clear and convincing, the sufficiency of evidence to establish a given finding is primarily for the trial court to determine. If there be substantial evidence to support such conclusion, the determination is not open to review on appeal. It being the function of the trial court to determine what facts are established by the evidence, before its conclusion can be set aside upon the ground of "insufficiency of the evidence" there must be a clear showing that upon no hypothesis whatever is there sufficient substantial evidence to support the decision reached in the court below. We must also assume in favor of the judgment the existence of every fact which could reasonably have been deduced from the evidence. Only when we can conclude that such facts are insufficient to support the judgment rendered may we interfere, because, in such a situation the question becomes one of law. The evidence in the instant case does not warrant a reversal on the ground of its insufficiency to support the judgment rendered. Although there was in the record expert testimony in conflict with that herein narrated, such testimony is to be given the weight to which it appears to the trial judge in each case to be entitled. The law makes no distinction between that kind of testimony and evidence of other character. State Compensation Insurance Fund v. I. A. C., supra, 195 Cal. at page 184, 231 P. 996.

[9, 10] Neither can we be unmindful of the rule so firmly established in this state that pension legislation must be liberally construed and applied to the end that the beneficent results of such legislation may be achieved. Pension provisions in our law are founded upon sound public policy and with the objects of protecting, in a proper case, the pensioner and his dependents against economic insecurity. In order to confer the benefits intended, such legislation should be applied fairly and broadly. In the case at bar, there is ample evidence warranting the inference that the physical condition of the kidneys of the decedent aggravated his post-operative condition and directly and proximately contributed to his demise. As was said by our Supreme Court in the late case of McKeag v. Board of Pension Commissioners, 21 Cal.2d 386, 390, 132 P.2d 198, 200:

"The language of section 185 ought not to be interpreted narrowly. Rather, a liberal construction is to be given, in accordance with the rule ordinarily used in construing pension legislation. O'Dea v. Cook, 176 Cal. 659, 169 P. 366; Casserly v. City of Oakland, 215 Cal. 600, 12 P.2d 425; Dillard v. City of Los Angeles, 20 Cal.2d 599, 127 P.2d 917 [128 P.2d 537]. As was said in Hurley v. Sykes, supra, 69 Cal.App. [310], page 316, 231 P. [748], 'In ascertaining the intent and meaning of the charter provision, a liberal construction should be indulged in to carry out the beneficial purposes aimed at. (Citing cases.) The spirit of these provisions is to protect all members of the fire department in the benefits which the fund insures, and they should not be narrowed by any strict or technical construction, but should be interpreted on broad principles. Any other construction would result in a limitation of the beneficial provisions of the act, and render nugatory the manifest intention of the law-making power, and do violence to its apparent purpose.' See, also, Walton v. Cotton, 19 How. (U.S.) 355-358, 15 L.Ed. 658."

That the policy in this state is to construe provisions of the character here involved liberally, serving as they do a beneficial purpose, was also the holding in Casserly v. City of Oakland, 215 Cal. 600, 603, 12 P.2d 425.

[11] Finally, appellants assail the action of the trial court in overruling their objection to the assumption in the aforesaid hypothetical question propounded to Dr. Harry H. Wilson that the decedent was "repeatedly subjected to exposure and to cold and wet weather, and water from fire-fighting"; that "during at least the last two years of the life of our hypothetical man his duties as a fireman required his repeated exposure to inclement weather, cold, dampness, and wet at fires * * * and that on many occasions at fires he * * * would be drenched with water." It is argued by appellants that there is no evidence in the record upon which these assumptions could be predicated. But the record does contain testimony by one fireman that when a "run" was made the decedent, in common with other firemen, would be "exposed to rain and anything, any kind of weather." Another fireman testified to the same effect, while a third gave evidence that the decedent, after arriving at a fire, would handle the hose and perform the usual duties of the firemen upon such occasions; that decedent was exposed to water, and that when there was a fire "we were apt to get wet." Respondent, Mrs. Cordell, also testified that many times upon the return of

her husband from a fire when she would see him at the fire station "he would be soaking wet." It is also worthy of note that in their brief appellants state "that firemen are exposed to whatever the weather might happen to be when they have an alarm of fire, and that they might become wet from water used in extinguishing fire is, of course, a self-evident proposition requiring no evidence."

In the case at bar, the foregoing admittedly "self-evident" proposition is supported by evidence of and concerning the facts upon which the hypothetical question was framed.

A careful examination of the record herein discloses sufficient evidence to support the findings and judgment.

The judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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67 Cal.App.2d 357

PEOPLE v. EASTMAN.

Cr. 2317.

District Court of Appeal, First District,
Division 2, California.
Dec. 20, 1944.

1. Criminal law 🔑1158(1)

Whether accused in entering a plea of guilty to burglary was laboring under a mistake of fact was a question of fact for trial court. Code Civ.Proc. § 2009.

2. Criminal law 🔑1144(17)

On appeal from order denying accused's motion to vacate conviction after he pleaded guilty to burglary on ground no such crime was committed, in absence of contrary evidence, Appellate Court was required to presume that accused was a person having ordinary faculties and able to understand simple words read by court from complaint at time of arraignment. Pen.Code, § 859a.

3. Burglary 🔑41(4)

Entering locked "outhouses" and shop of an engineering company was evidence of burglary. Pen.Code, § 459; § 664, subd. 1.

4. Criminal law 🔑998

Where accused crawled under a locked gate of a fence inclosing company's main building, "outhouses", and shop, and was arrested before entrance to building with intention of robbing cash drawer, and someone entered "outhouses" and shop, judgment of conviction on accused's plea of guilty to burglary would not be vacated on ground that crime of attempt to commit burglary was only offense committed. Pen. Code, §§ 459, 859a; § 664, subd. 1, Code Civ.Proc. § 2009.

Appeal from Superior Court, City and County of San Francisco; Alfred J. Fritz, Judge.

Lawrence Eastman pleaded guilty to burglary, and, from an order denying his motion to vacate and set aside a judgment of conviction, he appeals.

Order affirmed.

Ernest Spagnoli, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Ralph W. Scott, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The appeal is from an order of the Superior Court of the City and County of San Francisco, denying the appellant's motion for an order vacating, annulling and setting aside the judgment of conviction and sentence.

By a complaint filed in the Municipal Court in San Francisco during October, 1942, the appellant was charged with burglary. The premises alleged to have been burglarized consisted of the buildings of the Northwest Engineering Company, 255 Tenth Street, San Francisco. Gilbert Mallory was jointly charged.

At a preliminary examination held in said Municipal Court, Mallory was held to answer for burglary and an information was filed against him. Mallory was tried in the Superior Court for burglary and the jury disagreed. Mallory thereupon pleaded guilty to the crime of attempt to commit burglary of the second degree and was given a short county jail term.

The testimony given at the preliminary examination is contained in the reporter's transcript.

At said preliminary examination the appellant Eastman pleaded guilty to the charge of burglary and the magistrate then certified said case to the Superior Court for sentence. On November 5, 1942, the Superior Court sentenced him to state prison and fixed the degree as second degree burglary.

On June 2, 1944, appellant Eastman, through his counsel, moved the superior court that it vacate and set aside the judgment of conviction on the ground that no burglary was in fact committed by anyone or at all, including, of course, the appellant.

The notice of said motion to vacate judgment is contained in the clerk's transcript.

Included in the reporter's transcript on appeal are (1) the proceedings had on the hearing of the said motion to vacate judgment; (2) the said testimony adduced at said preliminary examination; and (3) the testimony of the prosecution witnesses at the trial of the co-defendant Mallory held in the superior court.

The appellant quotes from the testimony contained in the record facts showing that Mallory acted as a look-out and stationed himself at the corner of Folsom and Dore Streets, and that the appellant crawled under a wire gate into the yard occupied by Northwest Engineering Company at 255 Tenth Street. It does not show affirmatively that he entered any building in said lot. However it does show affirmatively that he crawled up on the roof of the building of Northwest Engineering Company with the intention of entering said building through the skylight and with the intention of robbing the cash drawer after entrance made. He was apprehended and arrested before entrance and while in one of the gullies of said roof. The appellant then contends that such facts show no burglary was committed by anyone; that the appellant pleaded guilty to a crime that was never committed; that the crime of an attempt to commit burglary of the second degree was the only offense that was committed and that the punishment of that offense could have been the county jail and not necessarily imprisonment in the state prison (Pen.Code, § 664, subd. 1); and that appellant's only remedy is by motion made to vacate the judgment. In connection with the last contention stated above, appellant contends that he labored under a mistake of fact and a mistake of law. Without deciding the point it will be assumed that the appellant did not err in presenting his contentions by making said motion. People v. Perez, 9 Cal.App. 265, 266, 98 P. 870. Assuming therefore that appellant's procedure was proper, the question at once arises whether the record shows he presented facts sufficient to grant him any relief.

[1, 2] That in entering a plea of guilty the appellant's contention that he labored under a mistake of fact presented one issue of fact calling for determination by the trial court. It determined that issue against the appellant. That being so the question before this court is, was there evidence in the record which will sustain such ruling? We think there was. At the time of the arraignment of appellant, pursuant to the provisions of the statute (Pen.Code, § 859a), the trial court read from the complaint as follows: "The Court: I instruct you, and each of you, that you are charged with the crime of felony, towit: Burglary, committed by you in the City and County of San Francisco, on the 13th day of October, 1942, in that you did then and there wilfully and unlawfully and feloniously and burglariously *enter the house*, room, apartment, tenement, shop, warehouse, store and building of Northwest Engineering Company, 255 Tenth Street, and situated in the said City and County of San Francisco, with the felonious intent then and there to commit theft, contrary to the form, force and effect of the statute in such case made and provided." (Italics ours.) But there is no evidence that appellant could not hear, that he could not understand, or that he labored under any disability whatever. Appellant was presenting a motion. He had the right to support it by his affidavit. C.C.P. § 2009. But the appellant made no affidavit nor did he appear and testify. The record shows, therefore, that the appellant was informed that the complaint before the court charged appellant did "enter the house" of Northwest Engineering Company. Those words were so simple as to be understood by any ordinary layman having ordinary faculties and, on the record, we must presume appellant was such a person. It follows that there was evidence supporting the ruling of the trial court.

[3, 4] Moreover, the premises of Northwest Engineering Company comprise a lot surrounded with a wire fence. In the fence is a gate which was locked with a padlock. Inside of the enclosure is the warehouse which is the main building. But there is also a shop which was under lock and key.

Officer Mudd testified: "There was no entrance gained to the building, but there was entrance gained to the outhouses and shop, which was under lock and key." In the absence of any evidence to the contrary, the trial court was entitled to conclude the outhouse or shop was entered. If so, such facts were evidence of burglary as alleged, (Pen.Code, § 459; 12 C.J.S., Burglary, § 18, p. 679), and there was no mistake.

The order appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

67 Cal.App.2d 311

FUNERAL DIRECTORS ASS'N OF LOS ANGELES AND SOUTHERN CALIFORNIA v. BOARD OF FUNERAL DIRECTORS AND EMBALMERS OF CALIFORNIA et al. (ARMSTRONG et al., Interveners).

Civ. 14536.

District Court of Appeal, Second District, Division 2, California.

Dec. 15, 1944.

Hearing Denied Feb. 8, 1945.

1. Mandamus 🔑168(2)

Generally, a writ of mandate will not be issued where petitioner fails to show that it will subserve or protect some right or interest of petitioner as a party beneficially interested. Code Civ.Proc. § 1086.

2. Mandamus 🔑23(1)

A trade association is not a party "beneficially interested" in a proceeding between state board and licensee of such board, so as to entitle association to writ of mandate to compel issuance of a certain order in the proceeding. Code Civ.Proc. § 1086.

See Words and Phrases, Permanent Edition, for all other definitions of "Beneficially Interested".

3. Mandamus 🔑23(1)

A nonprofit trade association composed of numerous funeral directors and embalmers operating in city of Los Angeles was not a party "beneficially interested" in a proceeding by State Board of Funeral Directors and Embalmers against holder of license issued by board, and hence was not entitled to writ of mandate to require board to vacate order modifying judgment of suspension of holder's license. Code Civ.Proc. § 1086.

* * *

Appeal from Superior Court, Los Angeles County; Joseph W. Vickers, Judge.

Mandamus proceeding by the Funeral Directors Association of Los Angeles and Southern California, formerly called Los Angeles Southern California Funeral Directors, an incorporated nonprofit association, incorporated under laws of the State of California, against the Board of Funeral Directors and Embalmers of the State of California and others, to require the named respondent to vacate an order modifying a judgment of suspension of the license of Burton H. Armstrong and others, copartners, doing business under the fictitious firm name and style of Armstrong Family, to practice embalming, wherein Burton H. Armstrong and others, copartners doing business under the fictitious firm name and style of Armstrong Family, intervened. From a judgment predicated upon an order sustaining a demurrer to the petition without leave to amend, the petitioner appeals.

Affirmed.

See also, 22 Cal.2d 104, 136 P.2d 785.

W. L. Pollard, of Los Angeles, for appellant.

Glenn Whitney, of Glendale, and Morse Craig and Frank J. Barry, both of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment predicated upon an order sustaining a demurrer without leave to amend to appellant's petition for a writ of mandate to require respondents, Board of Funeral Directors and Embalmers, to vacate an order modifying a judgment of suspension of the Armstrong Family's license to practice embalming.

The facts so far as material are:

On July 30, 1938, after charges were duly filed and a hearing held thereon, respondents in intervention's (hereinafter referred to as the licensee) license to practice the art of embalming was suspended for a period of ninety days, the order to be effective upon the service of a certified copy thereof on the licensee. Service was made on September 12, 1938. On September 13, 1938, the licensee obtained an alternative writ of mandate from the superior court directing respondent board to show cause why the judgment of suspension against the licensee should not be annulled. Thereafter upon a hearing in the superior court the alternative writ was discharged and the licensee appealed from the order of the superior court to the District Court of Appeal. On March 18, 1941, the appeal was dismissed by stipulation of the parties and on the same date respondent board made an order suspending its former order of July 30, 1938, and placing the licensee on probation for one year.

On August 22, 1941, appellant, an incorporated non-profit association, composed of numerous funeral directors and embalmers operating and doing business in the City of Los Angeles, filed a petition in the superior court seeking a writ of mandate requiring respondent board to annul the order of March 18, 1938, placing the licensee on probation for one year. To this petition respondents and the licensee filed demurrers on the ground, among others, that appellant (petitioner in the superior court) was not entitled to maintain an action for a writ of mandate since it was not a party "beneficially interested" as required by section 1086 of the Code of Civil Procedure.

This is the sole question necessary for us to determine:

Is appellant a party "beneficially interested," as the phrase is used in section 1086 of the Code of Civil Procedure, in the orders made by respondent board on July 30, 1938, and March 18, 1941?

This question must be answered in the negative and is governed by the following rules of law:

[1] 1) It is a general rule * that a writ of mandate will not be issued where the petitioner fails to show that it will subserve or protect some right or interest of the petitioner as a party beneficially interested. (Section 1086, Code of Civil Procedure; Ellis v. Workman, 144 Cal. 113, 77 P. 822; Marculescu v. City Planning Comm., 7 Cal.App.2d 371, 374, 46 P.2d 308.)

[2] 2) A trade association is not a party "beneficially interested" in a proceeding between a state board and a licensee of such board. (Baltimore R. Liquor, etc., Ass'n v. Kerngood, 171 Md. 426, 189 A. 209, 210, 109 A.L.R. 1253.)

[3] Applying the foregoing rules to the facts in the instant case, the record discloses that appellant was an incorporated non-profit trade association composed of numerous funeral directors and embalmers operating in the city of Los Angeles. Under rule 2, supra, it did not have a beneficial interest in the action between the respondent, State Board of Funeral Directors and Embalmers, and the licensee, who was also engaged in the embalming business in the state of California. Therefore under rule 1, supra, appellant was not entitled to maintain the present action.

Frederick v. San Luis Obispo, 118 Cal. 391, 50 P. 661; Eby v. Trustees of Red Bank School Dist., 87 Cal. 166, 25 P. 240; Hyatt v. Allen, 54 Cal. 353; Maxwell v. Board of Supervisors, 53 Cal. 389; Conn v. City Council, 17 Cal.App. 705, 121 P. 714, 719, relied upon by appellant, are all cases falling within one or more of the exceptions to the general rule stated above. It is likewise to be noted that in each of the cases just mentioned the petitioner was an elector and taxpayer, while in the present case petitioner is neither an elector nor taxpayer.

Olive Proration P. Comm., etc., v. Agricultural Prorate Comm., 17 Cal.2d 204, 109 P.2d 918, is likewise inapplicable to the present case for in such case the law specifically made petitioner the official representative of olive growers in the area effected.

The Maryland case, Maryland State Funeral Directors' Ass'n v. Mears, 150 Md. 294, 133 A. 62, is not of value to appellant in view of the fact that in such case petitioner's right to maintain the action was not questioned. In a later case, Baltimore R. Liquor, etc., v. Kerngood, 171 Md. 426, 189 A. 209, 210, 109 A.L.R. 1253, the Court of Appeals of Maryland expressly reaffirmed the rule that a trade association did not have sufficient beneficial interest to maintain a writ of mandate to intervene in a proceeding pending between a state board and licensee. The court expressly pointed out that the Maryland State Funeral Directors' case had been permitted to be maintained because no objection had been raised that petitioner was not a proper party.

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* The recognized exceptions to the general rule are:

In an action to compel (1) the calling of an election (Frederick v. City of San Luis Obispo, 118 Cal. 391, 392, 50 P. 661; Conn v. City Council, 17 Cal.App. 705, 710, 121 P. 714, 719), (2) levying of an assessment (Hyatt v. Allen, 54 Cal. 353, 360), (3) canvassing of city consolidated election returns (Taft v. Haas, 34 Cal.App. 309, 310, 167 P. 306), (4) a city council to advertise for bids for the lighting of streets and public buildings as required by law, (Santa Rosa Lighting Co. v. Woodward, 119 Cal. 30, 34, 50 P. 1025), an elector and taxpayer is considered a party sufficiently "beneficially interested" to maintain the action.

In view of our conclusions it is unnecessary to consider other points discussed by counsel.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

67 Cal.App.2d 334

AVERY v. FREDERICKSEN & WESTBROOK et al.

Civ. 7079.

District Court of Appeal, Third District, California.

Dec. 18, 1944.

Rehearing Denied Jan. 15, 1945.

Hearing Denied Feb. 15, 1945.

1. Damages ⊂⇒120(2)

Where contract authorizing defendant to remove sand from land required defendant to level off any portion of property from which sand had been removed and to replace topsoil and fences, a judgment allowing landowner damages for defendant's failure to restore property to original level in an amount greater than total value of land involved would be excessive. Civ.Code, §§ 3300, 3358, 3359.

2. Damages ⊂⇒140

Under contract requiring defendant, who was given right to remove sand from land for $25 per acre and payment of $150, to level off property from which sand was removed and to replace topsoil and fences removed, judgment for landowner for defendant's breach of contract for $87.50 which court found to be value of 3½ acres of the land from which sand had been removed, was not inadequate, though evidence showed that cost of filling and leveling property and replacement of topsoil thereon would be over $10,000. Civ.Code, §§ 3300, 3358, 3359.

◆

Appeal from Superior Court, Placer County; George L. Jones, Judge.

Action by Harold Avery against Fredericksen and Westbrook, a copartnership composed of A. C. Fredericksen and others, to recover damages for breach of a contract to level off any portion of plaintiff's property from which sand was removed and to replace topsoil and replace fences. From a judgment for plaintiff for $87.50, plaintiff appeals on the ground of inadequacy thereof.

Affirmed.

T. L. Chamberlain, of Auburn, and Gerald Beatty Wallace, of San Francisco, for appellant.

Thelen, Marrin, Johnson & Bridges, of San Francisco, for respondents.

ADAMS, Presiding Justice.

Appellant Avery, and respondents Fredericksen and Westbrook, a copartnership, entered into a contract which recited that the latter had entered into a contract with the United States War Department which required the use of material (granite sand) believed to be available on land owned by Avery; that "Owner grants to Contractor the right to enter upon the property and to remove, and the Contractor agrees to remove, therefrom such quantities of the material as Contractor may require in the performance of its said Contract"; that "Contractor agrees to pay to Owner, and Owner agrees to accept from Contractor, the sum of twenty-five dollars ($25.00) per acre for the acres used in the performance of its contract. Payment of ($150.00) one hundred and fifty dollars for the site of six acres shall be payed [sic] upon the signing of this agreement"; that "Before removing the required material, Contractor agrees to strip one foot of top soil from said property. After all of the required material has been removed, Contractor agrees to level off any portion of the property from which material is removed, and to replace the top soil, and to replace all fences which it may have removed." The land was described as a six acre site situated on the southeast corner of the owner's property.

Respondents entered upon the land and removed 100,000 cu. yds. of material from a three and one-half acre portion thereof, but did not level off such portion, nor replace the top soil. Appellant sued for damages in the sum of $10,400, alleged to be the reasonable cost of leveling off said three and one-half acres and replacing the top soil. The action was tried by the court sitting without a jury, and resulted in a judgment for appellant for $87.50 which the court found to be the value of the three and one-half acres, at $25 per acre. While the court found that the reasonable cost of leveling the area and replacing the top soil is $10,400, it held that damages in an amount greater than the total value of the land would be excessive and unreasonable.

The only question raised on this appeal is whether the court applied the correct measure of damages. It is agreed by the parties that the measure of damages is fixed by section 3300 of the Civil Code which reads: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Section 3358 of the Civil Code provides: "Notwithstanding the provisions of this chapter, no person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages, and in sections three thousand three hundred and nineteen, three thousand three hundred and thirty-nine, and three thousand three hundred and forty." And section 3359 of the Civil Code also provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

In spite of these provisions and though, according to the evidence in the case, plaintiff's land, if restored to its original condition, would have no greater value than the amount awarded as damages, appellant contends for the right to recover from defendants $10,400, as the cost of filling the pit left by defendants, the leveling of the three and one-half acres, and the replacement of the top soil thereon.

[1, 2] We agree with the finding of the trial court that an amount greater than the total value of the land would be excessive and unreasonable, and are of the opinion that the amount awarded fully compensates plaintiff for the detriment suffered by him by reason of the acts of defendants. It is said in 8 R.C.L. 434, 435, that one who has been injured by the breach of a contract or the commission of a tort is entitled to a just and adequate compensation for such injury, *and no more;* that in no case should he be placed in a better position than he would be in had the wrong not been done or the contract not been broken. Also, at page 453, the same authority states that courts generally agree that the rule of compensation to an injured party controls the measure of damages both in actions ex contractu and ex delicto, and that many authorities hold that the liability for loss incident to and resulting from a breach of a contract is generally not so extensive as that for a loss resulting from the commission of a tort. Also, p. 454, that the loss or injury actually sustained rather than the price paid or agreed to be paid on full performance, is the proper measure of damages, except where the contract provides by way of stipulated damages that the consideration shall be the amount recoverable.

We also find it stated in 15 Am.Jur. 400, that the fundamental principle of the law of damages is that one injured by a breach of a contract or by a wrongful or negligent act or omission shall have fair and just compensation commensurate with the loss sustained in consequence of defendant's act which gives rise to the action; also, pp. 402–404, that "The fundamental principle of the law of damages being compensation for the injury sustained, the plaintiff in a civil action for damages cannot, except in the cases in which punitive damages may be recovered, hold a defendant liable in damages for more than the actual loss which he has inflicted by his wrong. In other words, one injured by the breach of a contract or the commission of a tort is entitled to a just and adequate compensation for such injury, but no more. His recovery is, in the absence of circumstances giving rise to an allowance of punitive damages, limited to a fair compensation and indemnity for the injury which he suffered. The law will not put him in a better position than he would be in had the wrong not been done or the contract not been broken." These same principles are stated in 8 Cal.Jur. 821, where it is said that the general rule as to the measure of damages for breach of contract is the actual loss sustained; that it is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract to recover more upon its breach than he would have received by its due performance. It is also said, at page 742, that the object of damages is to give compensation for the loss from the injury sustained, and that they should be exactly commensurate with the injury, neither more nor less; that, as stated in Coburn v. California, etc., Cement Co., 144 Cal. 81, 84, 77 P. 771, 772, "The law seeks to give the complaining party the value of his bargain; to prevent a loss which the fulfillment of the contract would have prevented; to put the injured party, so far as money can do it, in the same position as if the contract had been performed."

In the early case of De Costa v. Massachusetts, etc., Min. Co., 17 Cal. 613, defendant dug a ditch on plaintiff's land. Plaintiff sued to have the ditch abated and filled up, and for damages. The court said, page 617 of 17 Cal.: "The plaintiff could not recover beyond the injury sustained, *and it was improper to award compensation for an expense which might never be incurred.* It is possible that the cost of filling up the ditch may far exceed any injury resulting from it in its present condition, and in that case it is not probable that the amount recovered would ever be used for that purpose. There are, undoubtedly, cases in which it is proper to allow prospective damages; but it is certain that the present case does not belong to that class. 'If the case be tort,' says Sedgwick, 'and the wrong done before suit brought, the plaintiff is not limited solely to the consequential damage which has actually occurred up to the trial of the cause, but he may go on to claim relief for the prospective damage, which can then be estimated as reasonably certain to occur.' (Sedg. on Dam. 109.) It is evident that relief of this character cannot be obtained, *unless it appear that the party will be subjected to the particular loss or injury for which he demands compensation.*" (Italics added.)

In Johnson v. Hinkel, 29 Cal.App. 78, 154 P. 487, 490, plaintiff leased land to defendant for oil drilling, the lease providing that in the event the land proved nonproductive and was abandoned by the lessee, he would not remove the casings from any well. Defendant abandoned the land and removed the casings, whereupon plaintiff sued and recovered judgment for $22,500 found to be the cost of replacing the casings. The contract provided that the land could be purchased for $20,000, so the amount awarded exceeded its value. In reversing the judgment the court said that plaintiff was entitled to recover his pecuniary loss only, that if it could be proved that the land contained no oil, then the only damage suffered by plaintiff was the value of the casing; that "It is a fundamental rule of law that courts will not, except where exemplary damages are given, allow a party to a contract to recover upon its breach more than he would have received by its due performance. The Civil Code, in providing for the measure of damages in the case of a breach of contract lays down the rule that a party is entitled to recover an amount which will compensate him for all the detriment proximately caused by the breach or which in the ordinary course of events would be likely to result therefrom. Civ.Code, § 3300."

In Perkins v. Blauth, 163 Cal. 782, 127 P. 50, defendants, with a dredger, cut through a levee along the Sacramento River with the result that plaintiff's lands were inundated from overflow of waters from the river, and injured. The difference in the market value of plaintiff's lands before and after the injury was held to be the proper measure of damages.

In Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 60 A.L.R. 475, plaintiffs sued for damages to their land caused by the blowing out of defendant's oil well on adjoining land, which resulted in depositing debris on plaintiffs' land, destroying lawns, trees, etc. The measure of damages to the realty was held to be as follows (page 336 of 205 Cal., page 956 of 270 P., 60 A.L.R. 475): "If the cost of repairing the injury by removing the debris deposited by the appellant, and otherwise restoring the premises to their original condition, amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value, then the value of the property is the proper measure. Salstrom v. Orleans, etc., Mining Co., 153 Cal. 551, 558, 96 P. 292."

Mutch v. Long Beach Imp. Co., 47 Cal. App. 267, 190 P. 638, involved the measure of damages for the attachment of an automobile. The judgment was for $1500.65, while the undisputed evidence showed that the value of the car when taken was $400. The court, in reversing this judgment, said, pages 268, 269 of 47 Cal.App., page 638 of 190 P., that "It must be apparent at once that there is something wrong with a scale of damages that allows three times as much for the detention of an article from the possession of the owner for a period of two years as could have been recovered if the trespasser had completely smashed it up and destroyed it in the first instance"; that "it would be against conscience to permit a recovery so out of proportion to the value of the thing involved as appears here." Citing sec. 3359, Civ.Code.

In Salstrom v. Orleans, etc., Min. Co., 153 Cal. 551, 558, 96 P. 292, where plaintiff's property was covered by debris from defendant's mining operations, the court said that if the cost of removing the debris would amount to less than the value of the property as it was prior to the injury, such cost would be the proper measure of damages; but if the cost of repair would exceed such value, then *the value of the property* would be the proper measure.

In Kell v. Jansen, 53 Cal.App.2d 498, 127 P.2d 1033, 1036, a case of damage to plaintiff's land due to the negligence of defendants, this court said: "The rule laid down in Green v. General Pet. Corp., 205 Cal. 328, 336, 270 P. 952, 60 A.L.R. 475, is that if the cost of repairing the injury and restoring the premises to their original condition amounts to less than the value of the property prior to the injury, such cost is the proper measure of damages; and if the cost of restoration will exceed such value then the value of the property is the proper measure."

Here the undisputed evidence shows that the fair market value of plaintiff's land before the sand was taken therefrom was $20 per acre and that its value was not depreciated by reason of the excavation left after removal of the sand; and that the value of plaintiff's whole tract of 365 acres would not exceed $7300. Plaintiff's own testimony showed that he had paid but $12.50 an acre for it six years before the trial, that he had put no improvements of any great value upon it thereafter, that he did not reside upon it and that it was used mainly for grazing. His testimony also shows that he told defendant's agent that he wanted $25 per acre for the land and that he "would charge for letting him go in there and get the material," $25 per acre. Payment of $150 for the use of six acres was due upon the signing of the agreement, and we assume was paid at that time. It therefore appears that plaintiff has been paid the full market value of his land, and in addition thereto has been allowed $87.50 for the three and one-half acres from which the sand was taken.

Appellant agrees that the measure of damages which he is entitled to recover is the amount which will compensate him for all of the detriment proximately caused by defendants, but urges that he will not be fully compensated unless he is paid the amount it will cost to level the three and one-half acres, even though his land would be worth no more than $25 per acre if it were restored to its original condition. He argues that the value of the work and labor necessary to level the land and restore the top soil was a part of the price which he was to receive for the sand. He says in his brief: "The moment said contract was executed, defendants became entitled to remove from plaintiff's land material which *to them* had a value of $25.00 per acre for the acres used in the performance of their contract with the Government, and a further value such that defendants, in order to get it, were willing to also agree 'to strip one foot of top soil from said property,' and after removing the material they required, 'to level off any portion of the property from which material' was removed and 'to replace the top soil.'" (Italics added.)

And he adds that the value of plaintiff's land was not involved. Apparently, then, he is urging that the value of the sand to defendants and not the detriment suffered by plaintiff himself should be the measure of damages to which he was entitled; but this is not the test laid down in the Code sections above cited.

Appellant relies heavily upon Sherman v. Gray, 11 Cal.App. 348, 104 P.1004. In that case plaintiff owned land in San Francisco covering a city block. He entered into a contract with defendants under which defendants were to remove 7000 cu. yds.

of surplus sand and pay therefor 6¼ cents per cu. yd. They were also to level and grade the block and streets to the official grade and cover the entire surface and one-half the streets fronting thereon with 2 inches of clay. Defendants removed 4388 cu. yds. more sand than the contract allowed, thereby reducing the level of the block below official grade, and did not grade or level the street or the land. The trial court found that in order to bring the lot to the official grade plaintiff would be obliged to put back this 4388 cu. yds. of earth, at a cost of $1090.17, which amount was allowed as damages. The controversy on appeal was whether defendants should be compelled to pay an amount necessary to restore to the land the amount of sand taken in excess of the amount provided for in the contract, or should pay only the amount provided in the contract to be paid as liquidated damages in case of default. There is nothing in the case to indicate that the amount allowed as damages exceeded the value of plaintiff's land, and since a city block was involved, obviously it did not. Also as the restoration of the excess sand taken was necessary in order to restore the land to the official grade, something which plaintiff would be compelled to do, it is fair to assume that its value had been depreciated to that extent by defendant's acts.

In the case before us the market value of plaintiff's land has not been depreciated, he has been allowed the full value thereof, and still has the land. It cannot be said, therefore, that he has suffered any detriment for which he is not compensated. He does not even suggest that he is under any compulsion to restore his land to its former condition, or that he would do so if allowed the $10,400 claimed. Common sense compels the conclusion that he would not spend such amount, or any of it, to level a piece of land the market value of which would not be enhanced thereby.

The judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

GARRISON, Insurance Com'r, v. EDWARD BROWN & SONS.

L. A. 16724.

Supreme Court of California.

Dec. 26, 1944.

Rehearing Denied Jan. 22, 1945.

1. Insurance ⚷50

If agents undertook obligations as to remittance of premiums on insurance policies in fiduciary capacity, they could not set off personal claims in action by insurance commissioner as liquidator of insurance company for recovery of premiums.

2. Insurance ⚷50

If insurance agents were trustees of insurance premiums collected they were obligated to remit them to insurer, deducting only commissions earned thereon as provided in agency agreement, and with respect to claims not allowed as deductions from premiums to be remitted they must seek satisfaction from insurer's insolvent estate as general creditors.

3. Trial ⚷395(5)

A general and ultimate finding drawn as a conclusion from facts previously found cannot stand if specific facts upon which it is based do not support it.

4. Insurance ⚷50

In insurance company liquidator's action against agent for premiums collected, findings stating probative facts that with knowledge and consent of insurance company, agent deposited money collected in behalf of company in agent's own bank account, unsegregated from other funds, and that all settlements between agent and company were made on a net cash basis, read as a whole and in connection with agent's answer, was a finding of an implied contract substituting creditor and debtor relationship for fiduciary relationship contemplated by agency agreement.

5. Contracts ⚷238(1)

Before a contract modifying a written contract can be implied, conduct of parties according to findings of trial court must be inconsistent with the written contract so as to warrant the conclusion that parties intended to modify written contract.

6. Insurance ⚷50

Evidence that settlements between insurer and its agent for insurance premiums collected by agent were made on a net cash basis, and that premiums were deposited unsegregated in the agent's own account, did not warrant a finding that the parties intended to modify the agency agreement contemplating a fiduciary relationship and to substitute in place thereof a debtor and creditor relationship in view of the terms of the agency agreement and the parties' conduct, notwithstanding the amount to be remitted by the agent was a net balance different from the amount held in the fiduciary relationship.

7. Trusts ⚷10

An ascertainable interest in a bank account of the trustee in which funds of the trustee and of the beneficiary are deposited constitutes an asset definite enough to be the subject matter of a trust.

8. Principal and agent ⚷136(4)

Statute requiring that if agent receives anything for benefit of principal, to possession of which another person is entitled, agent must, on demand, surrender it to such person, entitles one who has paid money through fraud or mistake to an innocent agent to recover from him, unless the agent has turned over money to his principal or otherwise changed his position. Civ.Code, § 2344.

9. Principal and agent ⚷136(4)

A suit to recover money paid to an agent upon ground that contract was subsequently breached by principal must be brought against the principal, and not against the agent, and alleged breach of contract does not retroactively affect lawfulness of payment and its receipt by agent at time when it was made.

10. Principal and agent ⚷184(1)

A claim against agent under statute relating to surrendering anything held by agent for benefit of principal to which another is entitled is limited to what claimant is entitled to demand from the principal. Civ.Code, § 2344.

11. Insurance ⚷50

When insurance company went into liquidation in another state, it was not agent's duty to return premium moneys in its hands to the various insureds, over and above amount of the earned premiums, since, when insurer became insolvent, the insureds were entitled to participate only in dividends payable out of insolvent estate to general creditors and it was agent's duty to remit funds to liquidator. Civ.Code, § 2344.

12. Principal and agent 🔑184(1)

Purpose of statute requiring agent to surrender anything in his hands for principal's benefit to possession of another person entitled to possession thereof is to avoid circuity of action rather than to enlarge scope of recovery to which claimant is entitled against principal. Civ.Code, § 2344.

13. Insurance 🔑84(1)

Question whether insolvent insurer owed agent for services in writing of policies before insurer was declared insolvent, for which agent did not obtain commissions, and for services relating to policies cancelled by insured because insurer's financial status was disrupted, was a question of law.

14. Insurance 🔑85

In so far as insurance agent was deprived by insurer's insolvency of commissions on policies written and not cancelled, agent was entitled to compensation from insurer equal to commissions as damages for breach of contract committed by insurer by its insolvency.

15. Insurance 🔑84(1)

Insurance agent was not entitled to compensation for services relating to policies cancelled by insureds before insurer was declared insolvent where cancellations occurred because of insurer's financial status, since agent assumed risk of losing compensation because of cancellations.

SCHAUER and EDMONDS, JJ., dissenting.

In Bank.

Action by Maynard Garrison, as Insurance Commissioner, against Edward Brown & Sons to recover insurance premiums, in which defendant filed a counterclaim. From a judgment for defendant plaintiff appeals and defendant filed a cross-appeal which was not perfected.

Reversed.

Robert W. Kenny, Atty. Gen., John L. Nourse, Deputy Atty. Gen., and Hester Webb, of San Francisco, for appellant.

Dunne & Dunne and A. B. Dunne, all of San Francisco, for respondent.

TRAYNOR, Justice.

Union Indemnity Company, hereinafter called Union, a Louisiana corporation licensed to do insurance business in this state, was declared insolvent by a Louisiana court on January 6, 1933, and was declared insolvent in California by decree of the Superior Court of the City and County of San Francisco on January 12, 1933. The Insurance Commissioner was appointed liquidator in California and vested with all property rights of the company in California. It does not appear that Union was unable to meet its liabilities as they became due or that it ceased operations before it was declared insolvent, although for some time before that date, at least since October 1, 1932, the liabilities of the company exceeded its assets. Union's liquidation in Louisiana resulted in a dividend of less than 4 per cent. In California no dividend has yet been paid. This case arises out of Union's relation to its general agent for California, Edward Brown & Sons, hereinafter called Brown. On October 1, 1931, Brown entered into a written agreement, guaranteed by the two other defendants, to act as general agent for Union. This agreement was modified and supplemented by another written agreement, also effective since October 1, 1931. There was also a profit-sharing agreement. Following the appointment of the liquidator in this state defendants filed with him a claim for $91,743.52, of which he allowed $25,897.97, rejecting the balance. In January, 1936, defendants filed a petition for an order to show cause why their claim should not be allowed for the full amount. In the same month the plaintiff liquidator filed this action against the defendants to recover $11,702.29, later modified to $9,757.39, allegedly representing insurance premiums collected by Brown before and after the declaration of insolvency and not turned over to Union or the liquidator. Under the agreements of October 1, 1931, Brown was appointed Union's agent for the purpose of "procuring acceptable applications for, and collecting premiums" on the classes of insurance and bonds named in the agreements. Brown was required to adhere to the rates prescribed by Union and to comply with the rules and regulations of the company with respect to the issuance of policies and bonds and "to conduct the business * * * strictly upon such terms, conditions and instructions as the Company may prescribe in its letters of instruction, or by letter, telegram, or telephone." Brown was to report to Union daily, or as soon as practicable, each policy or other writing issued and each change in the character or amount of Union's liability. Brown had also to render to Union monthly accounts covering all policies written, renewed or cancelled during the preceding month and to remit the amount thereof by deposit in a certain San Francisco bank on the fourth day of the fourth month following that in which the business was written. The agent was responsible under the agreement for the payment of all original and advance premiums on bonds and policies written by it. In the case of cancellations it was allowed return premiums if no premiums had been collected. The agency agreement further provided: "All premiums collected by the agent for the company are the property of the company and shall be held by the agent as a fiduciary trust until delivered to the company. The privilege of deducting commissions which are debts due the agent, if granted, shall not be taken as a waiver by the company of its exclusive ownership of all premiums." As to termination of the agency, the agreement called for a sixty-day written notice by either party and empowered Union to terminate the relation instantly for cause. Brown's last remittance to Union covered business written until the end of September, 1932. Plaintiff's action relates to premiums on business written after that date and, to a small extent, to premiums on previous business collected upon an audit. Defendants filed an answer denying any liability and setting up their claims against Union as an off-set and counterclaim. The trial court entered judgment against plaintiff and in favor of defendants on their cross-complaint for $39,267.31, which was reduced to $24,267.31 when a motion for a new trial was argued. Plaintiff appealed, and defendant filed a cross-appeal, which was not perfected. The matter is here on the clerk's transcript, the reporter having died while proceedings to secure a reporter's transcript were pending. Caminetti v. Edward Brown & Sons, 23 Cal.2d 511, 144 P.2d 570. The sole question to be determined is whether the findings of the trial court support the judgment.

[1, 2] Defendants contend that the agency agreement under which Brown was a trustee of the premiums collected was so modified as to make the relation of Union and Brown one of creditor and debtor rather than of beneficiary and trustee, and that this modification has been conclusively determined by the trial court in its findings. If defendants undertook their obligations as to the remittance of premiums in a fiduciary capacity, they would not be permitted to set off personal claims, for a fiduciary cannot set off claims owed him in his personal capacity against obligations that he assumes as a trustee. Bond v. City of Pasadena, 6 Cal.2d 139, 141, 56 P.2d 946; Kaye v. Metz, 186 Cal. 42, 49, 198 P. 1047; In re Hildebrandt, 92 Cal. 433, 436, 28 P. 486; Flynn v. Seale, 2 Cal.App. 665, 670, 84 P. 263; Libby v. Hopkins, 104 U.S. 303, 26 L.Ed. 769; Cook County Nat. Bank v. United States, 107 U.S. 445, 452, 2 S.Ct. 561, 27 L.Ed. 537; Western Tie & Timber Co. v. Brown, 196 U.S. 502, 25 S.Ct. 339, 49 L.Ed. 571; Alvord v. Ryan, 8 Cir., 212 F. 83, 85, 128 C.C.A. 539; Sperb v. McCoun, 110 N.Y. 605, 18 N.E. 441, 1 L.R.A. 490; Topas v. John MacGregor Grant, Inc., 18 F.2d 724, 52 A.L.R. 807; see 4 Bogert, Trusts and Trustees, § 812, p. 2354; 47 Am.Jur., Setoff and Counterclaim, § 51.

If defendants were trustees of the premiums collected, they would therefore be obligated to remit them, deducting only commissions earned thereon as provided in the agency agreement. With respect to all claims not allowed as deductions from the premiums to be remitted, they would have to seek satisfaction from Union's insolvent estate as general creditors. It must therefore be determined whether defendants' contention that their trusteeship established in the agency agreement was abolished, is sustained by the following finding: "At all times after October 1, 1931, to the knowledge of said Union Indemnity Company, and with its consent, all collections made by Edward Brown & Sons on account of premiums or otherwise, as agent of Union Indemnity Company or for Union Indemnity Company were deposited by Edward Brown & Sons in its own bank account or bank accounts unsegregated from other funds * * * and all settlements between Edward Brown & Sons and Union Indemnity Company were made on a net cash basis. In respect to all moneys due to Union Indemnity Company from Edward Brown and Sons the relation * * * was that of debtor and creditor and with the knowledge and consent of Union Indemnity Company, Edward Brown & Sons never collected or held any moneys paid as or for premiums on any policy of Union Indemnity Company as a trust fund; and, in this respect the contract of the parties was modified and said modification was fully performed. * * * Prior to January 6, 1933, it was agreed between Edward Brown & Sons and Union Indemnity Company that the relationship between Union Indemnity Company on account of premiums on its policies and bonds collected by and paid to Edward Brown & Sons should be that only of a debtor and creditor and that Edward Brown & Sons, should not be required to keep any moneys paid to it on account of premiums segregated or as trust funds or as fiduciary funds and that the only obligation or duty of Edward Brown & Sons in respect to any money so received should be a personal obligation to pay monthly to Union Indemnity Company the balance, if any, due after allowing credit to Edward Brown & Sons for funds expended by it on behalf of Union Indemnity Company, including return premiums paid on account of cancellations, and, on January 6, 1933 said agreement was fully performed."

[3] This finding includes the finding of certain probative facts and the conclusion that these facts are sufficient under the law to create a contract. See Baumgartner v. United States, 322 U.S. 665, 64 S.Ct. 1240, 1243, 88 L.Ed. 1525; Holmes, The Common Law, 115; Green, Mixed Questions of Law and Fact, 15 Harv.L.Rev. 271, 272; Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact, 57 Harv.L.Reg. 753, 822. "It is, of course, well settled that a general and ultimate finding * * * which is drawn as a conclusion from facts previously found, cannot stand if the specific facts upon which it is based do not support it" (McKay v. Gesford, 163 Cal. 243, 246, 124 P. 1016, 1017, 41 L.R.A.,N.S., 303, Ann.Cas.1913E, 1253), that is, if the probative facts are not susceptible of a construction that will support the judgment. Quinn v. Rosenfeld, 15 Cal.2d 486, 491, 102 P.2d 317; Matter of Forrester, 162 Cal. 493, 495, 123 P. 283; People v. McCue, 150 Cal. 195, 198, 88 P. 899; Hammond Lumber Co. v. Barth Invest. Corp., 202 Cal. 606, 609, 262 P. 31; Loud v. Luse, 214 Cal. 10, 12, 3 P.2d 542; Fitzpatrick v. Underwood, 17 Cal.2d 722, 727, 112 P.2d 3.

[4, 5] Nowhere in its findings has the trial court included probative facts that would indicate that Union and Brown ever modified the agency agreement by an express contract substituting a creditor and debtor relationship for the fiduciary relationship contemplated by the agency agreement. There is no reference to any writing or to any circumstances under which any other express contract might have been made between the parties. The probative facts that are stated in the finding, namely, that with the knowledge and consent of Union, Brown deposited all money collected on behalf of Union in its own bank account or bank accounts unsegregated from other funds, and that all settlements between Brown and Union were made on a net cash basis, relate to the conduct of Brown in performing the contract. When the finding is read as a whole and in connection with defendant's answer to the complaint[1] (Zeibak v. Nasser, 12 Cal.2d 1, 15, 82 P.2d 375; Kohner v. National Surety Co., 105 Cal.App. 430, 440, 287 P. 510; Dam v. Zink, 112 Cal. 91, 93, 44 P. 331), it is clear that the agreement therein referred to was an implied contract. It must therefore be determined whether the probative facts are susceptible of a construction that will support the finding of an implied contract. Before a contract modifying a written contract can be implied, the conduct of the parties according to the findings of the trial court must be inconsistent with the written contract so as to warrant the conclusion that the parties intended to modify the written contract. Columbia Casualty Co. v. Lewis, 14 Cal.App.2d 64, 72, 57 P.2d 1010; Harbor Const. Co. v. Walters, 101 Cal.App. 470, 478, 281 P. 1062.

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[1] Paragraph VII of defendants' answer alleged: "At all times mentioned in the complaint and herein during which Edward Brown & Sons acted as agent in respect to Union Indemnity Company under the agreement Exhibit 'A' (Original Agency Agreement) to the complaint, it acted as such and under said agreement only as the same is modified by Exhibit 'A' hereto and as modified (among other respects) as next hereinafter stated, that is to say:

"At all times after October 1, 1931, to the knowledge of Union Indemnity Company and with its consent all collections on account of premiums made by Edward Brown & Sons were deposited by Edward Brown & Sons in its own account or accounts and the same were not kept segregated, and all settlements between Edward Brown & Sons and Union Indemnity Company were made on a net cash basis, and at all of said times in respect of all moneys due to Union Indemnity Company by agreement of Edward Brown & Sons and Union Indemnity Company the relationship between Edward Brown & Sons and Union Indemnity Company as to any moneys due to Union Indemnity Company from Edward Brown & Sons was that of debtor and creditor. The relationship and modification as aforesaid was and has been fully performed."

[6, 7] The fact that the settlements between Brown and Union were made on a net cash basis does not warrant the conclusion that the parties intended to modify the agency agreement, for the settlements were in accord with the provisions of that agreement that remittance by the agent was to be made on the basis of business written after credit for cancellations with "the privilege of deducting commissions which are debts due the agent" which, "if granted, shall not be taken as a waiver by the company of its exclusive ownership of all premiums." The depositing by Brown with Union's knowledge and consent of all collected premiums in Brown's own bank account unsegregated from Brown's own funds was also consistent with Brown's fiduciary duties under the agency agreement. It is settled as to both express trusts and trusts created by operation of law that an ascertainable interest in a bank account of the trustee in which funds of the trustee and of the beneficiary are deposited constitutes an asset definite enough to be the subject matter of a trust. Corley v. Hennessy, 58 Cal.App.2d 883, 885, 137 P.2d 857; Kobida v. Hinkelmann, 53 Cal.App.2d 186, 193, 127 P.2d 657; Mitchell v. Dunn, 211 Cal. 129, 136, 294 P. 386; Noble v. Noble, 198 Cal. 129, 134, 243 P. 439, 43 A.L.R. 1235; In re Estate of Arms, 186 Cal. 554, 562, 199 P. 1053; Elizalde v. Elizalde, 137 Cal. 634, 635, 641, 66 P. 369, 70 P. 861. The fact that the amount to be remitted by defendants was a net balance different from the amount held in trust did not invalidate the trust, for funds may be held in trust to secure payment of an amount different from the total of the trust funds. The written agency agreement must therefore be regarded as controlling, for written contracts cannot be set aside and implied agreement substituted therefor if the conduct of the parties was not clearly contrary to the terms of the written contract. Columbia Casualty Co. v. Lewis, 14 Cal.App.2d 64, 72, 57 P.2d 1010; Houghton v. Lawton, 63 Cal.App. 218, 223, 218 P. 475; see 4 Cal.Jur. Ten-year Supp. (1943 Rev.) 164; 94 A.L.R. 1278. Since the probative facts on which the ultimate finding is based is not susceptible of the construction that there was an implied agreement modifying the written contract, they do not support the trial court's finding that there was an implied agreement.

Defendants also contend that plaintiff's claim is defeated by the following finding: "It is true that prior to January 6, 1933 defendant Edward Brown & Sons received moneys * * * as and for premiums * * * written in the months of October through December 1932, inclusive. It is not true that after deducting therefrom all return premiums on policies and/or bonds cancelled prior to January 6, 1933, and all commissions earned thereon, defendant Edward Brown held or still holds any sum belonging to Union Indemnity Company or owned by plaintiff herein or owed or owes Union Indemnity Company or plaintiff herein any sum or that said defendant, after January 6, 1933 or now, holds or held any money or thing belonging to Union Indemnity Company or plaintiff or owes any sum to Union Indemnity Company or plaintiff. After January 12, 1933 defendant Edward Brown & Sons received money which was the equivalent of a portion of premiums on policies and bonds in effect on January 6, 1933. It is not true that after deducting therefrom all commissions earned, Edward Brown & Sons holds any sum which was the property of Union Indemnity Company or any sum which is now vested in or owned by plaintiff or owed or owes Union Indemnity Company or plaintiff any sum. * * * Any and all sums collected by Edward Brown & Sons for or on behalf of Union Indemnity Company and any and all sums at any time due from Edward Brown & Sons to Union Indemnity were paid by Edward Brown & Sons to Union Indemnity Company. * * *"

[8-12] Even if it is assumed that this is a finding of fact rather than a conclusion of law, it must be read in conjunction with finding XVII, defining unearned premiums and excluding such premiums from Union's claims against Brown, and it is then clearly apparent that the court found that Union was entitled only to the "earned portion" of the premiums, namely, that portion covering the period ending January 6, 1933. The basis of this finding is that Union had no right to remittance by the agent of any portion of the premiums paid by the insured to Brown allocable to the time after Union ceased to do business. In passing upon plaintiff's motion for a new trial, the trial court stated that the case was decided on the theory that when Union went into liquidation in Louisiana the funds in the hands of Brown "were frozen, and that it was his duty upon the termination of the contracts in the liquidation proceedings to return the money to the various insureds, over and above the amount of the earned premiums." This theory

is erroneous. It is not supported by section 2344 of the Civil Code providing: "If an agent receives anything for the benefit of his principal, to the possession of which another person is entitled, he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same; and is responsible therefor, if, after notice from the owner, he delivers it to his principal." This rule entitles one who has paid money through fraud or mistake to an innocent agent to recover from him, unless the agent has turned over the money to his principal or otherwise changed his position. Weiner v. Roof, 19 Cal.2d 748, 752, 122 P.2d 896. In the present case, however, the insured sought to recover back premiums on the ground not of fraud or mistake, but of the breach of contract that Union committed when it allowed itself to be declared insolvent. Caminetti v. Pacific Mutual Life Ins. Co., 23 Cal.2d 94, 102, 142 P.2d 741; see Federico Macaroni Mfg. Co. v. Great Western F. Ins. Co., 173 La. 905, 139 So. 1, 79 A.L.R. 1256. There was no breach until Union was declared insolvent. Until that time Union functioned as an insurance company, covering losses of its insureds. Only upon the entry of the order directing its liquidation did Union's liabilities toward its creditors and claims against its debtors become fixed. 2 Deering's Gen.Laws, 1931, Act 3739, § 4. A suit to recover money paid to an agent upon the ground that the contract was subsequently breached by the principal must be brought against the principal and not against the agent. The alleged breach of contract does not retroactively affect the lawfulness of the payment and its receipt by the agent at the time when it was made. Bleau v. Wright, 110 Mich. 183, 68 N.W. 115; Finnegan v. Geoghegan, 111 N.Y.S. 656; Tripple v. Littlefield, 46 Wash. 156, 89 P. 493; Cooper v. Tim, 16 Misc. 372, 38 N.Y.S. 67; Huffman v. Newman, 55 Neb. 713, 76 N.W. 409; Wright v. Merritt Realty Co., 148 Wash. 380, 268 P. 873; Bank of United States v. Bank of Washington, 6 Pet. 8, 31 U.S. 8, 17, 8 L.Ed. 299; see 3 C.J.S., Agency, § 217, p. 128; 2 Am.Jur., Agency, § 340; 23 L.R.A.,N.S., 558; 1 Mechem on Agency, 2d Ed., § 1482, p. 1102; 82 A.L.R. 307; cf. Pancoast v. Dinsmore, 105 Me. 471, 75 A. 43, 134 Am.St.Rep. 582; Cassimus v. Vaughn Realty Co., 217 Ala. 561, 117 So. 180; Smith v. Binder, 75 Ill. 492. Moreover, a claim under section 2344 against the agent is limited to what the claimant is entitled to demand from the principal. Since Union became insolvent, the insureds were entitled to participate only in the dividend payable out of the insolvent estate to general creditors. This court could not recognize a claim for full satisfaction by the agent to whom the premium was paid without creating a preferential right for those insureds who happened to pay their premiums to an agent at the expense of all other creditors, including the other insureds. The creation of such a preferential right would go beyond the purpose of section 2344, which is to avoid circuity of action rather than to enlarge the scope of the recovery to which the claimant is entitled against the principal. After the appointment of a liquidator, who may take possession of all assets of the insolvent insurance company, it was the duty of the agent to remit funds in his hands to the liquidator for the purposes of liquidation.

[13-15] The question remains whether defendants' claim for compensation for services rendered from October 1, 1932, to January 12, 1933, which forms one of the items of the computation in question, should be upheld. The trial court found that the reasonable value of such services, which were not compensated, was in excess of $20,000. The services include Brown's activities relative to the writing of policies before Union was declared insolvent, for which Brown did not obtain the commissions due because Union's insolvency intervened. Other uncompensated services relate to policies cancelled by the insureds before Union was declared insolvent, cancellations which defendants claim occurred, not in the ordinary course of business, but because Union's financial status was already disrupted. The question whether compensation is owed for these services is a question of law. Insolvency of an insurance company is as much a breach of contract with the agents as with the insureds. See Caminetti v. Pacific Mutual Life Ins. Co., supra. Insofar as Brown was deprived by Union's insolvency of commissions for policies written and not cancelled, Brown is entitled to compensation equal to the commissions as damages for the breach of contract committed by Union. Recognition of this claim does not include the recognition of any claim of the agent based on the loss of business for the time after Union's insolvency. No such

claim is submitted on this appeal. There was, however, no breach of contract on the part of Union as to policies and bonds already cancelled when Union was declared insolvent. Brown assumed the risk under the agency agreement of losing compensation because of cancellations.

Plaintiff has attacked as unintelligible the finding containing the computation of the claims of the parties. Since we do not approve the theories of the trial court underlying this computation, it would serve no useful purpose to inquire into the intelligibility of the finding, for it will not stand in the way of the trial court upon the retrial of the case.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS and CARTER, JJ., concur.

SCHAUER, Justice (dissenting).

I dissent. This is a judgment roll appeal. We do not know what evidence was before the trial court. As shown in the findings of fact (quoted more fully in the majority opinion) the trial court found, among other things, that "Prior to January 6, 1933, it was agreed between Edward Brown & Sons and Union Indemnity Company that the relationship between Union Indemnity Company on account of premiums on its policies and bonds collected by and paid to Edward Brown & Sons should be that only of a debtor and creditor and that * * * the only obligation or duty of Edward Brown & Sons in respect of any money so received should be a personal obligation to pay monthly to Union Indemnity Company the balance, if any, due after allowing credit to Edward Brown & Sons for funds expended by it on behalf of Union Indemnity Company, including return premiums paid on account of cancellations, and, on January 6, 1933 said agreement was fully performed".

The above quoted finding, standing alone, fully supports the judgment insofar as concerns that phase of the case upon which the majority opinion bases the reversal. To escape or overcome the effect of this finding of ultimate facts the majority opinion relies upon the proposition that (a) certain probative facts were found which, it holds, do not necessarily establish such ultimate facts and that (b) the findings do not set forth other probative facts which would establish such ultimate facts. From that proposition the inference is drawn, or presumption indulged, in favor of reversing the judgment, that no evidence was produced sufficient to support the finding of ultimate facts. I do not find such inference or presumption tenable upon the record before us.

It has been sound and long-established law, which I deplore seeing disturbed, that "In reviewing the sufficiency of the findings to support the judgment, regard will be had to the ultimate facts found, and not to mere probative facts, which are not shown by the findings to be the only facts proved, and from which alone the court finds the ultimate facts. In the absence of such showing, the mere circumstance that some of the probative facts are inconsistent with the ultimate facts will not prevent the ultimate facts from controlling" (2 Cal.Jur. 872-873, § 511) and "an appellate court in reviewing the findings will give them a liberal construction in support of the judgment." Id., p. 871.

Here, the probative findings on which the majority relies to overcome the finding of ultimate facts are inadequate to that end. They may be insufficient in themselves to establish the ultimate facts but they are not inconsistent with them and do not preclude the existence of evidence which would support the finding of ultimate facts. "Any uncertainties in the findings are to receive such construction as will uphold rather than defeat the judgment" (2 Cal.Jur. 871, § 511) and upon a judgment roll appeal it will be presumed that competent evidence sufficient to sustain the findings was received without objection and "that there was no evidence before the court which in any respect qualified or limited the effect of the findings." 2 Cal.Jur. 877-878, § 514. See, also, Carpenter v. Froloff, 1939, 30 Cal.App.2d 400, 407, 86 P.2d 691; Stiles v. Bodkin, 1941, 43 Cal. App.2d 839, 840, 111 P.2d 675; Lamanet v. Lamanet, 1937, 18 Cal.App.2d 402, 405, 63 P.2d 1195; Whitney v. Redfern, 1940, 41 Cal.App.2d 409, 413, 106 P.2d 919, 921.

In the last cited case it was held that "Upon an appeal on the judgment roll alone, only the ultimate facts found by the court, not the probative facts which have no proper place in the findings, can be considered, and it is only in those cases where it clearly appears that the ultimate fact found is based upon and adduced from the findings of probative facts, and it is plain that the latter do not justify nor support the ultimate fact found, that the findings of probative facts will control that of the ultimate fact, and so deprive the judgment of support."

In Perry v. Quackenbush, 1894, 105 Cal. 299, 305, 38 P. 740, 741, this court held that "Findings of probative facts will not, in general, control, limit, or modify the findings of the ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence was insufficient to justify the decision. This, it has been repeatedly held, cannot be done in this mode." See, also, Breeze v. International Banking Corp., 1914, 25 Cal.App. 437, 443, 143 P. 1066; Pico v. Cuyas, 1873, 47 Cal. 174, 178.

The finding of ultimate facts in the record here appears to fully support the judgment. Since the findings do not preclude the existence of evidence to support the ultimate facts and do not establish probative facts which are essentially inconsistent with the ultimate facts found it seems to me that consideration for sound administration of justice demands that we affirm the judgment.

EDMONDS, J., concurs.

Rehearing denied; EDMONDS, SCHAUER, and SPENCE, JJ., dissenting.

25 Cal.2d 520

In re TEEL'S ESTATE.

TEEL v. GASKILL.

Sac. 5537.

Supreme Court of California.

Dec. 28. 1944.

Rehearing Denied Jan. 25, 1945.

1. Wills 🔑386

The trier of facts is the sole judge of credibility and weight of evidence in a will contest as in any other case.

2. Wills 🔑384, 386

On appeal from judgment in will contest, all the evidence must be examined but it is not weighed, and all the evidence most favorable to respondent must be accepted as true and that unfavorable discarded, and, if the evidence so viewed is sufficient as matter of law, the judgment must be affirmed.

3. Wills 🔑55(1)

Evidence of testatrix' abnormal conduct including attempts at death by suicide, witness' opinion of her mental condition, and disinheritance of testatrix' daughter and granddaughter with whom she was friendly, justified conclusion that testatrix was weak in body and mind at time of execution of the will.

4. Wills 🔑164(7)

The testator's mental and physical condition are factors to be considered on issue of undue influence.

5. Wills 🔑166(2)

A fiduciary relationship exists between husband and wife with respect to issue of undue influence in a will contest, and where such relationship is combined with unduly profiting by the will, and its being unnatural, and activity on part of proponent in procuring its execution, there is persuasive evidence of undue influence.

6. Wills 🔑324(3)

Whether will was executed through undue influence of proponent, who was testatrix' second husband with whom testatrix was married less than six months at time testatrix committed suicide, was for jury under conflicting evidence.

EDMONDS and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

In the matter of the estate of Irene L. Teel, deceased, wherein Rilma K. Gaskill contested the validity of decedent's purported last will and testament on ground of undue influence and mental capacity. From a judgment denying probate of the alleged will, John E. Teel, proponent, appeals.

Affirmed.

Prior opinion, 145 P.2d 330.

Hill & Hill and Arthur W. Hill, all of Eureka, for appellant.

John F. Quinn and Irwin T. Quinn, both of Eureka, for respondent.

CARTER, Justice.

This case involves the contest of the will of Irene L. Teel who died on December 2, 1940. Proponent is the surviving husband of decedent, and contestant is her daughter by a former marriage. The contest was based upon the grounds of undue influence and unsoundness of mind. A jury returned a verdict in favor of contestant on both grounds, and from a judgment entered thereon, proponent has appealed.

Proponent and decedent were married on June 29, 1940, the former being sixty-nine years and the latter sixty years of age. The will now under attack was executed on November 14, 1940, and decedent committed suicide on December 2, 1940.

Under the terms of the will in question, the testatrix stated that she purposely made no provision for contestant, her only daughter. All of her property was devised and bequeathed to proponent, and in case he should predecease her, to Roy Teel, her husband's son by a former marriage. It provided that her husband be appointed executor and if he should predecease her, that Roy Teel should serve as such. By a reciprocal will executed at the same time, proponent devised all of his property to decedent, and in the event she predeceased him, to his son, Roy Teel. The latter was to serve as executor if decedent died first. Joint tenancy deeds to certain of their properties were also executed contemporaneously with the wills. The reciprocal wills and joint tenancy deeds were preceded by an antenuptial agreement in which each agreed to convey certain property to the other. Apparently that agreement was destroyed when the wills and deeds were executed.

Prior to her marriage to proponent decedent was married to Andrew J. Friend who died in 1936. Most of the property owned by decedent at the time of her marriage to proponent had been acquired from her former husband on his death, it being either community property or his separate property. Its value exceeded that of the property owned by proponent at that time.

Decedent's suicidal death apparently was accomplished by permitting an automobile motor to run in an enclosed place. Her dog died with her apparently from the same cause. She left a last note to her husband in which she stated that she was sorry they could not agree on money matters, but that nothing she could ever say would change his mind, and that she was sorry they "couldn't be happy together." She had just sent a birthday greeting card to a friend. There was no evidence of any unusual occurrence which motivated her suicidal act.

The sole contention on this appeal is that the evidence is insufficient to establish unsoundness of mind or undue influence. Inasmuch as we believe the evidence is sufficient to support the finding of undue influence, it will not be necessary to determine the sufficiency of the evidence as to mental incapacity. However, as the mental condition of the decedent is a factor to be considered on the issue of undue influence, the evidence on that subject will be discussed.

The record shows the following in regard to the mental condition of the decedent. The mutual wills were prepared by attorney H. L. Ricks of Eureka, who was consulted by proponent and decedent and the terms were discussed generally by them with the attorney. Mr. Ricks endeavored to persuade decedent that she should not disinherit her daughter but was unsuccessful. He testified that decedent was of sound mind when the will was executed.

Mrs. Hattie J. Hutchins, formerly Mrs. Colby, an acquaintance of decedent lived next door to her in Hydesville, Humboldt County, in 1938, at which time she deeded property to Mrs. Hutchins and husband and herself as joint tenants, and established a joint bank account of $2,500 to be used in the construction of a house on the property. Payments were made by the Colbys on the $2,500 at the rate of $15 per month. Apparently there was no consideration for the deeds. In 1939, when Mr. Colby died, decedent became unfriendly. When asked what decedent did, Mrs. Hutchins replied that she found four flat tires on her car, the glass in the tail-lights broken, solder poured into padlocks, and that she hacked walnut trees on the property so that they would die. The outcome of the property transaction was that Mrs. Hutchins reconveyed the joint tenancy property to decedent for about $500. From her observation of and dealings with decedent about fifteen months in 1938 and 1939, she considered her "at times" "mentally unbalanced," that she was a "very peculiar woman." She based her opinion on her actions, looks and deeds. She had a "peculiar look" at times. She testified: "At one time she told me she planted a hedge across the back so a neighbor couldn't watch her or see her and then when she took another notion she trimmed it off so she could see, and I have known her to tell one neighbor that they could have the feed for their cows and turned right around in two or three days or so and let another neighbor put their's in, and things like that. We lived there all together fifteen months in the cabin and in the new house—I did; it was fifteen months that I was there; just about a year that Mr. Colby and I were there." Decedent mentioned suicide to her about eight times giving no reason except that she felt "ornery." She stated "she thought she would go see a doctor and have the wheels taken out of her head." Decedent became confused over the deed of reconveyance from Mrs. Hutchins stating she had to obtain such a deed in order to protect a transaction she had made with another person after she had received the deed from Mrs. Hutchins.

Witness George Baham who knew decedent for about three and one-half years testified that she was "most peculiar" in relation to her property and "things of that kind"; that "she would do something and then wish she hadn't done it and things of that kind, confusion."

The witness Gertrude Lewis testified that decedent bought a nightgown three or four days before her death stating that she wanted "something nice" because she would use it only once.

Miss Estelle Gaskill, daughter of contestant, and granddaughter of decedent, testified that in July, 1940, decedent offered her money for admission to a rodeo. After Miss Gaskill returned home she received a post card from decedent to the effect that she had purchased a rodeo ticket for her and a handkerchief, although decedent had already given her the handkerchief.

The witness Roy Brown testified that in 1920 he rescued decedent when she attempted to commit suicide by drowning; that she had spoken of suicide on other occasions; that he had seen her in 1940; that she was not exactly insane but was "doggone badly off balance," had a "weak mind" in every respect, "friendship, business or anything else; she would only carry one friend at a time." He recited an incident which occurred about 1920 or 1922, when she purchased a worthless cow and heifer for $150 and $80 respectively.

The witness George A. Friend, a brother of decedent's first husband, having seen decedent frequently prior to 1936, and several times after that, stated that her mental condition was "rather bad" because she was friendly or unfriendly from time to time without reason; that she was a woman of "very peculiar ways," kept to herself and did not want to see people.

Contestant testified that from her observation of her mother for the last few years, and at or about the time of the execution of the will, her "mental condition was bad." Decedent was erratic in her actions, was "melancholy and mournful" and could not understand why she did not like other people. She was moody and complained of pains in her head and abdomen and "doctored" all the time. She attempted to commit suicide.

The funeral director related the circumstances when decedent made arrangements for her first husband's funeral in 1936. She talked to him for twenty minutes and did not mention her husband's death until she "got up to leave." Instead of sending appropriate burial clothes for her husband, she sent a dress to the director. It is claimed that that incident arose from an innocent mistake in packages, but it was for the jury to valuate that explanation.

Decedent consulted Dr. Lowell J. Kramer of Fortuna, Humboldt County, in July, 1940. He diagnosed her case as gastric neurosis, low blood pressure, hypotension, and cancer phobia, but no organic ailment. She had lost fifteen pounds over a period of three months. She seemed considerably older than she was several months before—had failed considerably in that time. He did testify that he "saw no evidence of insanity." He testified: "Q. Her mind seemed to be perfectly clear at all times. A. With the possible exception of that phobia." However, he also stated that the act of committing suicide was abnormal and answered the following hypothetical question: "Q. What would your opinion of a person be who in 1922 threw herself into a river and attempted suicide. * * * In an attempt to commit suicide and was pulled out and who thereafter at least six or seven times threatened to commit suicide, did commit suicide on December 2nd of 1940, that prior thereto, a month or two or two months, the time is a little indefinite, told her husband that she would or might commit suicide, a woman who at one time purchased a high priced animal for $175.00 then disposed of it for a little or nothing, had to get rid of it, who at time three or four years, in 1937 or 1938 was in a business transaction, a transaction completely closed and the deeds had been drawn up and delivered and after all this was done she wrote a letter in which she stated that she wanted these quit-claim deeds to be made out and placed on record, when it already had been done; a woman that complained about her head, laid down a great deal, complained that she was not able to do her work; a woman that in drawing up her will left her property to a man she had been married four months to, cut out completely her only child, only daughter; who complained a great deal of headaches, she had low blood pressure, would you say a person that had such characteristics, * * * whether she was of sound or unsound mind. * * * A. I would strongly suspect she was of unsound mind if all those facts were true." He further testified that the "committing of normal acts did not obviate the possibility of an abnormal mind"; that when the person acted normally—had lucid intervals he could transact business.

[1] Proponent on the other hand produced an array of witnesses who testified as to the soundness of decedent's mind and contradicted other evidence offered by contestant. Attorneys with whom decedent consulted during 1940 regarding the disposition of her property including Mr. Ricks, the draftsman of the will, and other persons acquainted with her, testified that her mind was sound. Evidence is pointed to which it is asserted explains the instances of decedent's conduct above referred to. The value or credibility of those explanations were for the trier of fact. Reference is made to evidence that she handled her first husband's business affairs for many years, he being blind, and that she was a careful and cautious business woman. To review those conflicts is not the function of this court. The trier of fact is the sole judge of the credibility and weight of the evidence in a will contest the same as in any other case. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Miller, 16 Cal.App.2d 154, 60 P.2d 498; In re Estate of Ramey, 62 Cal.App. 413, 217 P. 135; In re Estate of Gill, 14 Cal.App.2d 526, 58 P.2d 734; In re Estate of Doolittle, 153 Cal. 29, 94 P. 240; In re Estate of Snowball, 157 Cal. 301, 107 P. 598; In re Estate of Cashion, 27 Cal.App.2d 689, 81 P.2d 628; In re Estate of Allan, 15 Cal.App.2d 272, 59 P.2d 425; In re Estate of Caspar, 172 Cal. 147, 155 P. 631; In re Estate of Arnold, 147 Cal. 583, 82 P. 252; In re Estate of Webster, 43 Cal.App.2d 6, 110 P.2d 81, 111 P.2d 355; In re Estate of Ross, 199 Cal. 641, 250 P. 676; In re Estate of Johnson, 200 Cal. 299, 252 P. 1049; In re Estate of Barr, 69 Cal.App. 16, 230 P. 181; In re Estate of Russell, 189 Cal. 759, 210 P. 249. An excellent statement of the rule appears in Re Estate of Bristol, supra. Although the issue was whether a codicil had been destroyed by the testator, the general rule is stated at page 223 of 23 Cal.2d, at page 690 of 143 P.2d:

"The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. * * * The rule as to our province is: 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' (Italics added.) * * * The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is 'substantial'; it is a door which can lead as readily to abuse as to practical or enlightened justice."

[2] A somewhat different theory was expressed in Re Estate of Casarotti, 184 Cal. 73, 78, 192 P. 1085, 1087, where this court said: "The testimony of proponent's witnesses must be taken into account in weighing the sufficiency of contestant's case. Evidence which standing by itself might be sufficient to sustain a verdict may, in the light of all the facts, be wholly inadequate, and that without invading the province of the jury as the judges of the weight and sufficiency of the evidence." This statement was quoted in Re Estate of McDonough, 200 Cal. 57, 251 P. 916. The last quoted excerpt cannot be considered as an accurate statement of the law inasmuch as it is contrary to the foregoing declaration in Re Estate of Bristol, supra, which has been announced so frequently

that it must be considered as controlling. Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed.

[3-5] Applying the foregoing rules to the facts of this case it is obvious that the many incidents of abnormal conduct, the attempts at suicide and finally death by suicide, the opinion of witnesses as to her mental condition, the disherison of her daughter and granddaughter, with whom she was friendly, when most of her property came from her first husband, the father of her daughter, in favor of proponent to whom she had been married less than six months, and finally, the opinion of the doctor who examined her, all taken together form a picture from which we must conclude that the jury by its verdict and the trial judge by denying a motion for judgment notwithstanding the verdict were reasonably justified in concluding that decedent was weak in both body and mind, and inferring that such condition existed at the time of the execution of the will. The circumstances must be viewed in the light of the mental condition of decedent. The mental and physical condition of the testator are factors to be considered on the issue of undue influence. 26 Cal.Jur. 669, 670. In the instant case, in addition, we have a husband and wife living together, and hence, a fiduciary relation existing between testatrix and proponent. A fiduciary relationship exists between husband and wife in respect to the issue of undue influence in a will contest, and where such fiduciary relationship is combined with unduly profiting by the will, and its being unnatural, and activity on the part of the proponent in procuring its execution, we have persuasive evidence of undue influence. See In re Estate of Nutt, 181 Cal. 522, 185 P. 393; In re Estate of Baird, 176 Cal. 381, 168 P. 561; In re Estate of Olson, 19 Cal.App. 379, 126 P. 171; In re Estate of Shay, 196 Cal. 355, 237 P. 1079; In re Estate of Gallo, 61 Cal. App. 163, 214 P. 496; In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; In re Estate of Easton, 140 Cal.App. 367, 35 P.2d 614; In re Estate of Graves, 202 Cal. 258, 259 P. 935; In re Estate of Bleil, 96 Cal. App. 283, 273 P. 1088; In re Estate of De Graaf, 34 Cal.App.2d 120, 93 P.2d 199; In re Estate of Bucher, 48 Cal.App.2d 465, 120 P.2d 44; In re Estate of Johnson, 31 Cal.App.2d 251, 87 P.2d 900; In re Estate of Hampton, 39 Cal.App.2d 488, 103 P. 2d 611; In re Estate of Rabinowitz, 58 Cal.App.2d 106, 135 P.2d 579.

[6] In the instant case we have various circumstances which support the conclusion reached. The condition of decedent's mind. The confidential relationship between proponent and decedent. The property possessed by decedent when the joint tenancy deeds and mutual wills were made was considerably larger than that owned by proponent. Although proponent and decedent were acquainted some time before their marriage they had been married less than six months at the time the will was executed. True, the evidence is conflicting, but there is evidence that decedent and her daughter and granddaugher were on friendly terms and that decedent had spoken of leaving property to her daughter. The estate of decedent consisted chiefly of property acquired from her first husband, the father of contestant, her daughter. Yet, she made no provision for her. By the laws of intestate succession she would have inherited one-half of the estate. Probate Code, § 221. Proponent went to the office of Mr. Ricks, the attorney who drafted the mutual wills and joint tenancy deeds and joined in the discussion of the terms of the will. Decedent did not discuss the matter with Mr. Ricks in the absence of proponent. Proponent telephoned Mr. Ricks' office several times to inquire whether the documents had been prepared. The day decedent committed suicide he was examining papers in a box presumably belonging to her. He did not notify contestant of her mother's death, and wasted no time after the death in transferring a joint bank account that had been supplied by decedent's funds. Decedent left suicide notes containing expressions to the effect that she had one chance to take and lost. She wrote a birthday note to a friend, Mrs. Lola Lutman, just before her death telling her to take certain articles of personal property in which decedent stated: "Lola dear, don't miss me, its best. Unless you are happy, what's the use? * * * John (proponent) is swell, don't think badly of him. He's a dear. Say nothing of this to John & use it just for yourself and Bud." Proponent testi-

fied that in her last note to him, decedent "spoke about the money matters, she said that she was sorry that they couldn't agree on money matters but she said that nothing she could ever say would change his mind about money matters because he would say and think he always had to work, that's as near as I remember what was in it." What, if anything, more was said in that note cannot be known inasmuch as proponent stated that he did not know where it was—that it had been mislaid.

On the other hand there is the testimony of Mr. Ricks that there was no appearance of influence by proponent, and that he tried to dissuade decedent from disinheriting her daughter. He also testified, however, that: "Q. Did Mr. Teel in any manner appear to dominate or influence the will of Mrs. Teel in the preparation of those papers or the execution of them. A. Well there was no apparent domination in words or anything that were used, but I just had an intuition I wanted to delay the matter, I didn't like the looks of the whole thing. Q. Yes, but Mr. Ricks, had there been any indication to influence there in your office, you would not have permitted her to sign at that time would you. A. I saw no evidence of influence." He prepared proponent's will also at the same time as that of decedent. He kept decedent's will in his office and she never asked for it or sought to change it. Decedent had consulted other attorneys alone with reference to the disposition of her property. However, proponent accompanied her to the offices of those attorneys and remained there while the attorneys consulted with her alone. Attorney Mace had never seen her before, and attorney Mitchell stated: "I know he (proponent) was in at one time and I heard him tell Mrs. Friend 'Well you talk to Mr. Mitchell and I will meet you at some time later at some particular place,' but I don't remember the dates or details you know, that's a year or more ago." Mr. Mitchell had previously acted as decedent's and proponent's attorney. Moreover, those visits to other attorneys' offices must be considered in the light of the premarriage property settlement agreement between proponent and decedent, and the other circumstances. There is also evidence that decedent told those attorneys that she wanted her husband to have her property. However, all that can be said on this subject is that there was a conflict in the evidence and that the trier of fact resolved that conflict against proponent. The rule heretofore stated with regard to the respective functions of the trier of fact and an appellate court is applicable.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

In my opinion there is no substantial evidence whatever to support the verdict which is upheld by the decision in this case, and the facts upon which the jury determined that the disposition which the testatrix made of her property should be set aside fall far short of the requirements laid down by the heretofore unbroken rules relating to the proof necessary to set aside a will.

At least until the present decision, testimony showing that one had the opportunity to influence a testator, even where it was shown that he had the interest or motive to do so, has not been held to justify the invalidation of a will. In re Estate of Gleason, 164 Cal. 756, 130 P. 872. And even the evidence tending to prove that influence was exercised to procure the making of a will has been said to be an insufficient ground for setting it aside. "The mere fact that one person has been influenced by the arguments or entreaties of another is not enough to make the influence an undue one. It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person taken in response to the pressure does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another." In re Estate of Anderson, 185 Cal. 700, 707, 198 P. 407, 410.

According to the testimony of H. L. Ricks, the attorney who prepared the will of Mrs. Teel, it was written at her request and in accordance with her wishes. When she first came to his office she told him that she wished to make a will in favor of her husband, leaving nothing to her daughter. Her husband was with her at the time, but there is no evidence that the visit was made at his suggestion or direction. On the contrary, the evidence shows that on previous occasions Mrs. Teel had consulted other attorneys; at one time she secured legal advice when her husband was not present.

When she visited Mr. Ricks, he attempted to dissuade her from disinheriting her daughter and told her to go home and think the matter over. But from the information given to him at the time by Mr. and Mrs. Teel he prepared reciprocal wills, incorporating the provisions specified by them. Subsequently the two returned and executed these wills before Mr. Ricks and Selma G. Burgess as subscribing witnesses. Although the attorney did not talk to Mrs. Teel alone, and she and her husband were present when each will was signed, there was nothing in the conduct of the parties, Mr. Ricks testified, indicating any domination of Mrs. Teel by her husband. Mrs. Burgess also told the jury that the testatrix was not acting under duress, menace, fraud or undue influence.

Before consulting Mr. Ricks, the appellant and his wife had obtained other legal advice but there is nothing to indicate that this was done at Mr. Teel's solicitation. E. S. Mitchell, one of the attorneys consulted, testified that in 1940 Mrs. Teel called upon him at least twice in reference to the disposition of her property. Mr. Teel was probably present at one of these interviews, said Mr. Mitchell, but he did not participate in the conversation. At the other visit, the attorney talked to Mrs. Teel alone. She told him that she had received a letter from her daughter demanding a share of the estate of the girl's father. Mrs. Teel asked if she was free to dispose of her property by will in accordance with her own wishes. The attorney advised her that she could do so, but the testimony does not indicate that he was asked to draw a will for her.

There is nothing in the testimony regarding her consultation with Delos A. Mace, the other attorney, to indicate that Mrs. Teel's husband took her to his office. Mr. Mace testified that when she and Mr. Teel came to see him, and she stated the purpose of her visit, he took her into his private office, and that Mr. Teel did not participate in the conversation. Mrs. Teel said that she wanted to leave all of her property to her husband; very emphatically she stated that her daughter was not to receive anything. After a discussion of the matter she said that she would think the matter over but she did not return.

In support of the jury's finding of undue influence, the contestant calls attention to the prenuptial agreement of Mr. Teel and the testatrix to make reciprocal wills, each naming the other as sole beneficiary, as evidence that he married her for her money. Emphasis is also laid upon the testimony showing that when Mr. Teel and his wife went to the office of Mr. Ricks, Mr. Teel discussed with her and the attorney the terms of the wills and the deeds which were also to be prepared. At that time he had with him certain documents and he made arrangements to provide the attorney with the legal descriptions of property. The contestant also points out that Mr. Teel later telephoned to the attorney on several occasions to inquire if the documents had been written; he was present when the will of his wife was executed and took possession of the deeds which were signed at that time. Because there was a confidential relationship between Mr. Teel and his wife, it is argued, and he unduly profited by the will which was obtained under those circumstances, the verdict rests upon substantial evidence.

But to set aside a solemnly executed will, upon the ground of undue influence, the appellate courts of this state have repeatedly held that a contestant must show coercion destroying free agency upon the part of the testator. In re Estate of Keegan, 139 Cal. 123, 72 P. 828. Evidence of opportunity, even if coupled with a motive to influence the testamentary act is not sufficient. In re Estate of Kilborn, 162 Cal. 4, 120 P. 762. Nor does proof of circumstances consistent with the exercise of undue influence meet the law's requirements; the facts relied upon must be inconsistent with voluntary action on the part of the testator. In re Estate of Donovan, 114 Cal.App. 228, 299 P. 816. And the evidence must show more than general influence, however strong and controlling; influence which invalidates the instrument must be "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." In re Estate of Carithers, 156 Cal. 422, 428, 105 P. 127, 130; In re Estate of Gleason, supra, 164 Cal. at page 765, 130 P. 872; other cases stating and applying this rule are In re Estate of Hopkins, 136 Cal.App. 590, 602, 603, 29 P.2d 249; Estate of Calkins, 112 Cal. 296, 44 P. 577; In re Estate of Clark, 170 Cal. 418, 424, 149 P. 828; In re Estate of Anderson, supra, 185 Cal. pages 707, 708, 198 P. 407. In short, as this court very recently said, "it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will." In re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25, 27. And although, since the decision in Re Estate of Baird, 176 Cal. 381, 168 P. 561, when one stands in a confidential relation to a testator and has participated in procuring the execution of a will by which he unduly profits as a beneficiary a presumption of undue influence arises, the rule strictly requires the concurrence of each of these factors. However unnatural a will may appear to be with regard to the natural objects of a testator's bounty, said this court in upholding the Baird will, such fact is not alone sufficient to sustain a finding of undue influence. Nor is evidence of a confidential relation alone sufficient. "There must be activity on the part of the beneficiary in the matter of the preparation of the will." 176 Cal. at page 384, 168 P. at page 563.

A further restriction upon the rule giving the contestant of a will the benefit of a presumption of undue influence under the circumstances which have been stated was made by the District Court of Appeal when it declared: "The instances will be found rare where our Supreme Court has permitted a will to be upset solely upon the ground of undue influence where the charges have been made against the husband or wife. No presumption is permitted to be indulged against this relation in this state, and it is not permitted in most other jurisdictions." In re Estate of Carson, 74 Cal.App. 48, 65, 239 P. 364, 372. This conclusion was, in part, based upon the case of Estate of Langford, 108 Cal. 608, 41 P. 701, where it was said that a wife may justly influence the making of her husband's will for her own benefit so long as she does not act fraudulently. "Accordingly, the circumstance that the testator's wife urged upon him the propriety of leaving his property to her does not constitute undue influence to vitiate the will. * * * And the mere fact that the will of the husband is changed to gratify the wishes of the wife does not raise a presumption of undue influence on her part. * * * In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made." 108 Cal. at page 623, 41 P. at page 705.

But disregarding the limitation which has been applied in the marital relation, I can find no substantial evidence either that Mr. Teel procured the preparation and execution of the will in his favor or that he unduly profited by it. It has been held that active participation in procuring the execution of a will cannot be inferred from the mere fact that the beneficiary accompanied the testator to the office where the will was drawn. In re Estate of Morcel, 162 Cal. 188, 121 P. 733; In re Estate of Easton, 140 Cal.App. 367, 35 P.2d 614. And in Re Estate of Shay, 196 Cal. 355, 237 P. 1079, this court, in reversing a judgment revoking probate of a will, said that the participation of the testator's children in procuring the execution of the instrument was not shown by evidence that a son, at his sister's request, mentioned the will to his father; that his father thereupon requested him to take notes and give them to a friend for preparation of the will; that he delivered the notes as requested and thereafter procured a copy of the will which he read to his father, who declared himself satisfied with its provisions; and that he then arranged for the execution of the will but was not present when the instrument was signed. In the present case, the evidence of participation by the beneficiary shows much less activity than that of either Shay's son or daughter.

Also the fact that the testatrix had more property than her husband and the value of his distributable interest under the will is more than she would have received had he predeceased her does not supply the factor of undue profit within the meaning of the rule. Even had Mrs. Teel left no will, her husband would have taken one-half of her estate under the laws of succession, Probate Code, § 221; and as they had also executed joint tenancy deeds of their real property which constituted a considerable portion of Mrs. Teel's estate, the amount by which Mr. Teel benefited by the will is not large, even accepting contestant's valuation of her estate at the time the will was executed as being approximately $24,000.

A will cannot be set aside upon the sole ground that it is unjust or unnatural (In re Estate of Martin, 170 Cal. 657, 663, 151 P. 138) and an unfair or unjust will creates of itself no presumption of incompetency or undue influence. In re Estate of Smith, 200 Cal. 152, 160, 252 P. 325; In re Estate of Putnam, 1 Cal.2d 162, 34 P.2d 148. Moreover, a will that favors a spouse over an adult daughter is not necessarily unnatural. This is especially true, as in the present case, where the daughter is a married woman, living with her husband, is self supporting and not dependent upon her mother. In re Estate of Stone, 172 Cal. 215, 222, 155 P. 992.

For these reasons, in my opinion, the judgment should be reversed.

TRAYNOR, J., concurred.

Rehearing denied; EDMONDS, TRAYNOR, and SPENCE, JJ., dissenting.

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25 Cal.2d 588

In re ROTHROCK.

S. F. 16934.

Supreme Court of California.

Dec. 29, 1944.

Rehearing Denied Jan. 25, 1945.

1. Attorney and client 🔑39, 54

Whether an attorney has been convicted of a crime involving moral turpitude, within the statute requiring transmission of the record to the Supreme Court for disbarment proceedings, is a question of law which the Supreme Court must decide, and, if the conviction on the face of the record shows moral turpitude, the record is conclusive. St.1939, p. 357, §§ 6100–6102.

2. Attorney and client 🔑39

An attorney's obtaining money by drawing four checks in amounts ranging from $3 to $25.07, knowing that he had no account in the bank or insufficient funds, constituted "moral turpitude" within the disbarment statute. St.1939, p. 357, §§ 6100–6102.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

3. Attorney and client 🔑48

In view of statute requiring transmission to the Supreme Court of the record of conviction of an attorney for a crime involving moral turpitude, he is not necessarily entitled to notice of the Supreme Court proceedings culminating in disbarment. St.1939, p. 357, §§ 6100–6102.

4. Attorney and client 🔑53(1)

In a proceeding to set aside a disbarment order based on the disbarred attorney's plea of guilty of petty theft, the Supreme Court could not consider facts relied on to show that he was insane, and that the prosecuting officers, by overreaching him, induced him to plead guilty. St. 1939, p. 357, §§ 6100–6102.

◆

In Bank.

In the matter of the disbarment of Donald A. Rothrock, an attorney at law. Motions and petitions to set aside an order of disbarment.

Motions and petitions denied.

Donald A. Rothrock, in pro. per., for petitioner.

Jerold E. Weil, of Los Angeles, for respondent.

PER CURIAM.

By a complaint filed in the Justice's Court of San Jose Township, Donald A. Rothrock, then a member of the bar of California, was charged with the crime of petty theft. On February 5, 1941, Rothrock pleaded guilty to the charge and was sentenced to a term of six months in the county jail. After he had served about three months of that time, he was paroled for the purpose of receiving medical treatment at the Veterans' Bureau in Colorado.

In conformity with the provisions of the State Bar Act, a certified copy of the judgment of conviction was transmitted to this court which, on May 12, 1941, made an order disbarring Rothrock from practice. More than a year and one-half later, by a series of motions and petitions he challenged the validity of that order upon the grounds, generally stated, that the record of his conviction, as presented to this court, did not justify his disbarment. In support of one of these motions, he declares that petty theft does not necessarily involve moral turpitude. He also alleges that his crime, if any, was not petty theft and that the prosecuting officers, by overreaching him, induced him to enter a plea of guilty. At the time of committing the act and entering the plea, he continues, he was insane. Before ordering his disbarment based upon the conviction of petty theft, Rothrock asserts, this court should have afforded him an opportunity to appear and defend against any finding of moral obliquity, and by reference or otherwise, ascertained the facts concerning the offense for which he was prosecuted. In two other notices of motion he attacks the order of disbarment upon some or all of the same grounds.

The State Bar Act provides that the clerk of the court in which an attorney is convicted of a felony or misdemeanor involving moral turpitude shall transmit a record of such conviction to this court. A plea of guilty is deemed to be a conviction. If the judgment is final, proceedings to disbar the attorney shall be undertaken by the Supreme Court and the record of conviction shall be conclusive evidence. Business and Professions Code, §§ 6100, 6101, 6102, St.1939, p. 357. Rothrock admits that he was disbarred upon a record of conviction submitted in accordance with these provisions, but he contends that the crime of petty theft does not necessarily involve moral turpitude. He insists that only upon a consideration of the evidence concerning the act for which he was convicted may that question be determined.

[1] In a proceeding recently brought by an attorney at law to avoid disbarment because of a judgment of conviction, the effect of the record was considered and it was held that whether a person has been found guilty of a crime involving moral turpitude is a question of law which this court must decide. In re McAllister, 14 Cal.2d 602, 603, 95 P.2d 932. And as since stated, "if the conviction on the face of the record shows moral turpitude, then the record is conclusive of the matter." In re Richardson, 15 Cal.2d 536, 540, 102 P. 2d 1076, 1078. More specifically, the court observed when passing upon the validity of an order disbarring Rothrock which was based upon his conviction of the offense of assault with a deadly weapon: "In cases such as those involving convictions of murder, forgery, extortion, bribery, perjury, robbery, embezzlement and other forms of theft, no difficulty would attend the determination of the question of moral turpitude from a consideration of the record of conviction alone." In re Rothrock, 16 Cal.2d 449, 454, 106 P.2d 907, 910, 131 A.L.R. 226.

But because of the petitioner's assertions that he did not commit petty theft, and that the plea of guilty upon which the order of disbarment now under attack is based was made as the result of an agreement with the district attorney to accept responsibility for an offense not committed, this court referred the matter to The State Bar for the purpose of taking evidence and making findings of fact concerning the issue of moral turpitude. The committee of The State Bar to which the matter was assigned for hearing accorded Rothrock an opportunity to appear as a witness in his own behalf. He did not do so but presented a letter which was received in evidence. The committee took the testimony of the deputy district attorney who prosecuted Rothrock and the justice of the peace before whom he pleaded guilty. This evidence, with the record of the proceedings in the justice's court at the time of plea and sentence was presented to the Board of Governors, which made findings of fact substantially as follows:

On January 31, 1941, a complaint was filed against Rothrock in the Justice's Court of San Jose Township charging him with the commission of a felony. It was alleged that, with the intent to defraud one Mabel Beale, he drew a check in the sum of $5.83 upon the Bank of America, Colton branch, "knowing at the time that he had not sufficient funds in, or credit with, said bank to meet said check in full." There were at that time in the hands of the district attorney, three other checks, all of which had been drawn by Rothrock on the same bank, one to Hotel DeAnza for $25.07, one to Hotel DeAnza for $3.00, and one to Mrs. Norma Butler for $12.01. Rothrock admitted to a deputy district attorney that he had used each of these checks to obtain money, and that he knew he had no money in the bank to cover them.

As the result of an arrangement described by the deputy district attorney as a "deal" which was made by him and counsel for Rothrock, a complaint charging the petitioner with petty theft was filed. This complaint was based upon Rothrock's act in obtaining $5.83 from Mrs. Beale but it did not mention the check as the means he had used to get the money. To this complaint Rothrock entered a plea of guilty and a sentence of six months' imprisonment in the county jail was thereupon imposed. The district attorney then dismissed the complaint charging a felony.

No promise was made by the deputy district attorney, or any other person, either to Rothrock or to his attorney that Rothrock would be given a suspended sentence. On the contrary, Rothrock was informed before he pleaded guilty that he would not be given a suspended sentence, and he knew that the result of his plea and conviction "might or would be suspension or disbarment." Also, after his plea was entered and before he was sentenced, he admitted to the justice of the peace that he had passed the four checks which have been mentioned. After being sentenced he asked permission to withdraw his plea of guilty, but permission was denied. The judgment of conviction was never revoked, vacated, or set aside, and it has become final.

Shortly after his conviction and sentence Rothrock filed in the superior court an application for writ of habeas corpus. At the hearing in that proceeding he repeatedly admitted having issued the checks and his application was denied. In the habeas corpus matter, and also in the proceedings before the justice's court, Rothrock was represented by counsel but not at all times by the same counsel.

Upon these findings the Board of Governors concluded that (1) Rothrock pleaded guilty to and was convicted of the crime of petty theft, involving moral turpitude, and (2) that the record in the case, including his applications for a writ of habeas corpus, "demonstrates, on the part of the respondent, a gross lack of honesty and good morals, and a gross disrespect for the principles of justice, honesty and good morals." The board further declared that, in its opinion, the case is controlled by sections 6101 and 6102 of the Business and Professions Code, and recommended that the order of disbarment should stand.

[2] The evidence presented to The State Bar abundantly supports the findings and conclusions of the Board of Governors. It may be conceded that conceivably a bank account might be innocently overdrawn through mathematical miscalculation and not in the commission of an act of moral turpitude. But this clearly is not such a case. The checks drawn by Rothrock and bank memoranda concerning them appear as exhibits in the record. They show that over a period of several days checks were drawn by Rothrock on a bank in which he had no account, and his acts in obtaining money by such means certainly amount to moral turpitude.

[3] Considering the petitioner's complaint that he received no notice of the proceeding in this court which concluded with the order of disbarment, the statute makes no requirement for any notification to a convicted attorney that the record of conviction has been transmitted in conformity with its provisions. At one time, the Code of Civil Procedure authorized the removal or suspension of an attorney at law for "His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence." Code Civ.Proc. § 287. In construing that provision, which is substantially the same as the one which is now a part of the State Bar Act, this court said: "The only notice which the accused attorney is to have under that subdivision is that which he receives on the trial of the criminal charge of which he has been convicted. The law informs him that one of the results of his conviction will be his subsequent disbarment, in the manner provided by the Code of Civil Procedure. This answers the constitutional requirement that he shall have due process of law before he can be deprived of his right to practice." In re Collins, 188 Cal. 701, 708, 206 P. 990, 993, 32 A.L.R. 1062.

[4] The other grounds relied upon by Rothrock in support of his motions to set aside the order of disbarment concern his mental condition at the time he pleaded guilty in the justice's court, and representations which, he asserts, were made to him at that time. The facts alleged by him might be appropriately stated as the basis for a proceeding in the Justice's Court, or in a court of equity, to set aside the judgment of conviction but they cannot be considered by this court for the purpose of avoiding the effect of the record transmitted in conformity with the State Bar Act. If, for any reason, the judgment of the court below is vacated, the order based upon it will be without support and subject to further consideration. In the meantime, Rothrock must accept the consequences of the conviction.

The motions and the petitions are, and each of them is, denied.

BURGESS et al. v. CAHILL et al.

Sac. 5684.

Supreme Court of California.

Dec. 28, 1944.

Rehearing Granted Jan. 25, 1945.

1. Automobiles 🔑192(1)

Prior to the imputed liability statute, the general rule was that an automobile owner, not present at the time of the operator's negligence, was not liable unless the operator was his agent or servant and was engaged in his service. Vehicle Code, § 402, St.1937, p. 2353.

2. Automobiles 🔑192(1)

The purpose in enacting the imputed liability statute was to protect innocent third persons from careless use of an automobile, and this protection should be paramount to the rights of an owner who, though nonculpable has permitted the use of his automobile by others. Vehicle Code, § 402, St.1937, p. 2353.

3. Automobiles 🔑192(1)

The imputed liability statute defines an automobile owner's liability where the principle of respondeat superior is inapplicable, in order to make the owner liable for the negligence of any person to whom he has expressly or impliedly given permission to operate the automobile. Vehicle Code, § 402, St.1937, p. 2353.

4. Automobiles 🔑192(1)

Under the imputed liability statute, the foundation of an automobile owner's liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public. Vehicle Code, § 402, St.1937, p. 2353.

5. Automobiles 🔑192(1)

The owner of an automobile can avoid statutory liability for another person's negligence by refusing to permit its use by such person, but may not avoid the consequences of the operator's negligence by secret restrictions limiting the permitted use. Vehicle Code, § 402, St.1937, p. 2353.

6. Automobiles 🔑193(10)

Where a farm corporation employed a mechanic to care for farm machinery and provided him with a pickup truck, kept at his home, and furnished oil and gasoline, and on a Sunday evening the mechanic and his son and wife, who was driving, were using the truck to obtain shrubbery for their prospective home, and a collision occurred, the corporation was liable under statute, even if it had instructed the mechanic that the truck was for use on company business only. Vehicle Code, § 402, St.1937, p. 2353.

7. Automobiles 🔑192(1)

Where the owner of an automobile expressly or impliedly permits its use, and it is being driven by another with the consent of the permittee, who accompanies the driver, the owner is liable for the driver's negligence to the extent set forth in the imputed liability statute. Vehicle Code, § 402, St.1937, p. 2353.

EDMONDS, J., dissenting.

◆

In Bank.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Billy Burgess, a minor, etc., and others, against Samuel A. Cahill, H. P. Garin Company, and others for personal injuries and wrongful death resulting from a collision involving a truck owned by the defendant company. From a judgment on a directed verdict for the company, plaintiffs appeal.

Reversed.

Prior opinion 149 P.2d 716.

Gumpert & Mazzera and Charles A. Zeller, all of Stockton, for appellants.

Neumiller & Ditz, Irving L. Neumiller, and C. H. Hogan, all of Stockton, for respondent.

SHENK, Justice.

The plaintiffs have appealed from a judgment for the defendant H. P. Garin Co. entered pursuant to a directed verdict. No appeal was taken from the separate judgments entered for the plaintiffs against other defendants.

The appeal is presented on a settled statement of facts from which it appears that the defendant H. P. Garin Co. was engaged in a farming enterprise on Bouldin Island, situated about eight miles northwest of Stockton; that the defendant Samuel Cahill was employed by it in 1942 as a mechanic to keep its farm machinery in repair; that the company provided Cahill with a Ford pickup truck to go back and forth to his work and for use in his work, which truck was kept at Cahill's home. The company furnished the oil and gasoline for the company car used by Cahill, but made no effort to check the mileage of the car or the amount of fuel consumed. All of the company cars, with the exception of the one in the possession of Cahill, contained printed stickers prohibiting the use of the machines for private purposes. Cahill used the company car on several occasions to obtain groceries for his personal use, and on one occasion took the car on a fishing trip to Bouldin Island. There is no evidence that any officer or employee of the defendant company knew that Cahill at any time had used the car for his personal purposes. On January 17, 1943, at 7 o'clock p. m., Cahill, his wife and son, were riding in the company car for the purpose of picking up some plants and shrubs to be planted at a home to which they intended to move. On this trip, and while Mrs. Cahill was driving, a collision occurred between the car and an automobile being driven by Utah R. Thornburgh, as a result of which Thornburgh and another person in his car were killed and others seriously injured.

The record discloses a conflict in the evidence as to whether Cahill was expressly prohibited from using the company car for his personal purposes. An officer of the company testified that Cahill was told at the time the car was turned over to him that it was for use on company business only. Cahill testified that he at no time received instructions, either written or oral, restricting its use.

At the conclusion of the trial, the court instructed the jury to return a verdict in favor of the defendant company on the ground that there was no substantial evidence that the Ford pickup was being operated at the time of the accident with the permission of the owner of the vehicle. The jury returned a verdict in compliance with that instruction and judgment was entered accordingly.

The asserted liability of the defendant corporation is based on section 402 of the Vehicle Code, St.1937, p. 2353, which provides in part that: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." No contention is made that the car was being used on business of the company, nor is it contended that Cahill had express permission to use the car for his own purposes.

The question presented is whether the conduct or declarations of the owner with respect to the use of the automobile by Cahill constituted "permission, express or implied, of such owner" so as to impose upon the owner the statutory liability, and is to be determined in the light of the undisputed primary facts, namely, ownership of the car by H. P. Garin Co., and general possession and use of the car by Cahill with the owner's consent. In disposing of the question, we may assume that Cahill was instructed by the owner not to use the car except on company business.

[1] Prior to the enactment of the imputed liability statute, the general rule was that the owner of an automobile, who was not present at the time of the negligent act which caused injury to a third person, could not be held liable unless it was shown that the person in charge was the agent or servant of the owner and at the time was engaged in the business of his service. Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42.

[2-4] A reading of the language of the statute and a review of the decisions in this state reveal that the legislative purpose in the enactment of section 1714¼ of the Civil Code (now section 402 of the Vehicle Code), was to protect innocent third parties from the careless use of automobiles and that this protection should be paramount to the rights of an owner who has permitted the use of his car by others even though he, personally, was not guilty of negligence. The words of the statute are clear and indicate that purpose. The statute defines the owner's liability in cases where the principle of respondeat superior is inapplicable, in order to make the owner liable for the negligence of any person to whom he had expressly or impliedly given permission to operate his car, and thus prevent him from escaping liability by saying that his car was not being used in his business or was being operated without his authority. Souza v. Corti, 22 Cal.2d 454, at page 457, 139 P.2d 645, 147 A.L.R. 861, citing Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608; Plaumbo v. Ryan, 213

App.Div. 517, 210 N.Y.S. 225. The legislation was plainly intended to increase the liability of the nonculpable owner of a motor vehicle for its operation on a public highway. The foundation of the statutory liability is the permission given to another to use an instrumentality which if improperly used is a danger and menace to the public.

After its enactment, the earlier cases appear to have been decided on the theory of a strict construction of the statute which imposed a new liability upon the owner of the vehicle. Accordingly, it was held that where there was no evidence that the employee had authority to use the car on personal business, and no evidence that the employer had knowledge of such previous use, it was immaterial that the employee was not expressly warned against such practices. Gordoy v. Flaherty, 9 Cal.2d 716, 72 P.2d 538. In defining implied permission, the earlier cases turned on the question of knowledge on the part of the employer that the employee was using or intended to use the vehicle for his own purposes. This is illustrated by the case of Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, 455, where it was declared that: "Permission to drive a motor vehicle, implied as well as express, such as is necessary to bring the case within section 1714¼, can only exist when the owner had knowledge or at least reason for believing that the vehicle would be driven by the person with whose negligence it is sought to charge him. A person cannot be said to have permitted that of which he had no knowledge or information. Bradford v. Sargent, 135 Cal.App. 324, 332, 27 P.2d 93." In the later case of Burford v. Huesby, 35 Cal.App.2d 643, 96 P.2d 380, a directly opposite position was taken. It was there held that knowledge or information of the intended use of the car had reference to the element of "express" as opposed to "implied" consent.

Concerning the right of the owner of an automobile to restrict its use by a permittee and escape the statutory liability, the cases of Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, held that the owner had a right to restrict the time of use, and that use by the permittee beyond that time was without permission, express or implied. Even if those cases should be followed they are not controlling here, as the vehicles there involved were entrusted to the permittees for single, specific purposes, and not for general use, as was the car in the present case.

The developing trend of fixing responsibility on the owner of the automobile who entrusts it to another in accord with the plain language of the statute was followed in Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608. Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 147 A.L.R. 861, contains a review of the cases both in this and other jurisdictions interpreting the liability to be imposed on the owner of an automobile under statutes similar to section 402 of the Vehicle Code. It was there said (page 460 of 22 Cal.2d, page 648 of 139 P.2d, 147 A.L.R. 861): "Any secret restrictions imposed by him [the owner] on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident. Violations of such restrictions may not be said to cause a revocation of the permission."

[5] The owner of a motor car can avoid the statutory liability by refusing to permit its use by another, but he may not avoid the consequences of the operator's negligence and escape liability therefor by secret restrictions limiting the permitted use. Bayless v. Mull, supra, 50 Cal.App.2d page 75, 122 P.2d 608. "The liability * * * so to speak, runs with the car, unaffected by the owner's action unless its presence upon the public ways was without his sanction." Guzenfield v. Liberty Mutual Ins. Co., 286 Mass. 133, 190 N.E. 23, 24.

[6] The defendant company sought to avoid responsibility for the negligence of its permittee by testimony that he had been instructed not to use the car on other than company business. But the attempt to avoid the statutory liability is unavailing when it appears, as it does here, that the automobile was turned over to Cahill for his general use.

[7] The fact that at the time of the accident the wife of the defendant Cahill was operating the vehicle would not, on this record, affect the result. Mr. Cahill was in the car and his wife was driving with his consent. If an automobile is being driven by another with the consent of the permittee, where the permittee accompanies the driver, the owner is liable to the extent set forth in section 402 of

the Vehicle Code. Hicks v. Reis, 21 Cal.2d 654, 134 P.2d 788; Sutton v. Tanger, 115 Cal.App. 267, 1 P.2d 521; Hughes v. Quackenbush, 1 Cal.App.2d 349, 37 P.2d 99; Armstrong v. Sengo, 17 Cal.App.2d 300, 61 P.2d 1188. See, also, Souza v. Corti, supra.

From what has been said it follows that the trial court erred in directing a verdict for the defendant owner.

The judgment is reversed.

GIBSON, C. J., and CURTIS and CARTER, JJ., concurred.

TRAYNOR, Justice (concurring).

I concur in the judgment on the ground that there is sufficient evidence in the record to require submission of the issue to the jury that the use of the vehicle at the time of the accident was with the implied permission of the owner.

SCHAUER, J., concurred.

EDMONDS, Justice (dissenting).

By the decision in this case, an employer who provides an automobile for the business use of his employee is responsible for injuries sustained by a third person when it is driven by the employee without the knowledge of the owner, on a Sunday for the employee's own purposes in violation of the instructions that it should not be so used. This imposition of liability, in my judgment, is not justified by the provisions of section 402 of the Vehicle Code and, contrary to the previous decisions of this court, in effect, makes the owner of an automobile liable for all damages which may be sustained when it is driven by any person who did not steal the vehicle. I cannot concur in such a construction of the statute, nor in the rejection of the principles which have been stated and applied by this court in recent cases.

Mr. Justice Shenk's present conclusions in regard to the statutory liability of the owner of an automobile are quite contrary to those expressed by him in Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, 648, 147 A.L.R. 861, which was decided less than two years ago. In that case, the owner of an automobile gave his son general permission to use the family car, but expressly instructed him not to allow anyone else to operate the vehicle. At the son's direction, a friend drove the automobile for the former's convenience at a time when and in a locality where the son had permission to use the vehicle. An accident occurred and the owner was held liable upon the ground that "the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner. Any secret restrictions imposed by him on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident. Violations of such restrictions may not be said to cause a revocation of the permission. Liability of the defendant owner in this case pursuant to section 402 of the Vehicle Code is therefore established. Cases such as Engstrom v. Auburn Auto. Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, Henrietta v. Evans, 10 Cal.2d 526, 75 P.2d 1051, and Di Rebaylio v. Herndon, 6 Cal.App.2d 567, 44 P.2d 581, were concerned with violations of restrictions placed on the borrower as to the purpose for and the time within which the car was to be used. Further consideration need not now be given to those cases for the reason that we have here no question concerning the use of the car for the purpose or the period for which it was borrowed."

In the present case, says Mr. Justice Shenk, "the attempt to avoid the statutory liability is unavailing when it appears, as it does here, that the automobile was turned over to Cahill for his general use." But this use was "general" only so far as company business was concerned. According to the statement of facts, Cahill was provided with a small truck "to go back and forth to his work and for use in his work." The truck was kept at Cahill's home and the accident occurred on a Sunday when the truck was being used for the employee's purposes. The opinion concedes that "Cahill was instructed by the owner not to use the car except on company business." Certainly from these uncontradicted facts it clearly appears that Cahill had permission to use the car only in connection with his employer's business and it cannot be said, as in the Souza case, that "the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner."

Also, if Engstrom v. Auburn Auto. Sales Corp., supra, and Henrietta v. Evans, supra, are not now to be followed, those decisions should be directly and not sub silentio overruled. In the first of these cases, a prospective purchaser was permitted to borrow an automobile for inspection by members of his family upon the understanding that it would be returned within two hours. It was kept until late the next day, when an accident occurred which occasioned the litigation. This court absolved the owner from liability upon the ground that the permittee substantially had violated the limitation as to the time of use.

The same conclusion was reached in the Henrietta case, which also arose because of the use of an automobile which had been taken from a sales agency. The owner gave a prospective purchaser permission to drive the car from Desert Center to Beaumont for purposes in connection with the transaction. Contrary to instructions, the permittee drove beyond Beaumont and to Colton, where the accident occurred. In holding the owner not liable for the injuries sustained, the court said [10 Cal.2d 526, 75 P.2d 1052]: "The cases uniformly hold that, where the permission is granted for a limited *time,* any use after the expiration of the period is without consent, and the owner is not liable, unless the circumstances justify an inference of implied consent to further use. * * * [T]his same rule applies where permission is granted for use in a particular *place* or locality, or for a particular *purpose,* and the limitation is exceeded. * * * [T]here is no fundamental ground of distinction between a limitation of time and one of purpose or place, in so far as permission is concerned; and it would seem clear that a substantial violation of either limitation terminates the original express consent and makes the subsequent use without permission."

If, in the present case, the owner of the truck is liable for the injuries sustained by Billy Burgess, it is because the court now rejects the rule that consent for the use of an automobile may be limited to a particular purpose as expressly recognized by a majority of my associates in the Souza case. In that case, said Mr. Justice Shenk, there was "no question concerning the use of the car for the purpose or for the period for which it was borrowed." Here the owner, without question, restricted Cahill's use of the truck to business purposes, yet the court imposes liability resulting from driving the vehicle upon a Sunday for a personal errand.

For these reasons, in my opinion, the judgment should be affirmed.

25 Cal.2d 399

BOLLINGER v. NATIONAL FIRE INS. CO. OF HARTFORD, CONN.

S. F. 16780.

Supreme Court of California.

Dec. 6, 1944.

Rehearing Denied Jan. 4, 1945.

1. Judgment 🔑570(1)

A nonsuit does not prevent another action from being brought or maintained, and if pleaded in bar is not res judicata on the merits or any other issue than that of the nonsuit itself.

2. Pleading 🔑214(1)

On demurrer, statement of facts in complaint must be taken as true.

3. Insurance 🔑623(4)

An action on fire policy which provided that loss should be payable 30 days after parties have agreed upon amount thereof was not premature because at time of commencement of the action 30 days had not elapsed from time of agreement upon amount of loss where insurer had denied liability unconditionally.

4. Insurance 🔑623(4)

An insurer's unconditional denial of liability after insured has incurred loss and made claim under policy gives rise to an immediate right of action.

5. Insurance 🔑146(3)

When claims on a policy are honestly made, care should be taken to prevent technical forfeiture such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits.

6. Action 🔑66

Dilatory tactics are not favored by the law.

7. Insurance 🔑623(1)

Where insurer's plea of prematurity to action on fire policy was a dilatory plea in abatement unrelated to the merits and not asserted for nearly a year after plaintiff's action was filed, insurer lost its privilege to raise such plea.

8. Insurance 🔑640(1)

Insurer's defense of premature filing of the action on fire policy was not properly pleaded by the answer that no part of the loss was due to insured or to insured's bankruptcy trustee, where plea was not asserted until policy limitation period expired, and there was nothing to put plaintiff on notice of anything other than a general denial of liability and insurer's request for additional time did not indicate intent to rely on premature filing. St.1935, p. 596, §§ 2070, 2071.

9. Continuance 🔑1

While courts are indulgent in granting continuances to allow litigants a reasonable time to prepare for trial on the merits, they must also guard against imposition and unreasonable delays. Code Civ.Proc. §§ 594a–596.

10. Dismissal and nonsuit 🔑73

The law favors a trial on the merits.

11. Insurance 🔑146(3)

The law discourages a technical forfeiture of insured's rights.

12. Insurance 🔑623(1)

Where insured's first action on fire policy was pending when limitation period expired, and insurer did not assert plea of premature filing of the action for nearly a year after action was filed, insurer was precluded from relying in subsequent action upon the running of limitation period. St. 1935, p. 596, §§ 2070, 2071.

13. Insurance 🔑623(1)

Statutes designed to prevent technical forfeitures under statutes of limitations also apply to limitation period incorporated by statute into every insurance policy, particularly where Legislature has shortened the limitation period from four years controlling actions on other written instruments to 15 months on fire policies, since the probability of technical forfeiture is all the greater. St.1935, p. 596, § 2071; Code Civ. Proc. §§ 4, 355.

14. Courts 🔑78

The Supreme Court may formulate rules of procedure where justice demands it. Code Civ.Proc. §§ 355, 356, 473, 475; Civ.Code, §§ 3523, 3528; Const. art. 6, § 4½.

15. Insurance 🔑622(6)

Where insured's bankruptcy trustee commenced an action on fire policy in good time and diligently pursued it in the municipal court, and nonsuit was erroneous and unrelated to the merits, and but for the unreasonable delay in bringing the action to trial limitation period would not have expired, a subsequent action in superior court was in reality a continuance of the earlier action involving the same parties, facts and cause of action, and being promptly filed after entry of judgment of nonsuit, trustee could not be deprived of trial on the merits because he failed to seek other remedies in the municipal court. St.1935, p. 596, § 2071; Code Civ.Proc. § 355.

16. Limitation of actions 🔑70(1), 85(1, 2)

Statutes of limitation are not rigid, and while property rights or immunities may be acquired as result of running of statutory period, the period will be extended or tolled by the occurrence of certain events which may be the subject of conflicting evidence such as absence from the state or disability. Code Civ.Proc. § 351 et seq.

17. Limitation of actions 🔑104½

The running of statute of limitations may be suspended by causes not mentioned in the statute itself.

18. Limitation of actions 🔑96(2), 104(1)

Fraudulent concealment by defendant of facts upon which a cause of action is based or mistake as to the facts constituting the cause of action will prevent the running of limitation period until discovery.

19. Insurance 🔑124

An insurer must exercise good faith in dealing with insured.

20. Insurance 🔑623(1)

Where first action on fire policy was pending when limitation period expired after which insurer filed a claim that action had been filed prematurely, the equitable considerations justifying relief were applicable whether insurer violated a legal duty in failing to disclose intention to set up a technical defense or whether insurer was merely seeking aid of court in sustaining a plea that would enable insurer to obtain an unconscionable advantage and enforce a forfeiture. St.1935, p. 596, §§ 2070, 2071.

SCHAUER, J., dissenting in part, and EDMONDS and CURTIS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Contra Costa County; A. F. Bray, Judge.

Action by Fred M. Bollinger, as trustee in bankruptcy, etc., against the National Fire Insurance Company of Hartford, Conn., to recover for fire loss under a fire policy issued by defendant to bankrupt. From a judgment for defendant, following an order sustaining defendant's demurrer, without leave to amend, plaintiff appeals.

Reversed with directions.

Prior opinion, 147 P.2d 611.

Fred M. Bollinger, in pro. per., and Jack J. Miller, both of Stockton, and Kenneth M. Johnson, of San Francisco, for appellant.

Long & Levit and Bert W. Levit, all of San Francisco, for respondent.

TRAYNOR, Justice.

Plaintiff, as trustee in bankruptcy, brought this action to recover on a policy of fire insurance issued to the bankrupt, Kwan Tow. The policy follows the standard form prescribed by the Insurance Code, §§ 2070 and 2071, St.1935, p. 596. It requires the insured to give the insurer written notice of loss without unnecessary delay; to separate the damaged property from that which is undamaged and put it in the best possible order; to make an inventory stating the quantity and cost of each item, and the amount claimed thereon; to submit detailed preliminary proof within sixty days after the fire; to submit the amount of loss to arbitration if the insurer does not assent to the amount claimed within twenty days after receipt thereof or if an agreement is not otherwise reached. The policy also provides that "A loss hereunder shall be payable in thirty days after the amount thereof has been ascertained either by agreement or by appraisement * * *" and that "No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire."

The complaint incorporates the policy by reference and alleges that plaintiff was appointed trustee of the bankrupt's estate on September 20, 1939; that on September 27, 1939, the property insured was partially destroyed by fire; that on November 18, 1939, plaintiff and the insured submitted proof of loss to defendant as required by the policy; that plaintiff and the insured have performed all the conditions set forth in the policy; that on December 22, 1939, plaintiff and defendant's agent entered into an agreement fixing the amount of loss at $1,160.25; that defendant denied all liability under the policy on the grounds that at the time of the fire the insured was not the sole and unconditional owner of the insured personal property; that at the time of the destruction of the property there was a change in "the interest in, title to, or possession of the subject of insurance," and that under the terms of the policy such a change has made the policy void. The complaint alleges further that on January 15, 1940, shortly after the plaintiff was advised that the defendant denied all liability under the policy, he brought suit in the Superior Court of San Joaquin County to recover on the policy and on defendant's motion the action was transferred to the Municipal Court of the City and County of San Francisco; that defendant requested and obtained from plaintiff and the court numerous continuances and extensions of time thereby delaying the time of trial until January 8, 1941; that after plaintiff presented his evidence, defendant moved for a nonsuit upon the ground that the action had been prematurely filed because thirty days had not elapsed from the time of agreement upon the amount of loss; that the motion was granted and judgment upon the nonsuit entered February 21, 1941; that on February 25, 1941, plaintiff filed the present action in the Superior Court of Contra Costa County alleging that plaintiff learned for the first time on January 8, 1941, the time of trial of the first action, that defendant was relying upon the defense that the action was premature and that had he known earlier he would have dismissed that action and filed a new one within the time permitted by the policy; that this defense was not set up or disclosed in defendant's demurrer or answer in that action and that by reason of this fact and the numerous continuances and extensions of time obtained, defendant waived the requirement that suit be commenced fifteen months from the time of the fire. Defendant demurred, claiming that the action was barred because it was commenced more than fifteen months after the fire. The trial court sustained the demurrer without leave to amend and entered judgment for defendant. Plaintiff appeals.

[1, 2] This appeal is not from the judgment of nonsuit given in the municipal court, nor is the purpose of this appeal or this decision to attack that judgment collaterally, for its effect as res judicata on the issue of nonsuit is conceded. A nonsuit, however, does not prevent another action from being brought or maintained, and if pleaded in bar is not res judicata on the merits or on any other issue than that of

the nonsuit itself. Gates v. McLean, 70 Cal. 42, 11 P. 489; Slocum v. New York Life Ins. Co., 228 U.S. 364, 33 S.Ct. 523, 57 L.Ed. 879, Ann.Cas.1914D, 1029. Plaintiff does not contend that the municipal court did not have jurisdiction to try the case or that the nonsuit is not binding on him but admits its validity and urges this court to declare that its scope and evidentiary value against him does not bar his present attempt to secure a hearing on the merits. The action in which this appeal is taken is essentially the same as that in which the nonsuit was granted, for the parties, facts, and cause of action are identical, and but for the granting of defendant's motion for nonsuit this action would not have arisen. The proceedings in the municipal court cannot be ignored in reviewing the factual background of this action. They are indeed the very facts and only facts on which defendant's demurrer must stand or fall. From the statement of facts in the complaint, which were not denied, and which, for the purpose of ruling on the demurrer are therefore to be taken as true, it clearly appears that defendant's motion for nonsuit should have been denied.

[3, 4] The action was not premature. Plaintiff, from the time he succeeded to the rights of the bankrupt under the policy of insurance upon which this action is founded to the time of this appeal, faithfully performed all conditions required of the insured by the terms of the policy. If defendant had not denied liability the loss would have been payable under the terms of the policy thirty days after the parties had agreed upon the amount thereof. Defendant, however, unconditionally denied liability, leaving plaintiff no alternative but to sue to enforce the claim of the bankrupt. The period of thirty days is allowed an insurance company so that it will have time to investigate to determine its course of action in response to a claim against it. It may exercise the option given it in the policy to "repair, rebuild or replace" the damaged building or machinery "within a reasonable time" on giving notice of its intention to do so; it may decide to pay the loss agreed upon; or it may determine that it has a valid defense to the claim of liability. If an insurance company unconditionally denies liability it would serve no purpose to require the insured to delay suit further. As the court declared in Paez v. Mutual Indem., etc., Ins. Co., 116 Cal.App. 654, 660, 3 P.2d 69, 71, "The obvious purpose of the provision inhibiting the institution of an action within the 60-day period is to permit the company to make an investigation of the circumstances surrounding the loss, but if the company makes an outright denial of liability there can be no excuse for delay in commencing an action for the purpose of determining whether the company's claim of nonliability is well taken. It would be an idle act to insist upon compliance with the requirement for delay in bringing an action which the law 'neither does nor requires.' Civ.Code, § 3532; Farnum v. Phoenix Ins. Co., [83 Cal. 246, 263 (23 P. 869, 17 Am.St.Rep. 233)] supra." The rule is therefore settled in this court, as in the federal and most state courts, that an unconditional denial of liability by the insurer after the insured has incurred loss and made claim under the policy gives rise to an immediate right of action. Paez v. Mutual Indem., etc., Ins. Co., supra; Williams v. Hartford Ins. Co., 54 Cal. 442, 448, 35 Am.Rep. 77; Carroll v. Girard F. Ins. Co., 72 Cal. 297, 299, 13 P. 863; Millard v. Supreme Council Legion of Honor, 81 Cal. 340, 349, 22 P. 864; Farnum v. Phoenix Insurance Co., 83 Cal. 246, 263, 23 P. 869, 17 Am.St.Rep. 233; McCollough v. Home Ins. Co., 155 Cal. 659, 663, 102 P. 814, 18 Ann.Cas. 862; Wilkinson v. Standard Acc. Ins. Co., 180 Cal. 252, 258, 180 P. 607; Grant v. Sun Indemnity Co., 11 Cal. 2d 438, 440, 80 P.2d 996; Lee v. United States Fire Ins. Co., 55 Cal.App. 391, 395, 396, 203 P. 774; Francis v. Iowa Nat. Fire Ins. Co., 112 Cal.App. 565, 573, 574, 297 P. 122; Hill v. Mutual Benefit Health, etc., Ass'n, 136 Cal.App. 508, 512, 29 P.2d 285; Fohl v. Metropolitan Life Ins. Co., 54 Cal. App.2d 368, 383, 129 P.2d 24; Trousdell v. Equitable Life Assur. Soc., 55 Cal.App. 2d 74, 84, 130 P.2d 173, 990; see 7 Couch on Insurance (1930), § 1656b, pp. 5755-5756 and Cum.Supp. p. 83, citing cases in support of the general rule from the Supreme Court of the United States, Canada, and twenty-eight state courts; 5 Joyce, Insurance, 2d Ed., § 3211; Civ.Code, § 1440; cf. dictum in Genuser v. Ocean Accident, etc., Corp., 57 Cal.App.2d 979, 983, 135 P. 2d 670. The desirability of the rule is apparent, for if a waiting period were necessary notwithstanding the election of the insurer to deny liability, it would become a trap for the unwary, and would encourage dilatory tactics as in the present case. Irwin v. Insurance Co. of North America, 16 Cal.App. 143, 116 P. 294, and Borger v.

Connecticut Fire Ins. Co., 29 Cal.App. 476, 156 P. 70, are therefore disapproved.

[5] The insurance policy incorporated by reference in the complaint is of the usual complexity. While courts are diligent to protect insurance companies from fraudulent claims and to enforce all regulations necessary to their protection, it must not be forgotten that the primary function of insurance is to insure. When claims are honestly made care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits. (Grant v. Sun Indemnity Co., supra; Glickman v. New York Life Ins. Co., 16 Cal.2d 626, 107 P.2d 252, 131 A. L.R. 1292; 13 Appleman, Insurance Law and Practice (1943), § 7385, p. 37; see New York Life Ins. Co. v. Eggleston, 96 U.S. 572, 577, 24 L.Ed. 841; Kansas City Life Ins. Co. v. Davis, 9 Cir., 95 F.2d 952, 957; American Credit Indemnity Co. v. W. K. Mitchell & Co., 3 Cir., 78 F.2d 276, 277, 278; Langmaid, Waiver and Estoppel in Insurance Law, 20 Cal.L.Rev. 1, 40-41; 7 U.Pitt.L.Rev. 148-50).

[6, 7] Defendant's position would not be improved had the action in fact been premature, for defendant had lost the privilege to urge this defense by failing to plead it plainly and to assert it promptly. Dilatory tactics are not favored by the law, for they waste the court's time, increase the cost of litigation unnecessarily, and may easily lead to abatement of an action on purely technical grounds after the statute of limitations has run. 1 C.J.S., Abatement and Revival, § 193; Bemmerly v. Woodward, 124 Cal. 568, 574, 57 P. 561; Realty & Rebuilding Co. v. Rea, 184 Cal. 565, 194 P. 1024; Seches v. Bard, 215 Cal. 79, 8 P.2d 835; California Thorn Cordage, Inc. v. Diller, 121 Cal.App. 542, 9 P.2d 594. Defendant's plea of prematurity was a dilatory plea in abatement, unrelated to the merits and not asserted for nearly a year after plaintiff's action was filed. Under these circumstances defendant loses its privilege to raise it.

[8] Defendant contends, however, that the defense was properly pleaded by the following language in its answer: "that neither the whole of said loss nor any part thereof was or is due, owing or payable to plaintiff or to Kwan Tow or to anyone at the time of the commencement of this action, at the present time or at any other time, or at all. * * *" It cites cases holding that such a denial is sufficient to raise the issue of prematurity. None of the cases cited, however, involved a delay so long that the policy limitation period expired or the failure promptly to assert the defense. There is nothing in the language quoted to put plaintiff on notice of anything other than a general denial of liability under the policy. Defendant's requests for additional time did not indicate any intent to rely on premature filing, for extensions of time for trial are not necessary to raise the defense of prematurity.

[9] While courts are indulgent in granting continuances to litigants to allow them a reasonable time to prepare for a trial on the merits, they must also guard against imposition and unreasonable delays. Estate of Bollinger, 145 Cal. 751, 753, 79 P. 427; Light v. Richardson, 3 Cal.Unrep. 745, 746, 747, 31 P. 1123; see Code Civ.Proc. §§ 594a, 595, 596. Not only was there nearly a year's delay in the present case but the nonsuit prevented a trial on the merits.

[10-12] Under the circumstances it would be a perversion of the policy of the statute of limitation to deny a trial on the merits. As the Supreme Court of the United States declared in Order of R. Telegraphers v. Railway Exp. Agency, 1944, 321 U.S. 342, 64 S.Ct. 582, 586, "Statutes of limitation * * * in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put an adversary on notice to defend within the period of limitation and the right to be free of stale claims in time comes to prevail over the right to prosecute them. Here, while the litigation shows no evidence of reckless haste on the part of either party, it cannot be said that the claims were not timely pursued." See, also, 190 Law Times 303-05. The short statutory limitation period in the present case is the result of long insistence by insurance companies that they have additional protection against fraudulent proofs, which they could not meet if claims could be sued upon within four years as in the case of actions on other written instruments. Code Civ.Proc. § 337. Originally

the shortened limitation periods were inserted into policies by insurers. Some courts declared such provisions void as against public policy while other courts enforced them in order to protect freedom of contract. See cases collected, 41 Yale L.J. 1069-75. In refusing to permit a short limitation period to defeat a claim that had been brought in good time and diligently pursued, the court in Genuser v. Ocean Accident, etc., Corp., 57 Cal.App.2d 979, 986, 135 P.2d 670, 674, declared "We assume that the limitations of time within which suit may be brought which are commonly found in insurance policies are placed there in good faith and to serve a wholly proper and meritorious purpose. We do not doubt that experience has demonstrated the wisdom of providing by contracts of insurance shorter periods for the institution of actions than those provided by law, but the purpose of such limitations is to obtain the advantage of an early trial of the matters in dispute and to make more certain and convenient the production of the evidence upon which the rights of the parties may depend" but "it is clear to us that defendant's conduct furnished the occasion for the delay and that it cannot take advantage of a situation which was of its own creation." Under the circumstances of the present case it would be manifestly unjust for this court to prevent a trial on the merits, which the law favors (Berri v. Rogero, 168 Cal. 736, 741, 145 P. 95; Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148; 13 Cal.L.Rev. 363), thereby incurring a technical forfeiture of the insured's rights, which the law discourages (Grant v. Sun Indemnity Co., supra; Glickman v. New York Life Ins. Co., supra; see 7 U.Pitt.L.Rev. 148), by enforcing the fifteen-month limitation period when the prior action was filed promptly and long before the period expired.

[13] The statutes of most states provide that when an action is brought in good time and diligently pursued, but defeated by some technicality unrelated to the merits, a new action may be brought within a certain period, usually six months or a year, which shall be deemed a continuance of the former action. These statutes have their origin in section 4 of the English Limitation Act of 1623.[1] Wood v. Carpenter, 101 U.S. 135, 139, 25 L.Ed. 807; Gaines v. City of New York, 215 N.Y. 533, 537, 109 N.E. 594, L.R.A.1917C, 203, Ann.Cas.1916A, 259. Although there is a conflict in the cases where the limitation period is contractual, in the several jurisdictions, except Michigan, that have adopted a standard form of insurance policy by statute, as California has, it has been held that these or other remedial statutes designed to prevent technical forfeitures under statutes of limitation also apply to the limitation period incorporated by statute into every insurance policy. See cases collected in George v. Connecticut Fire Ins. Co., 84 Okl. 172, 200 P. 544, 691, 201 P. 510, 23 A.L.R. 97, 106-109; Greulich v. Monnin, 142 Ohio St. 113, 50 N.E.2d 310, 149 A.L.R. 483, 491-492. The reason for such a rule has particular force when the Legislature has shortened the limitation period from four years, controlling actions on other written instruments, Code Civ.Proc. § 337, to fifteen months on fire insurance policies, Insurance Code, § 2071, since the probability of technical forfeiture is all the greater. The California counterpart of such statutes is section 355 of the Code of Civil Procedure, copied from section 84 of the New York Code of Procedure, which in turn was based on section 4 of the English Limitation Act of 1623. Gaines v. City of New York, supra. Simplified by the elimination of references to particular English forms of practice, section 355 provides: "If an action is commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal." If construed literally as applying only in the event of reversals on appeal, section 355 would not give the protection that the English statute afforded to a plaintiff who

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[1] "If in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill; or if any of the said actions be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry; that in all such cases the party plaintiff, his heirs, executors or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such given against the plaintiff, or outlawry reversed, and not after." 21 Jac. 1, c. 16, § 4.

had unsuccessfully pursued his right in a previous suit. Even the English statute, however, had to be supplemented by judicial construction and applied beyond its literal language to accomplish its purpose. "One may perhaps venture to say that the judges took rather a liberty with the statute, but I presume the origin of the doctrine is to be found in the hardship inflicted in particular cases on the litigant or his estate through no fault of his own by a rigid adherence to the terms of s. 4." Lopes, L.J., in Swindell v. Bulkeley, 18 Q.B. 250; Hayward v. Kinsey, 12 Mod. 568, 88 Eng.Rep. 1526; Hodsen v. Harridge, 2 Wms.Saund. 64, 85 Eng.Rep. 693; Curlewis v. Mornington, 7 El. & Bl. 285, 119 Eng.Rep. 1252; see Gaines v. City of New York, supra, 215 N.Y. at page 537, 109 N.E. 594, L.R.A.1917C, 203, Ann.Cas. 1916A, 259.

The New York Court of Appeals in the Gaines case, speaking through Judge Cardozo, held that statutes that have their roots in the English statute should be construed with similar liberality: "We think that, whatever verbal differences exist, the purpose and scope of the present statute are identical in substance with its prototype, the English act of 1623. * * * The statute is designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts." [215 N.Y. 533, 109 N.E. 596.] Although the Gaines case involved the section of the New York Code of Procedure that succeeded section 84 of that Code from which section 355 of the California Code of Civil Procedure was taken, the doctrine of construction set forth therein did not rest on the wording of the new section but on the basic policy of the statute. The wording of section 355 is reminiscent of the old English statutes that specified situations instead of formulating general rules. As presently worded it protects a plaintiff who has mistaken his remedy if he was awarded a judgment in the first instance and defeated on appeal. There is all the more reason to protect a plaintiff, as in the present case, who has not mistaken his remedy but through error of the trial court was not allowed to proceed to trial. The basic policy that underlies section 355 calls for relief in such a case. See Code Civ.Proc. § 4.

[14-18] In any event this court is not powerless to formulate rules of procedure where justice demands it. Indeed, it has shown itself ready to adapt rules of procedure to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits. Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153; Tuller v. Superior Court, 215 Cal. 352, 10 P. 2d 43; see 31 Cal.L.Rev. 225, 227; see, also, Rogers v. Duhart, 97 Cal. 500, 504, 32 P. 570; California Constitution, art. VI, § 4½; Code Civ.Proc., §§ 355, 356, 473, 475; Civ.Code, §§ 3523, 3528. The Wennerholm case, supra, is typical. The Legislature enacted section 472c of the Code of Civil Procedure to do away with the unduly technical rule that required plaintiff to request leave to amend, even though the trial court had already sustained a demurrer without leave to amend, before he could seek appellate review of the trial court's order. Although the action was pending at the time of the enactment, the court refused to follow the cases that had established the technical requirement, thus adopting the rule in 472c before it became law. It was also held that where amendment is sought after the statute of limitations has run, the amended complaint will be deemed filed as of the date of the original complaint so long as recovery is sought upon the same general set of facts (see, also, cases collected in 16 Cal.Jur., § 143, pp. 547-548), recognizing that despite the new filing, the action is still the same. In the present case plaintiff brought his action on the policy in good time and diligently pursued it. The nonsuit was erroneous and unrelated to the merits. But for the unreasonable delay in bringing the action to trial, the limitation period would not have expired and ample time would have remained to file a new action. Since this action is in reality a continuance of the earlier action involving the same parties, facts, and cause of action, and was promptly filed after entry of judgment on the nonsuit, plaintiff should not be deprived of a trial on the merits because he failed to seek other rem-

edies in the municipal court. Statutes of limitations are not so rigid as they are sometimes regarded. Under certain circumstances property rights or immunities may be acquired as a result of the running of the statutory period, but the period will be extended or tolled by the occurrence of certain events, which may be the subject of conflicting evidence, such as absence from the state or disability. Code Civ.Proc. § 351 et seq. It is established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself. Braun v. Sauerwein, 10 Wall. 218, 223, 77 U.S. 218, 223, 19 L. Ed. 895; Collins v. Woodworth, 6 Cir., 109 F.2d 628, 629. It is settled in this state that fraudulent concealment by the defendant of the facts upon which a cause of action is based (Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 30 P.2d 39) or mistake as to the facts constituting the cause of action (Davis, etc., Co. v. Advance, etc., Works, Inc., 38 Cal.App.2d 270, 100 P.2d 1067; see 16 Cal.Jur. 505) will prevent the running of the period until discovery.

[19, 20] Principles of equity and justice, which moved this court in the Kimball case, supra, to grant relief are likewise controlling here. There is no need to make fine distinctions as to the persons who owe a duty to disclose. The Kimball case involved an employer whose fiduciary obligations to his employees are uncertain. The present case involves an insurer whose duty of good faith in dealing with the insured is well established. See 13 Appleman, Insurance Law and Practice 37; Vance, Insurance (1930) 74. It is likewise unnecessary to dwell upon the contention that the insurer's duty of good faith to its insured arises at the time of contracting and persists throughout the period when premiums are paid and no return is sought, but that when a loss occurs and the insured seeks to obtain the compensation provided in the contract, the parties deal at arm's length. It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture.

The judgment is reversed with directions to the trial court to overrule the demurrer.

GIBSON, C. J., and SHENK and CARTER, JJ., concur.

SCHAUER, Justice (concurring and dissenting).

I concur in the judgment but reach my conclusion upon a different ground and dissent from certain propositions declared in the majority opinion as hereinafter indicated. That opinion, in effect, reviews the judgment which was rendered in the municipal court in the preceding action. I agree with the majority statement by Mr. Justice TRAYNOR that, upon the facts as pleaded here, it appears that in the municipal court action "defendant's motion for nonsuit should have been denied." But concluding that the municipal court erred at that time in that action is immaterial on this appeal. The fact remains that the municipal court did grant the motion, did determine that such action was prematurely brought, and did enter judgment of dismissal. We have no power, on this appeal from the judgment of another court in another action, to vacate the judgment in the previous action in the municipal court. We cannot revive that action in the guise of sustaining this one. The only materiality of that one here concerns not what should have been done but what was done.

As a secondary basis for its conclusion Justice TRAYNOR'S opinion declares: "Defendant's position would not be improved had the action [in the municipal court] in fact been premature, for defendant *had lost the privilege to urge this defense by failing to plead it plainly and to assert it promptly.* * * * Defendant's plea of prematurity was a dilatory plea in abatement, unrelated to the merits and not asserted for nearly a year after plaintiff's action was filed. *Under these circumstances defendant loses its privilege to raise it.*" (Italics added.) I do not know whether Justice TRAYNOR intends to imply that the trial court in such a situation *loses jurisdiction* to entertain a special dilatory plea or merely errs in sustaining it. If he means the former it seems to be a rather drastic innovation of law to promulgate without precedent, and if he means the latter, then, obviously, his attack on the municipal court judgment is collateral. Assuming that that court abused its discretion in entertaining the dilatory plea when it was so tardily raised, nevertheless, *that court,* not this one, possessed the jurisdiction to, and did, pass on the plea. *The ac-*

tion in the municipal court, erroneously or otherwise, was ended by the judgment of dismissal. The new action, in which this appeal is taken, was not commenced until the complaint in it was filed. (Code Civ. Proc. §§ 350 and 405). That date is February 25, 1941, and it is with that date we must reckon in determining whether the action is barred by the statute of limitations.

In seeking to avoid the bar of the statute here Justice TRAYNOR goes on to declare that "The statutes of most states provide that when an action is brought in good time and diligently pursued, but defeated by some technicality unrelated to the merits, a new action may be brought within a certain period, usually six months or a year, which *shall be deemed a continuance of the former action.* * * * In any event this court is not powerless to formulate rules of procedure where justice demands it. * * * Since this action is in reality *a continuance of the earlier action* involving the same parties, facts, and causes of action, and was promptly filed after entry of judgment on the nonsuit, plaintiff should not be deprived of a trial on the merits because he failed to seek other remedies in the municipal court." (Italics added.) While legislation such as that which Justice Traynor says "The statutes of most states provide" would seem desirable under the circumstances of the case before us, the fact remains that in California the statutes do not so provide. I do not feel at liberty to concur in supplying the lacking legislation. Statutes of limitation are more than "rules of procedure." In addition to the fact that the prescribing of limitation periods, otherwise than by contract, is essentially a legislative function, it is the law that parties acquire vested rights through the operation of statutes (or contracts) of limitation when the prescribed period has completely run and even the Legislature cannot retroactively enlarge a period which has expired. (See Peiser v. Griffin (1899), 125 Cal. 9, 14, 57 P. 690; Chambers v. Gallagher (1918), 177 Cal. 704, 708, 709, 171 P. 931.) Hence we have no right to innovate the amendment decreed by the majority opinion and give it retroactive effect.

But there is a sound basis upon pre-existing statutes for reaching the conclusion that the present action is not barred. The Legislature has fixed four years (Code Civ. Proc. § 337) as being ordinarily the reasonable period within which an action founded upon an instrument in writing shall be brought, but by the provisions of sections 2070 and 2071 of the Insurance Code has prescribed "fifteen months next after the commencement of the fire" as the period within which an action for the recovery of a claim upon a fire insurance policy must be instituted. This special limitation is required to be set forth in every policy and, by reason of such statute, it is to be deemed included in every policy regardless of whether it is actually written therein. (See Brown v. Ferdon (1936), 5 Cal.2d 226, 230, 54 P.2d 712; Hales v. Snowden (1937), 19 Cal.App.2d 366, 369, 65 P.2d 847; Mueller v. Elba Oil Co. (1942), 21 Cal.2d 188, 204, 130 P.2d 961; Fernelius v. Pierce (1943), 22 Cal.2d 226, 243, 138 P.2d 12; Baugh v. Rogers (1944), 24 Cal.2d 200, 215, 148 P.2d 633.) It derives its effectiveness from the statute. The same statute also prescribes certain requirements as to notification, proof, ascertainment of loss, and lapse of time, which must be met *before* an action can be "sustained." It specifically provides that "No suit or action * * * for the recovery of any claim shall be *sustained, until after* full compliance by the insured with all of the foregoing requirements, nor unless *begun* within fifteen months next after the commencement of the fire." (Italics added.)

The meaning of the word "sustained," and the effect of the clause in which it appears, might be open to argument if the defendant here had not already committed itself to its understanding of a definite meaning for that word and the clause, and enforced that meaning on the plaintiff. This section, on its face, would seem open to the meaning that an action on the policy could be *commenced at any time* "within fifteen months next after the commencement of the fire" but that it could not be *"sustained,"* as by a judgment for plaintiff, until the lapse of the required time, etc. But the meaning attributed to the clause by defendant, and adopted by the municipal court in granting defendant's motion for nonsuit, is not merely that an action assertedly prematurely brought can be abated during the incompetent period and until the specified requirements have been met, but is, rather, that such an action must be dismissed. In other words, the position of the defendant, as invoked in the preceding action, and held by the court in a judgment which has become final, is that the provision in question amounts to a *statutory prohibition staying the commencement of the action.* Defendant cannot be permitted to invoke the benefits of a statutory prohibition against the commencement of an action on the policy without also bearing the burden of such statutory prohibition. Section 356 of the Code of Civil Procedure is a general law of the state, applicable under the circumstances shown. It provides that "When the commencement of an action is stayed by * * * statutory prohibition, the time of the continuance of the * * * prohibition is not part of the time limited for the commencement of the action." Excluding the time during which, on defendant's theory, plaintiff was prohibited from commencing the action, his second complaint was filed in time.

For the reasons above stated I concur in the judgment of reversal.

EDMONDS, Justice (dissenting).

Some months ago, upon an opinion written by Mr. Justice TRAYNOR, this court affirmed the judgment in favor of the insurer. Bollinger v. National Fire Ins. Co., Cal.Sup., 147 P.2d 611. I concurred in the decision and nothing was developed upon the rehearing to change my views that the applicable law was then correctly applied to the uncontroverted facts. The present discussion of my associate omits all reference to the principal contentions of the parties and places the decision upon a ground correctly designated by Mr. Justice SCHAUER as judicial legislation. I assert with confidence that the rule of procedure which is now promulgated as justification for reversing the judgment has no sound legal basis, and I adhere to the principles which were stated and applied in the former opinion.

In California, all fire insurance must be written upon a standard form of policy which, in part, provides: "No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire." Insurance Code, § 2071. The fire which occasioned the damage for which the appellant demands reimbursement occurred about eighteen months before this action was filed. Relying upon the provision of the statutory policy, the insurer demurred upon the ground that the action was begun subsequent to the expiration of the period of limitation. The trial court sustained the demurrer without leave to amend, and entered judgment for the insurer. The issue, consequently, concerns the propriety of that ruling.

The language of the policy, the appellant asserts, must be interpreted as permitting an insured to commence an action within fifteen months from the time the cause of action accrues, which, he declares, is the date "it was first possible to file a suit under the policy" after the amount of loss has been ascertained. The courts of a small minority of states have so construed policy provisions such as the one required by our statute. Ellis v. Council Bluffs Ins. Co., 64 Iowa 507, 20 N.W. 782; German Ins. Co. v. Fairbank, 32 Neb. 750, 49 N.W. 711, 29 Am.St.Rep. 459; Sample v. London, etc., F. Ins. Co., 46 S.C. 491, 24 S.E. 334, 47 L.R.A. 696, 57 Am.St.Rep. 701; Boston Marine Ins. Co. v. Scales, 101 Tenn. 628, 49 S.W. 743; Hong Sling v. Royal Ins. Co., 8 Utah 135, 30 P. 307; McFarland & Steele v. Peabody Ins. Co., 6 W.Va. 425. The great weight of authority, however, holds that the clear terms of such a limitation will be enforced and, accordingly, a policy providing that no action will be sustained "unless begun within fifteen months next after commencement of the fire" simply fixes a period beyond which the insured may not sue. Provident Fund Soc. v. Howell, 110 Ala. 508, 18 So. 311; Daly v. Concordia Fire Ins. Co., 16 Colo.App. 349, 65 P. 416; Chichester v. New Hampshire Fire Ins. Co., 74 Conn. 510, 51 A. 545; Gibraltar Fire & Marine Ins. Co. v. Lanier, 64 Ga. App. 269, 13 S.E.2d 27; Maxwell Bros. v. Liverpool, etc., Ins. Co., 12 Ga.App. 127, 76 S.E. 1036; McDaniel v. German-American Ins. Co., 134 Ga. 189, 67 S.E. 668; Williams v. Greenwich Ins. Co., 98 Ga. 532, 25 S.E. 31; Trichelle v. Sherman & Ellis, Inc., 259 Ill.App. 346; Western Coal, etc., Co. v. Traders' Ins. Co., 122 Ill.App. 138; Colonial Mut. F. Ins. Co. v. Ellinger, 112 Ill.App. 302; Oakland Home Ins. Co. v. Allen, 1 Kan.App. 108, 40 P. 928; State Ins. Co. of Des Moines v. Stoffels, 48 Kan. 205, 29 P. 479; Smith v. Herd, 110 Ky. 56, 60 S.W. 841, 1121; Owen v. Howard Ins. Co., 87 Ky. 571, 10 S.W. 119; Guccione v. New Jersey Ins. Co., La.App. 167 So. 845; Tracy v. Queen City F. Ins. Co., 132 La. 610, 61 So. 687, Ann.Cas.1914D, 1145; Blanks v. Hibernia Ins. Co., 36 La.Ann.

599; Carraway v. Merchants' Mut. Ins. Co., 26 La.Ann. 298; Earnshaw v. Sun Mut. Aid Soc., 68 Md. 465, 12 A. 884, 6 Am.St. Rep. 460; Metropolitan Life Ins. Co. v. Dempsey, 72 Md. 288, 19 A. 642; Fullam v. New York Union Ins. Co., Mass., 7 Gray 61, 66 Am.Dec. 462; Little v. Phoenix Ins. Co., 123 Mass. 380, 25 Am.Rep. 96; Dahrooge v. Rochester German Ins. Co., 177 Mich. 442, 143 N.W. 608, 48 L.R.A.,N.S., 906; Shackett v. People's Mut. Ben. Soc., 107 Mich. 65, 64 N.W. 875; Peck v. German F. Ins. Co., 102 Mich. 52, 60 N.W. 453; Rottier v. German Ins. Co., 84 Minn. 116, 86 N.W. 888; Willoughby v. St. Paul German Ins. Co., 68 Minn. 373, 71 N.W. 272; Grigsby v. German Ins. Co., 40 Mo.App. 276; Bradley v. Phoenix Ins. Co., 28 Mo. App. 7; Glass v. Walker, 66 Mo. 32; Ignazio v. Fire Ass'n of Phila., 98 N.J.L. 602, 121 A. 456; Electric Gin Co. v. Firemen's Fund Ins. Co., 39 N.M. 73, 39 P.2d 1024; Biloz v. Tioga, etc., Ass'n, Sup., 21 N.Y.S. 2d 643, affirmed 260 App.Div. 976, 23 N.Y. S.2d 460; Hamilton v. Royal Ins. Co., 156 N.Y. 327, 50 N.E. 863, 42 L.R.A. 485; King v. Watertown F. Ins. Co., N.Y., 47 Hun 1; Rouse v. Old Colony Ins. Co., 203 N.C. 345, 166 S.E. 177; Welch v. Phoenix Ins. Co., 192 N.C. 809, 136 S.E. 117; John Tatham & Co. v. Liverpool, etc., Ins. Co., 181 N.C. 434, 107 S.E. 450; Travelers' Ins. Co. v. California Ins. Co., 1 N.D. 151, 45 N.W. 703, 8 L.R.A. 769; Appel v. Cooper Ins. Co., 76 Ohio 52, 80 N.E. 955, 10 L.R.A.,N.S., 674, 10 Ann.Cas. 821; Lucas v. Life Ins. Co. of Virginia, Ohio App., 42 N.E.2d 674; United States F. Ins. Co. v. Swyden, 175 Okl. 475, 53 P.2d 284; Camden F. Ins. Ass'n v. Walker, 111 Okl. 35, 238 P. 462; Wever v. Pioneer F. Ins. Co., 49 Okl. 546, 153 P. 1146, L.R.A.1918F, 507; Egan v. Oakland Home Ins. Co., 29 Or. 403, 42 P. 990, 54 Am.St.Rep. 798; Miners Savings Bank v. Merchants F. Ins. Co., 131 Pa.Super. 21, 198 A. 495; Hocking v. Howard Ins. Co. (Howard Ins. Co. v. Hocking), 130 Pa. 170, 18 A. 614; Schroeder v. Keystone Ins. Co., Pa., 2 Phila. 286; Braunstein v. North River Ins. Co., 62 S.D. 561, 255 N.W. 463; Kroeger v. Farmers' Mut. Ins. Co., 52 S.D. 433, 218 N.W. 17; Schlitz v. Lowell Mut. F. Ins. Co., 96 Vt. 334, 119 A. 516; Morrill & Co. v. New England F. Ins. Co., 71 Vt. 281, 44 A. 358; Virginia F. & M. Ins. Co. v. Wells, 83 Va. 736, 3 S.E. 349; Virginia F. & M. Ins. Co. v. Aiken, 82 Va. 424; Hefner v. Great Amer. Ins. Co., 126 Wash. 390, 218 P. 206; State Ins. Co. v. Meesman, 2 Wash. 459, 27 P. 77, 26 Am.St.Rep. 870; Hart v. Citizens Ins. Co., 86 Wis. 77, 56 N.W. 332, 21 L.R. A. 743, 39 Am.St.Rep. 877; McFarland v. Railway, etc., Accident Ass'n, 5 Wyo. 126, 38 P. 347, 677, 27 L.R.A. 48, 63 Am.St.Rep. 29.

The decisions in California follow this rule and hold that an insured must begin his action within fifteen months from the date of loss. Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501; Garido v. American Cent. Ins. Co., 2 Cal.Unrep. 560, 8 P. 512; Harlow v. American Equitable Assur. Co., 87 Cal.App. 28, 261 P. 499; Fitzpatrick v. North American Acc. Ins. Co., 18 Cal.App. 264, 123 P. 209. The appellant insists, however, that in Case v. Sun Ins. Co., 83 Cal. 473, 23 P. 534, 8 L.R.A. 48, the court followed the minority rule. But in that case the insurer exacted compliance with policy provisions which required thirteen months to complete although the contract restricted the commencement of an action to "within twelve months next after the fire shall occur." Under those circumstances the limitation was held unenforceable. A similar situation was shown in Bennett v. Modern Woodmen, 52 Cal.App. 581, 199 P. 343, because, giving literal effect to the insurer's by-laws, the remedy of the beneficiary was suspended until the organization rejected her claim although the period of limitation was then running. Otherwise stated, the by-laws which the insurer there relied upon gave it the opportunity to delay action until the period of limitation had expired.

In the present case, less than ninety days after the fire the appellant and the insurance company agreed upon the amount of the loss which, by the terms of the statutory policy, was payable thirty days thereafter. The present action was commenced about eighteen months after the date of the fire and thirteen months after the loss was payable. Moreover, had the insurance company exacted full compliance with every provision of the policy, the amount of the loss would have become payable not more than five months after the fire, and the limitation of fifteen months for the commencement of an action gave the insured ten months in which to sue. In other words, by the terms of the policy contract, the time for bringing an action could not have been reduced to less than ten months and because in the present case the amount of the loss was promptly agreed upon, the insured had thirteen months within which to pursue his remedy.

Certainly this situation is entirely different from that shown in either Case v. Sun Ins. Co., supra, or Bennett v. Modern Woodmen, supra, and it affords no justification for applying the doctrine relied upon by a few courts for the purpose of relieving from policy provisions which unduly shortened the period of limitation by policy covenants. See 41 Yale L.J. 1069. In a number of states the Legislature has adopted a statute either prohibiting any limitation by contract or providing for a specified time after accrual of the cause of action for the commencement of the action. But in jurisdictions having no statutory prohibition against policy limitations, the rule is that although parties to a contract may agree upon a limitation period less than that provided by statute generally, a reasonable time must be allowed for the commencement of an action. Tebbets v. Fidelity & Casualty Co., supra; Fitzpatrick v. North American Acc. Ins. Co., supra; Harlow v. American Equitable Assur. Co., supra; Beeson v. Schloss, 183 Cal. 618, 192 P. 292; Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal.2d 748, 117 P.2d 669. According to the doctrine of these cases, the form of policy required by the Insurance Code of this state, § 2071, unquestionably provides for a reasonable period within which to sue.

In the opinion of Mr. Justice TRAYNOR, it is implicitly admitted that, under ordinary circumstances, an action must be commenced within fifteen months after the date of the fire, and that the limitation is not unreasonable. There is the further implication that the insurer is not estopped, nor did it waive the right to assert that the present action is barred. However, the opinion avoids the consequence of the principles formerly deemed controlling by formulating a rule of procedure heretofore unknown in this state, to the effect that when an action is brought in good time and diligently pursued, but defeated by some technicality unrelated to the merits, a new action may be commenced within a reasonable time, which shall be deemed a continuance of the former action. The asserted basis for such relief is that the legislative enactments of several states so provide, and the justification for its adoption by this court is said to be that in the present case the end to be achieved justifies the means. Judicial decision should not rest upon that doctrine.

Admittedly the appellant finds himself in unfortunate circumstances. But those circumstances were of his own choosing, and his plight is no different than that of a multitude of litigants against whom this court has applied clear rules of law. And contrary to the intimation raised by dictum in the majority opinion, the appellant's position was not occasioned by any unreasonable conduct of the insurer. Although it is said that the situation of the plaintiff at the present time is attributable to the improper ruling of the trial court in the original action granting the insurer's motion for a nonsuit, the record shows no allegation nor claim by him that the company obtained extensions of time for the designed purpose of causing the period of limitations to expire, that the continuances were improper or not for good cause, or that the insurer affirmatively misled him by lulling him into a sense of false security.

On the contrary, it appears that the appellant, an attorney at law, consented to the continuances granted the company. He is charged with notice of the provisions of his policy (Madsen v. Maryland Casualty Co., 168 Cal. 204, 142 P. 51; Rice v. California-Western States Life Ins. Co., 21 Cal. App.2d 660, 70 P.2d 516), and the state of the law governing his suit. Implicit in the present holding of Mr. Justice TRAYNOR, however, is the assumption that in some unspecified manner the insurer took unfair advantage of the appellant and, consequently, justice demands that this court create a remedy. The so-called "factual background of this action," warrants no such assumption; on the contrary, controlling principles compel the conclusion that according to settled rules of law the insurer took no undue advantage of Bollinger. He and the insurance company were adversaries in an action at law and as such entitled to deal at arm's length. The company was under no duty to warn Bollinger that his action would be forfeited if he did not commence a proper action within the time limited by the policy (Fleishbein v. Western Auto S. Agency, 19 Cal.App.2d 424, 65 P.2d 928; Wilhelmi v. Des Moines Ins. Co., 103 Iowa 532, 72 N.W. 685; Hocking v. Howard Ins. Co. (Howard Ins. Co. v. Hocking), 130 Pa. 170, 18 A. 614; Travelers' Ins. Co. v. California Ins. Co., supra) nor to warn him that it intended to rely on strict enforcement of the policy provisions. The rule that the insurer and the insured owe each other a high degree of good faith in contracting (Vance on Insurance, 2d Ed., 1930, p. 74-75) does not in any sense affect their position as adversaries in a court of law for, in litigation, they face each other in an entirely different capacity having entirely different incidents.

Unquestionably Bollinger chose to follow a course by which, according to the former rule of decision in this state, he lost his right of action. I concur in the conclusions of Mr. Justice SCHAUER that the ruling in the first suit brought by Bollinger is immaterial to the present litigation and that this court should not countenance a collateral attack upon the former judgment of nonsuit. But if it is to be considered, as stated by Mr. Justice TRAYNOR, the determination was incorrect, because "an unconditional denial of liability by the insurer after the insured has incurred loss and made claim under the policy gives rise to an immediate cause of action." Bollinger therefore had an effective remedy by appeal which he did not invoke. Instead of doing so he commenced the present action, alleging that by its conduct the insurer waived the right to rely upon the provisions of the policy, and the court now devises an extraordinary remedy to relieve a litigant who, instead of taking an appeal from an erroneous judgment, sued in another court upon the same claim.

The rule now applied is said to be one of procedure, but it determines the substantive rights of the parties and, in addition, operates retroactively to interfere with vested rights acquired by virtue of the term of the policy contract and the Insurance Code. And if the remedy is a part of the common law, it certainly directly conflicts with constitutional and statutory provisions. To me, the question for decision is readily determinable by fundamental principles which have long been recognized and applied. Accordingly, and even more particularly for the reasons well stated by Mr. Justice TRAYNOR upon the previous decision of this case, I am of the opinion that the judgment should be affirmed.

CURTIS, J., concurs.

Rehearing denied; EDMONDS and SCHAUER, JJ., and SPENCE, Justice pro tem., dissenting.

In re ROBERTS' ESTATE.

STIEBEL et al. v. ROBERTS et al.

Civ. 14574.

District Court of Appeal, Second District, Division 2, California.

Dec. 21, 1944.

Rehearing Denied Jan. 12, 1945.

Hearing Granted Feb. 19, 1945.

1. Executors and administrators ⚷513(9), 514

Where executor's account has been settled and court order approving it has become final, it is conclusive against all persons interested in estate, and items thereof may not be questioned in subsequent accounting or at final accounting. Probate Code, § 931.

2. Executors and administrators ⚷514

An order approving the executrices' amended first account current constituted substantial evidence sustaining finding that such order was given and made.

3. Trusts ⚷274(2)

Where, after various repairs had been made to roof of house belonging to estate, it became necessary to remove old roof and reroof building, expenditure for new roof was properly charged against corpus of estate.

4. Trusts ⚷274(2)

An expenditure for new hot water heaters in an apartment house belonging to estate was a proper item payable from corpus thereof.

5. Trusts ⚷274(2)

An expenditure for painting entire exterior of apartment house belonging to estate was properly chargeable against corpus of estate, since it was not a regular annual or periodical expense.

6. Trusts ⚷274(2)

An expenditure for installation of electric refrigerators in apartment house belonging to estate was properly chargeable against corpus of estate, since it was not an ordinary and recurring expense.

7. Executors and administrators ⚷506(3)

Where finding regarding contents of final order of June 28, 1937, setting forth interests of various persons in deceased's property was in conformity with final order of June 8, 1938, determining heirship, finding was supported by evidence.

8. Executors and administrators ⚷506(3)

Evidence sustained finding that, in order to pay expenses of administration, debts, and other principal payments, it had been necessary for executrices to use income receipts.

9. Trusts ⚷274(2)

Payment upon notes secured by mortgage on apartment house belonging to estate was properly charged against corpus of estate rather than to income.

10. Wills ⚷782(1)

Where will provided that $200 per month was to be paid testator's wife for her natural life out of rents and receipts of estate before children would get theirs, wife was not required to make election between rights under will and her statutory community property rights.

11. Wills ⚷782(1)

Where testator attempts to dispose of entire community property as well as his separate estate, and there is nothing in express terms of will or language when read in light of circumstances indicating intention that gifts to wife are to be in lieu of her community property rights, she is not required to elect between taking under will and taking her community interest, but is entitled to both.

12. Executors and administrators ⚷217

The decedent's widow was entitled to be reimbursed from estate for expenditures made by her on behalf of estate and amount deposited in estate account to which she was entitled.

13. Executors and administrators ⚷216(1, 2)

Where most of work in connection with estate was handled by decedent's widow and her attorneys prepared most of documents, there was no abuse of discretion in assigning to her two-thirds of executrices' commissions and to her attorneys two-thirds of fees for attorneys of executrices.

14. Executors and administrators ⚷194(6)

Where court ordered that allowance be made to decedent's widow for her support and maintenance to continue until further order of court, widow was entitled to allowance during entire period of settlement of estate.

15. Executors and administrators ⚷194(6)

An order for a family allowance made to continue until further order of court continues, if estate is solvent, during progress of settlement of estate, unless original order is modified.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Charles H. Roberts, deceased, involving the claims of Ethel E. Stiebel, contestant, Elizabeth Clare Roberts, petitioner, and Oliver James Roberts, Blanche Sims O'Brien, Emma Sims Hauk, Earl J. Wherry, and Charles T. Sims, legatees. From orders settling the amended second account current, the third and final account and supplemental statement thereto, and decreeing distribution of the estate of the deceased, the contestant and Oliver James Roberts, Blanche Sims O'Brien, and Emma Sims Hauk appeal.

Orders affirmed.

See also, 154 P.2d 416.

Potter & Potter and Frank Rouse, all of Los Angeles, for appellants.

Chase, Barnes & Chase, of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal by legatees from orders settling the (1) amended second account current, (2) third and final account and supplemental statements thereto, and (3) decreeing distribution of the estate of Charles H. Roberts, deceased.

There are six questions presented for our determination which will be stated and answered hereunder seriatim:

First: *Was there substantial evidence to sustain the trial court's findings as follows:*

A.

"That an Order was duly given and made herein on or about the 10th day of October, 1934, settling, allowing and approving the said Executrices Amended First Account Current on file herein, showing that said executrices were chargeable with property belonging to said estate in the amount of ....$31,407.62 of which the sum of .... 1,397.62 was in cash, and the balance of.. 30,010.00 represented the amount at which the real and personal property of said estate was accounted for."

On October 10, 1934, the first account current of the executrices was approved and filed. This account showed that they were chargeable with property of the estate in the sum of $31,407.62. No appeal was taken from the order of October 10, 1934, and the same became final before the hearing on the present accounts.

[1] The law is established in California that when an executor's account has been settled and the order of the court approving it has become final, it is conclusive against all persons interested in the estate, and items entered in such account may not be questioned in subsequent accountings or at the final accounting. (Probate Code, sec. 931; In re Estate of Marshall, 118 Cal. 379, 381, 50 P. 540; Security-First National Bank of Los Angeles v. Superior Court, 1 Cal.2d 749, 755, 37 P.2d 69; Sontag v. Superior Court, 1 Cal.App.2d 138, 141, 36 P.2d 140.)

[2] Applying this rule to the facts of the present case it is clear that the order of October 10, 1934, constituted substantial evidence to sustain the questioned finding.

B.

"That as shown by said Amended Second Account Current, said Third and Final Account and said Supplemental Statement thereto, said executrices have been and are chargeable with property belonging to said estate as follows:

"Balance as per Order settling Amended First Account Current	*$31,407.62.*
"Additional charges to conform carrying value of real and personal property to corrected or supplemental inventories, on file, as shown by said Amended Second Account Current (as amended in open court)	*44,710.00.*
"Proceeds from the sale of real and personal property as shown by said Amended Second Account Current	*10,025.00.*
"Rents and income receipts as shown by said Amended Second Account Current including the sum of $1916.20 received from property set apart to Elizabeth Clare Roberts as a probate homestead	*32,567.26.*
"Principal expenditures for a new roof, new refrigerators, repainting the apartment house, new water heater coils, as tending to improve the value of the estate property, as shown by said Amended Second Account Current	*1,786.07.*
"Rents and income receipts as shown by said Third and Final Account	*6,584.92.*
"Rents and receipts as shown by said Supplemental statement	*5,567.75.*
"Total charges	*$132,648.62.*

"That the sum of $1916.20 received from property after the same was set apart as a probate homestead to the widow of said deceased does not properly belong to said estate and is not a proper charge against said executrices. That after deducting said sum from the foregoing total, the total amount of charges as shown by said Accounts and Supplemental Statement is the sum of ....$130,732.42."

Appellants' contention that the foregoing finding is erroneous in charging to the capital account (1) $220 for repairs to a roof of property of the estate, (2) $150 for hot water heaters for an apartment house belonging to the estate, (3) $950 for painting an apartment house of the estate, and (4) $446.07 for electric refrigerators for an apartment house belonging to the estate, is without merit.

[3] (1) The record discloses that after various repairs had been made to a roof of a house belonging to the estate, it became necessary to remove the old roof and reroof the building. Such sum was properly charged against the corpus of the estate. (In re Jackson's Will, 135 Misc. 329, 239 N.Y.S. 362, 367; In re Griffith's Estate, 2 Pa.Dist. 191.)

[4] (2) The record discloses likewise that it was necessary to install new hot water heaters in an apartment house belonging to the estate. Such cost was a proper item payable from the corpus of the estate. (Central Hanover Bank & Trust Co. v. Nisbet, 121 Conn. 682, 186 A. 643, 647.)

[5] (3) The evidence discloses that the entire exterior of an apartment house, property of the estate, needed painting. Such item was not a regular annual or periodical expense. It was an unusual expense and therefore properly chargeable against the corpus of the estate.

[6] (4) The installation of refrigerators was not an ordinary and recurring expense but an unusual and extraordinary expense and therefore properly chargeable against the corpus of the estate. (See Abell v. Brady, 79 Md. 94, 28 A. 817, 820; Evans v. Ockershausen, 69 App.D.C. 285, 297, 100 F.2d 695, 707, 128 A.L.R. 177.)

C.

"That by a Final Order duly given and made herein on or about the 28th day of June, 1937, it was Ordered, Adjudged and Decreed that an undivided one-fifth (1/5) of all of the property, other than the parcel set aside absolutely as a probate homestead estate, of which the decedent died seized, or which his estate has acquired since his death by operation of law or otherwise, was and is the community property of the said Elizabeth Clare Roberts and said decedent Charles H. Roberts, subject, however, to the payment of one-fifth (1/5) of the debts of the decedent and the expenses of administration of his estate, and that subject thereto said Elizabeth Clare Roberts is entitled to have set aside and distributed to her upon distribution of said estate an undivided one-half (1/2) thereof, to-wit: an undivided one tenth (1/10) interest in all of the remaining properties of the estate of said decedent for and on account of her community interest therein. It was further ordered, adjudged and decreed by said Order dated June 28, 1937 that an undivided four-fifths (4/5) of all of the properties other than the parcel set apart absolutely as a probate homestead, of which Charles H. Roberts died seized, or which his estate has acquired since his death by operation of law or otherwise was the separate property of said Charles H. Roberts, subject however, to the payment of four-fifths (4/5) of the debts of said decedent and of the expenses of the administration of his estate.

"It was further ordered, adjudged and decreed by said order of June 28, 1937, that Elizabeth Clare Roberts, is entitled under the terms of said Last Will and Testament of said Charles H. Roberts, deceased, to the payment of the sum of Two Hundred Dollars ($200.00) a month for the rest of her natural life, from the date of the death of said decedent, to-wit: August 11, 1933, to be paid out of the net income received from nine-tenths (9/10) of the remaining estate or property of said decedent; that said payments of Two Hundred Dollars ($200.00) a month are a charge upon the net income to any of the persons entitled to the corpus or principal of said estate, or to an interest therein; and that said bequest is a bequest of income.

"That said Order further provides that upon distribution of said estate the following named persons are entitled to the following interests in the balance of said estate, to-wit: said separate property and the remaining one-half of said community property, subject to the said payments of $200.00 per month out of any income therefrom:

"(a) Oliver J. Roberts, son of said decedent, is entitled to a life interest in an undivided five-twelfths (5/12) thereof, and upon his death the remainder interest therein should be distributed to the children of said Oliver J. Roberts, if any, share and share alike;

"(b) Ethel E. Stiebel, daughter of said decedent, is entitled to a life interest in an undivided three-twelfths (3/12) thereof, and upon her death the remainder interest therein should be distributed to the children of said Ethel E. Stiebel, if any, share and share alike.

"(c) The Children of Lottie Sims, a predeceased daughter of said decedent, to-wit: Blanche Sims O'Brien, Emma Sims Hauck and Charles Sims, are entitled to three-twelfths (3/12) thereof, share and share alike.

"(d) Earl J. Wherry, son of Maud Roberts Wherry, predeceased daughter of said decedent, is entitled to an undivided one-twelfth interest thereof.

"(e) That in the event the remainder interest following the life estate to said Oliver J. Roberts, or the remainder interest following said life estate to Ethel E. Stiebel should lapse by reason of the failure of issue of said Oliver J. Roberts or of said Ethel E. Stiebel, the persons entitled to said remainder interest or interests are:

"Elizabeth Clare Roberts as to an undivided one-ninth (1/9) thereof (the same being community property) together with an undivided one third (1/3) interest in the remaining eight-ninths (8/9) thereof;

"Oliver J. Roberts, Ethel E. Stiebel, and the lawful issue of Maud Roberts Wherry and the lawful issue of Lottie Sims, an undivided two-thirds (2/3) interest in the remaining eight-ninths (8/9) thereof, share and share alike by right of representation."

[7] The foregoing finding is in conformity with the final order of the court of June 8, 1938, determining heirship, therefore such finding is amply supported by the evidence.

D.

"That in order to pay expenses of administration, debts and other principal payments, it has been necessary for said executrices to use and apply the income receipts from said estate for such purposes. That the total amount of principal receipts

or sums available therefor as of November 17, 1943 by the sum of $11,528.70 which sum has been paid out of the net income receipts of said estate which would otherwise have been distributable to Elizabeth Clare Roberts as hereinafter set forth. That in addition thereto certain additional principal expenditures will have to be made out of income cash on hand."

[8] The foregoing finding is fully substantiated by the evidence supporting the findings hereinbefore discussed.

[9] Second: *Did the trial court err in charging payment upon a note, secured by a mortgage on an apartment house belonging to the estate, to the corpus of the estate rather than to the income of the estate?*

This question must be answered in the negative. The payment of principal items of debt against an estate are properly payable out of the corpus of the estate. (In re Estate of Dare, 196 Cal. 29, 42, 235 P. 725; In re Estate of Lair, 38 Cal.App.2d 737, 741, 102 P.2d 436.)

[10] Third: *Was respondent, Mrs. Roberts, required to make an election between her rights under the will of her deceased husband and her statutory community property rights?*

This question must be answered in the negative. Decedent's will provided among other things as follows:

"Firstly: After the payment of my just and lawful debts, I give, devise and bequeath to my wife, Elizabeth Clare Roberts, Two Hundred Dollars ($200.00) per month for her natural life out of the rents and receipts of my estate. This Two Hundred Dollars ($200.00) must be paid first, then the children get theirs."

[11] The law is established in California that where a testator attempts to dispose of the entire community property as well as his separate estate, and there is nothing in the express terms of the will nor in its language when read in the light of the circumstances under which it was prepared that indicate an intention that gifts to his wife under his will are to be in lieu of her community property rights, she is not required to elect between taking under the will and claiming her community interest, she is entitled to both. (In re Estate of Prager, 166 Cal. 450, 453 et seq. 137 P. 37; In re Estate of Moore, 62 Cal. App. 265, 272, 216 P. 981.)

In the will of decedent there is no expressed intention or necessary implication from the words used and the facts surrounding the execution of the will to lead to the conclusion that decedent intended to require his wife to make an election between her community property rights and the provision made for her in his will.

[12] Fourth: *Was Mrs. Roberts entitled to be reimbursed in the sum of $1,650.-97?*

This question must be answered in the affirmative. It is stipulated by the parties that the estate received $10,025 from the sale of property belonging to the estate; that in addition the rents and receipts from the estate totaled $32,567.26. These two amounts aggregate the sum of $42,592.26. The evidence disclosed that Mrs. Roberts paid on behalf of the estate $1,434.18, while the total deposits to the bank account of the estate amounted to $41,435.22. Since the total receipts accounted for amount to $42,592.26, it is evident that Mrs. Roberts expended $1,157.04 of estate money not deposited in the bank and $277.14 of her own money for which she was entitled to reimbursement. It was also stipulated that the receipts from a bungalow court which had been set aside to her as a probate homestead amounted to $1,373.83, which sum was deposited in the estate account and to which sum Mrs. Roberts was entitled. The total of the two sums aggregate $1,650.97, the amount the trial court found should be paid to Mrs. Roberts.

[13] Fifth: *Was Mrs. Roberts entitled to 2/3 of the executrices' commissions and her attorneys entitled to 2/3 of the fees for the attorneys of the executrices?*

This question must be answered in the affirmative. The evidence discloses that most of the work in connection with the estate was handled by Mrs. Roberts and that her attorneys prepared most of the documents in connection with the probate and settlement of the estate. No abuse of discretion appears upon the part of the trial judge in dividing the executrices' commissions and fixing the attorneys' fees.

[14] Sixth: *Was Mrs. Roberts entitled to a family allowance during the entire period of the settlement of the estate, and did the court properly allow credit for sums paid to her on account thereof?*

This question must be answered in the affirmative. The Probate Court in 1933 made the following order:

"It Is Ordered By The Court that the executrices of said estate pay to Elizabeth Clare Roberts, widow of said decedent, for her support and maintenance, the sum of $100.00, the same to date from the date of the death of said decedent, to-wit, the 11th day of August, 1933 and to continue until the further order of the court."

[15] The law is established that an order for a family allowance which is made "to continue until the further order of the court" continues if the estate is solvent, as it was in the present case, during the progress of the settlement of the estate, unless the original order is modified. (In re Estate of Treat, 162 Cal. 250, 254, 121 P. 1003; In re Estate of Boselly, 179 Cal. 218, 219, 176 P. 45).

Since the original order was not modified, Mrs. Roberts was entitled to the family allowance during the entire period of administration of the estate.

For the foregoing reasons the orders are and each is affirmed.

MOORE, P. J., concurs.

W. J. WOOD, J., deeming himself disqualified, did not participate in the foregoing decision.

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67 Cal.App.2d 380

In re ROBERTS' ESTATE.

ROBERTS et al. v. STIEBEL et al.

Civ. 14575.

District Court of Appeal, Second District,
Division 2, California.

Dec. 21, 1944.

Rehearing Denied Jan. 12, 1945.

1. Appeal and error 🔑907(3)

Where appeal is on judgment roll alone, findings will be conclusively presumed to be supported by the evidence.

2. Executors and administrators 🔑216(2)

Where appeal from order allowing extraordinary fees to attorneys for one of coexecutrices of estate was upon judgment roll alone, and no errors appeared on judgment roll, trial court's finding that attorneys had performed extraordinary services which were for benefit of estate was conclusively presumed to be supported by the evidence.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Charles H. Roberts, deceased, wherein Elizabeth Clare Roberts and others contested the petition of Bernard Potter and Bernard Potter, Jr., for an extraordinary fee as attorneys for one of the coexecutrices, and wherein Ethel E. Stiebel, a legatee, was a party. From an order allowing the extraordinary fee, the contestants appeal.

Order affirmed.

Chase, Barnes & Chase, of Los Angeles, for appellants.

Frank Rouse and Potter & Potter, all of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from an order allowing respondents $2500 as extraordinary fees as attorneys for one of two co-executrices of the estate of Charles H. Roberts, deceased. The appeal is prosecuted by Elizabeth Clare Roberts, the other co-executrix, and certain heirs.

Appellants filed a notice to prepare a reporter's transcript of the oral proceedings pursuant to Rule 4, Rules on Appeal, and gave notice to prepare a clerk's transcript designating the papers filed with the clerk pursuant to Rule 5, Rules on Appeal. The clerk's transcript was prepared and filed but the reporter's transcript was not prepared and filed because appellants made no arrangements with the reporter for such preparation and notified the reporter that they did not intend to have a reporter's transcript prepared. A stipulation was entered into by the parties that the transcript in another appeal involving the estate and the same party, Second Civil No. 14574, 154 P.2d 411, could be used by either party on the present appeal. However, the transcript in Second Civil No. 14574, has no application to the present appeal, therefore the instant appeal is upon the judgment roll alone and governed by the rules applicable in such a case.

Appellants urge that the order should be reversed because there is not any substantial evidence to sustain the trial court's finding that respondents "have performed *extraordinary services for and on behalf of the estate of Charles H. Roberts, deceased, as alleged in said petition and which were for the benefit of said estate, which are of the reasonable value of Twenty-Five Hundred ($2500.00) Dollars and are properly chargeable to and out of the principal of said estate, and are payable out of any assets of said estate in the hands of said executrices.*"

[1] This proposition is without merit and is governed by the established law in California that where an appeal is on the judgment roll alone the findings will be *conclusively* presumed to be supported by the evidence. (In re Estate of Mautner, 38 Cal.App.2d 521, 522, 101 P.2d 520; In re Estate of Woods, 23 Cal.App.2d 187, 191, 72 P.2d 258.)

[2] Applying the foregoing rules to the facts of the instant case, since the appeal is on the judgment roll alone the finding above set forth is conclusively presumed to be supported by the evidence, and as no errors appear on the judgment roll the order must be affirmed.

The order appealed from is affirmed, respondents to recover their costs on appeal.

MOORE, P. J., and W. J. WOOD, J., concur.

MOXLEY v. TITLE INS. & TRUST CO. et al.

Civ. 14481.

District Court of Appeal, Second District, Division 1, California.

Jan. 2, 1945.

Hearing Granted March 1, 1945.

1. Trusts 🔑61(1)

Where parties seek to terminate a trust and have property distributed absolutely to them, such termination will not be decreed if unborn persons have contingent interest in the trust.

2. Infants 🔑77

The future interests of unborn persons may be bound when guardian ad litem is appointed for them only when statute authorizes appointment of guardian ad litem.

3. Infants 🔑77

Appointment of a guardian ad litem to represent unborn persons is not authorized. Code Civ.Proc. §§ 372, 373.

4. Infants 🔑77

An action could not be maintained to modify testamentary trust under terms of which entire corpus and all its accumulations should be transferred to testatrix' daughter upon her reaching age of 35 years, and providing that, if daughter should die before reaching that age, corpus and accumulations should be delivered to her children, since contingent remaindermen would be "indispensable parties" to the action and they could not virtually be represented by either the beneficiary or trustee or by a guardian ad litem. Code Civ.Proc. §§ 372, 373.

See Words and Phrases, Permanent Edition, for all other definitions of "Indispensable Party".

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Peggy Ann Moxley, formerly Peggy Ann Kent, against Title Insurance & Trust Company and others to cancel a testamentary trust. From a judgment of dismissal which was based upon order sustaining general and special demurrers to amended complaint without leave to amend, the plaintiff appeals.

Affirmed.

Ben C. Cohen, of Los Angeles, for appellant.

Alfred Wright and Harold F. Collins, both of Los Angeles, for corporate respondent.

Martin Gendel, of Los Angeles, for respondent guardian.

YORK, Presiding Justice.

This is an appeal from a judgment of dismissal which was based upon an order sustaining general and special demurrers to the amended complaint without leave to amend.

The instant action was brought by appellant, Peggy Ann Moxley, to set aside, cancel and annul a trust created on September 19, 1932, by the will of her mother, Mabelle E. Kent. It is alleged in the amended complaint that under the terms of the testamentary trust, respondent Title Insurance and Trust Company and Sidney R. Kent were named as trustees, to hold and administer the trust estate for the use and benefit of appellant, said trustees being given absolute discretion to apply any part of the net income for her support, care and education. It was also provided that when appellant should reach the age of 35 years, the trust estate and all accumulations thereof should be transferred and delivered to her, whereupon the trusteees were to be discharged from the trust; that if appellant should die before reaching the age of 35 years, the trust estate and accumulations should be transferred and delivered to any child or children of appellant; but in the event appellant should die without issue before reaching the age of 35 years, said trust estate to be transferred to any beneficiary designated by the deed or testamentary disposition of appellant, and in the absence thereof to appellant's sister; or in the event such sister did not survive appellant then to the issue of said sister.

Mabelle E. Kent, the trustor, died on October 14, 1932, and on March 16, 1934, the trust estate was distributed to the named trustees who entered upon their duties and continued to act as joint trustees until the death of Sidney R. Kent (appellant's father) on March 19, 1942. Since then the corporate trustee has acted alone.

It is also alleged that when the will creating the trust was executed, appellant was fifteen years of age, living with her mother and attending school in Los Angeles; that it was contemplated by the trustor, appellant's mother, that if she should die before appellant attained the age of 35 years, the latter could live with her father, Sidney R. Kent, who would provide for her independently of the benefits to be derived from the trust, and therefore it would be unnecessary for appellant to receive the corpus of the trust prior to her attainment of that age; that the trustor believed that appellant's father then living would participate in the management of the trust, but by reason of his death, this is no longer possible; that the income from the trust is negligible and wholly inadequate to support appellant in the manner consistent with her station in life; that by reason of her father's death she is unable to receive the comforts and necessities to which she had been accustomed during his lifetime, all of which was contemplated by the trustor at the time of the creation of the trust; "that in view of plaintiff's lack of funds and the acute shortage of suitable housing accommodations, plaintiff is unable to acquire or purchase a home which she would otherwise be able to do if her father were now living. That the income which plaintiff is now receiving, independent of the trust herein, is insufficient for the purpose of purchasing a home, maintaining the same or otherwise providing herself with the comforts and necessities of life to which she had become accustomed and which it was contemplated she would have at the time of the creation of said trust.

"That the plaintiff has arrived at the age of majority and is now of the age of 26 years, happily married and living with her husband, Capt. E. D. Moxley, presently in the United States Army. That plaintiff is in good health and fully capable of managing the estate which was conveyed by her mother in trust to the Title Insurance and Trust Company, defendant herein. That plaintiff is desirous of purchasing a home as aforesaid for the purpose of permanently establishing herself and her husband in the City of Los Angeles.

"That the conditions aforesaid have arisen since the creation of the trust and were not taken into consideration by the plaintiff's mother at the time of its creation and said situation was not contemplated by plaintiff's mother and therefore no provision was made for the same.

"That the objects and purposes of the trust have been accomplished in that the plaintiff has been protected during her minority when she was incapable of providing for herself, and she is now able to take care of her own affairs. That the said trust was created primarily to provide for the support and education and maintenance of plaintiff, and the provision with reference to the remaindermen's interest was collateral to, subsidiary and secondary to those of plaintiff herein. That it was not contemplated that the trust could not be earlier revoked. That there is nothing in the terms of the trust that makes the same irrevocable before the period prescribed for its duration, nor was the same intended to be irrevocable, nor was the trust a spendthrift trust making it incapable of termination before the full period prescribed for its duration."

It is further alleged that appellant's interest in the trust estate created by the last will of her father, Sidney R. Kent, has a value in excess of the sum of one-half million dollars, and that appellant by virtue of the powers granted her thereunder, "for a good and valuable consideration, did irrevocably designate and appoint as beneficiary any child or children which might be born to the plaintiff who might be living when she reached the age of 35 years and that the amount so bequeathed, devised and directed to be paid to such beneficiary or beneficiaries upon the contingency mentioned aforesaid is in excess of the total amount of the estate devised and bequeathed to the defendant, Title Insurance and Trust Company, herein. That by virtue of such irrevocable designation and appointment under the last will and testament of the plaintiff as aforesaid, the issue of plaintiff's body, if any there be, should she die before reaching the age of 35, will not be prejudiced, nor will any detriment accrue to such contingent beneficiaries and for said reason there is not nor can there be any hostility of interest between plaintiff and such defendant remaindermen."

It is further alleged in the amended complaint that appellant has no living issue and pursuant to the provisions of the trust she has by good and sufficient deed conveyed to her husband, E. D. Moxley, all of her right, title and interest in the estate created thereby, to take effect in the event she should die without issue surviving her before reaching the age of 35 years, and has also by last will and testament disposed of all of her property of every kind, character and description, including her interest in this trust.

Thereafter, to-wit, on September 23, 1943, upon the petition of appellant, the respondent R. E. Allen was appointed as guardian ad litem for any child or children now unborn but who may be living at the time of the death of appellant should she die before she reaches the age of 35 years.

General and special demurrers to the amended complaint were interposed by respondent trustee and said guardian ad litem, which, as heretofore stated, were sustained without leave to amend.

The demurrers were grounded upon the following propositions: "I. The court will not terminate a trust at the instance of the life beneficiary, if there are persons yet unborn who have a contingent interest in the trust. Estate of Easterday, 1941, 45 Cal.App.2d 598, 114 P.2d 669. II. Equity lacks jurisdiction to terminate a trust when all parties in interest are not before the court. Gray v. Union Trust Co., 1915, 171 Cal. 637, 154 P. 306; Fletcher v. L. A. Trust, etc., Bank, 1920, 182 Cal. 177, 187 P. 425; Woestman v. Union Trust, etc., Bank, 1920, 50 Cal.App. 604, 195 P. 944."

In the case of Mabry v. Scott, 51 Cal. App.2d 245, 254, 124 P.2d 659, it was held that unborn contingent remaindermen may be represented, in case there are no living members of this class, by persons holding estates which precede theirs, provided there is no hostility of interest between the two groups, and that in such action brought by the settlor to cancel a trust which was to terminate on the death of all beneficiaries, namely, the settlor, his former wife and their four children, then to go first to the living issue of such children—where the beneficiaries other than the settlor, together with the trustee, were named defendants, there was virtual representation of the unborn contingent remaindermen by the living children. In the cited case, the court quoted from County of Los Angeles v. Winans, 13 Cal.App. 234, 109 P. 640, to the following effect: "The interests of representative and represented must, however, be so identical that the motive and inducement to protect and preserve may be assumed to be the same in each." [51 Cal.App.2d 245, 124 P.2d 664.]

[1] Section 183, chapter 12, page 735 of volume II of Restatement of the Law of Property, Future Interests, enumerates the prerequisites for representation of unborn persons, and in connection with such section there appears, in a pocket supplement of California annotations attached thereto, the following comment: "* * * if the judgment or decree which is sought would not operate with equal record for the possible interests of the person joined as a party and of the unborn person, no principle of representation will be invoked to cut off the right of the unborn person. Thus, *where parties seek to terminate a trust and have the property distributed absolutely to them such termination will not be decreed if unborn persons have contingent interests in the trust.* Gray v. Union Trust Co. of San Francisco, 1915, 171 Cal. 637, 154 P. 306; Fletcher v. Los Angeles Trust & Savings Bank, 1920, 182 Cal. 177, 187 P. 425; Woestman v. Union Trust & Savings Bank, 1920, 50 Cal.App. 604, 195 P. 944." (Emphasis added.)

In the instant case, the only ascertainable beneficiary of the trust here under attack is appellant, and if she succeeds in obtaining a termination of the trust she will thereby destroy the entire interest of her unborn children therein. Thus it appears that her interest in the trust and the interests of her unborn children are completely hostile and, under the allegations of the complaint, there are no other living persons whose interests in any way resemble those of her unborn issue.

[2, 3] In this regard, appellant urges that the guardian ad litem may represent the contingent unborn remaindermen. While it is true that the court in the Mabry case, supra, quoted from section 182 of volume II, Restatement of the Law of Property, Future Interests, which section indicates that the interests of unborn persons may be bound when a guardian ad litem is appointed for them, nevertheless, the comment therein indicates that such future interests may be so bound only when a statute authorizes the appointment of a guardian ad litem. A special note on page 734 of said Restatement is as follows: "Caveat: The Institute takes no position as to whether the general power of equity includes power apart from statute, to appoint a guardian ad litem for the interests limited in favor of unborn children and thereby to permit a judicial proceeding to become binding as against such interests." In the California annotations on said section 182, it is stated: "The general provisions for the appointment of a guardian ad litem, Code Civ.Proc. secs. 372 and 373, do not appear to apply to wards not yet in being."

Again referring to the Restatement, section 186 is to the effect that an unborn person may be represented by the trustee when the latter is competent to represent such future interest, and it is stated in comment (a) under section 181 at page 724, discussing those actions wherein a trustee is competent to represent living beneficiaries, that: "Ordinarily, therefore, in actions affecting the subject matter of the trust brought by the trustee against third persons, or by third persons against the trustee, the beneficiaries are represented by the trustee and are not necessary parties. In an action, however, in which there is a conflict of interests between the trustee and the beneficiary or where the beneficiaries have conflicting interests, the trustee does not represent them and they are necessary parties to the litigation." See, also, Estate of Easterday, 45 Cal.App.2d 598, 114 P.2d 669.

[4] Applying the principles of law here enunciated, it appears that the unborn contingent remaindermen are indispensable parties to the instant action, since they cannot be virtually represented by either appellant beneficiary or respondent trustee, or by the guardian ad litem. Therefore, the court properly sustained the demurrers to the amended complaint without leave to amend.

For the reasons stated, the judgment of dismissal is affirmed.

DORAN and WHITE, JJ., concur.

COLUMBIA PICTURES CORPORATION v. DE TOTH.

Civ. 14640.

District Court of Appeal, Second District, Division 1, California.

Dec. 28, 1944.

Hearing Granted Feb. 19, 1945.

1. Action 🔑6

Where it was apparent from examination of allegations of complaint that whatever cause of action may exist already accrued and that only question for determination was liability of respective parties, the case was not one for declaratory relief. Code Civ.Proc. § 1061.

2. Action 🔑6

A proceeding for declaratory relief can only be invoked to declare rights, and not to determine or try issues. Code Civ. Proc. § 1061.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Columbia Pictures Corporation against Andre De Toth for a declaratory relief with respect to rights of parties under a contract of employment. From a judgment of dismissal entered after a demurrer was sustained without leave to amend, plaintiff appeals.

Affirmed.

Mitchell, Silberberg & Knupp and Samuel V. Cornell, all of Los Angeles, for appellant.

Bautzer, Ryan, Ford & Silbert, Robert E. Ford, and Bernard M. Silbert, all of Hollywood, for respondent.

PER CURIAM.

This is an appeal from a judgment entered after the sustaining of a general and special demurrer to the complaint in an action to obtain a declaration of the rights of the parties with reference to a contract of employment. The demurrer was sustained without leave to amend the complaint.

The complaint alleges the making of an oral contract of employment by which appellant engaged the services of respondent as a motion picture director for a term of one year; that upon request of respondent this contract was cancelled; and that another contract was made between the parties, which contract appellant requested to be reduced to writing; but that respondent, although continuing for a considerable time to recognize such contract, and although continuing to perform the same until some time shortly prior to December 24, 1943, did nevertheless on this last date refuse and ever since has refused to reduce said agreement to writing or to be further bound thereby, and has refused to perform the same in whole or in part. The prayer of the complaint is "for a judgment and decree * * * which shall by its terms fix, determine and declare the rights and duties of the parties hereto in the premises and which shall determine and declare that said contract, as modified and extended, including the options granted to plaintiff to extend or renew the same as hereinabove set forth, is a valid and subsisting obligation between the parties hereto, and which shall determine and declare the rights and duties of each of the parties thereunder and award to the parties hereto such and all further relief as may be just and proper * * *."

[1, 2] It is immediately apparent from an examination of the allegations of the complaint that whatever cause of action may exist has already accrued and that the only question for determination is the liability of the respective parties or the relief to which they are entitled. In such a case "the nature of the action is not a cause for declaratory relief, but is defined by the subject-matter of the accrued cause of action." Standard Brands of California v. Bryce, 1 Cal.2d 718, 37 P.2d 446, 447; Fritz v. Superior Court, 18 Cal.App.2d 232, 63 P.2d 872. It has been said that a proceeding for declaratory relief can only be invoked to declare rights and not to determine or try issues. Loomis F. G. Ass'n v. California Fruit Exchange, 128 Cal.App. 265, 281, 16 P.2d 1040. Moreover, section 1061 of the Code of Civil Procedure, with respect to actions for declaratory relief, provides: "The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances."

The trial court properly sustained the general demurrer to the complaint without leave to amend. The judgment of dismissal is affirmed.

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67 Cal.App.2d 300

DARLING et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14491.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1944.

Rehearing Denied Jan. 4, 1945.

Hearing Denied Feb. 8, 1945.

Constitutional law ⚷301

Where medical testimony, though conflicting, was ample to support findings of Industrial Commission, that employee's death was compensable and all parties were given a full opportunity to present their evidence which was considered by the Commission in making its decision, reversing findings of referee that death was due to heart condition, no denial of due process to employer and insurance carrier resulted. St. 1937, pp. 293, 294, 299, §§ 5310, 5313, 5315, 5703.

Proceeding by H. Reave Darling, an individual doing business as Darling's, employer, and the Standard Accident Insurance Company, insurer, against the Industrial Accident Commission of the State of California and others, to review an order awarding compensation to the widow and minor child of a deceased employee.

Order affirmed.

James E. Minds, of Los Angeles, for petitioners.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondents.

YORK, Presiding Justice.

Petitioners, the employer and the insurance carrier of such employer, seek by the instant proceeding to review the findings and an award of death benefits made by the respondent commission on January 5, 1944, in favor of the surviving dependent wife and the minor daughter of the deceased employee, Eugene Fernholtz.

Said commission found that the said employee, while employed as a florist on December 22, 1942 by the petitioner Darling, "sustained injury arising out of and occurring in the course of said employment consisting of a right inguinal hernia * * * said injury required a surgical operation, which operation caused a clot to lodge in the employee's lung, causing an abscess, proximately resulting in his death on May 22, 1943."

From the evidence adduced at the hearing before the referee, it appears that the operation for the cure of the hernia was performed on February 23, 1943, by Dr. Donald Cass, whose report shows that the patient made "an uneventful recovery except for a respiratory infection which developed while in the hospital." The patient reported to Dr. Cass several times after he left the hospital and on April 6th was discharged by Dr. Cass as cured and returned to his work on April 12, 1943. Mrs. Fernholtz testified that her husband terminated his employment at "Darling's" about a week before his death, for reasons not material here; that so far as appeared to her, he had been in perfect health and made no complaints until he suffered the hernial injury. Three weeks or a month before his death, he told her that while walking he experienced a pain in his upper chest which caught his breath. Sometime later, because of this recurring pain, Mr. Fernholtz again consulted Dr. Cass, as a result of which he told his wife that Dr. Cass said there was nothing wrong with his heart. Dr. Cass reported the date of this visit as May 19, 1943, stating that Mr. Fernholtz complained to him that for several weeks he had experienced pain in his heart on exertion, but that he had insisted it was due to gas. Dr. Cass stated in his report that "He was advised to have an electrocardiographic examination for possible coronary disease, inasmuch as it was indicated that this might be the trouble." Mrs. Fernholtz further testified that on the evening of May 20, 1943, following his visit to Dr. Cass, her husband was again seized with pain in his upper chest which he again concluded was caused by gas. On the following day, Friday, May 21st, he attended a luncheon of the Rotary Club at the Biltmore Hotel when the pain again recurred and he became very ill. Dr. W. F. Traughber, a physician of 25 or 30 years experience, was present at this luncheon and treated Mr. Fernholtz there and later at his office. When her husband returned home that evening, Mrs. Fernholtz testified that he related what had occurred and advised her that the doctor reported there was nothing wrong with his heart. He was almost immediately seized with the pain and was unable to lie down or rest that night, indicating to his wife that he felt as if he had an olive seed in his upper chest which he was unable to remove by coughing. On Saturday morning, May 22, 1943, Mrs. Fernholtz took her husband to Dr. Traughber's office where his condition became worse. He had difficulty in breathing and kept coughing and spitting up a yellow-grayish substance which eventually became tinged with blood. Mrs. Fernholtz was unable to secure hospital accommodations for her husband, and took him home that afternoon with a nurse in attendance. His condition became progressively worse and at 11 o'clock that night he died.

Dr. Traughber performed an autopsy in the presence of William T. Stahlmann, an embalmer employed by the Forest Lawn Cemetery Association, and reported his findings and opinion that the death of Mr. Fernholtz resulted from an abscess in the right lung, caused by a blood clot lodging there, which in turn resulted from the operation performed on February 23, 1943.

Mrs. Fernholtz notified Dr. Cass of her husband's death and subsequently at his request she consented that a second autopsy be performed. This was done by Dr. A. R. Camero, whose findings were to the effect that the death of Mr. Fernholtz resulted from coronary occlusion and heart failure, and was in no way connected with the hernia operation.

The respondent commission adopted the findings and opinion of Dr. Traughber and made its award of compensation accordingly.

It is here contended that "in reaching its decision of January 5, 1944, the respondent commission denied petitioners due process of law." In this connection petitioners maintain that at the time the members of the respondent commission reached their decision they "had not read or heard read the record of the testimony taken before the hearing officer on October 5, 1943, nor the exhibits which included all medical reports and reports of the two autopsies."

When this cause was on calendar for oral presentation to this court on June 26, 1944, permission was granted for the filing of a supplemental return to the writ of review in order to show the situation as it actually existed at the time the case was before the commission.

This supplemental return contains a memorandum of the referee who heard the cause on October 5, 1943, which summarizes the evidence produced at that time. This memorandum was dictated on the day of the hearing. On October 8, 1943, said referee dictated a supplemental memorandum summarizing the medical reports of Dr. Traughber, Dr. Camero, and Dr. Cass, together with a so-called discussion and interpretation of these reports. On October 29, 1943, the referee dictated his memorandum on decision with the following recommendation: "Employee sustained injury a.o.e. and c.o.e., consisting of a right inguinal hernia, which caused temporary total disability from February 22, 1943, to and including April 11, 1943, a period of 5-6/7 after deducting the waiting period of one week, entitling the employee to $25.00 a week during said time, in the total sum of $146.43, which has been paid by the defendants. Earnings, maximum. The employee died on May 22, 1943, *as the result of a heart condition, which was neither caused nor aggravated by any injury sustained in the employment. Take nothing award to be submitted for signatures of the Commissioners.*" (Emphasis added.)

On October 13, 1943, said referee addressed a memorandum to the medical department of respondent commission, asking for a review of the "file, our memo and the electrocardiographic tracings, and advise (1) Whether the tracings show a normal heart, as reported by Dr. Traughber; (2) Whether the diagnosis of Dr. Traughber or Dr. Camero is supported by the reported findings; (3) Whether we are correct in our tentative conclusion that this is purely a heart death; and (4) Assuming this is a purely heart death, did the fact of surgery on February 23, 1943, play any part either in aggravating the heart trouble or in hastening the time of death."

Having received reports from Dr. Donald Cass on November 18 and 19, said referee indited a supplemental memo on decision dated November 26, in which he quoted from said reports, to-wit: "In view of the lapse of time between his surgical treatment and the development of the symptoms, it is still my (Dr. Cass's) opinion that his coronary disease was in no way related to his operation or to his hernia * * *" and recommended that "Employee sustained injury aoe and coe, consisting of a right inguinal hernia, which caused temporary total disability from February 22, 1943, to and including April 11, 1943; maximum earnings; *employee died on May 22, 1943, as a result of a heart condition which was neither caused nor aggravated by any injury sustained in the employment. Decision accordingly.*" (Emphasis added.)

Petitioners are frank enough to say that they "are perfectly willing to stipulate that up to this point in the proceedings before the Referee Campbell, the hearing officer, such proceedings were entirely proper and lawful, and in line with what we understand due process to be in an administrative hearing." However, they continue, "From this point on * * * we will attempt to point out * * * wherein the respondents have violated both the letter as well as the spirit of the law and shall attempt to show that the action of the respondent commission has been capricious and arbitrary and that the so-called 'expeditious procedure' followed by the respondent commission and substituted by it for 'due process of law' has defeated the ends of justice and denied petitioners that due process of law to which they are lawfully entitled."

Without going into detail with regard thereto, an examination of the medical reports of the doctors employed by the petitioners on one hand, and the report of the deceased employee's private physician, Dr. Traughber, on the other, reveals a decided conflict in the opinions of these medical experts.

Reverting again to the supplemental return to the writ, it is disclosed that on December 23, 1943, a so-called "intercommunication" passed from Clell H. McCredie, Referee of respondent commission, to Douglass A. Campbell, the referee who presided at the open hearing of the instant cause, which reads as follows:

"The Commission refused to sign your proposed Findings and Award. * * * They wish to accept the applicant's medical that the operation caused the clot to lodge in the lung, resulting in an abscess, which resulted in the death; that is, they wish to issue a compensable award as to the death being aoe and coe (arising out of and occurring in the course of employment). *The record has been written up.* Will you please prepare appropriate findings and award in accordance with the Commission's wishes." On December 30, 1943, referee Campbell dictated a supplemental memorandum on decision, together with an order, as directed by referee McCredie. A photostat copy of respondent commission's register of proceedings in the instant cause discloses that on December 8, 1943, an "order for transcript of testimony" was filed, and that on December 13, 1943, "Transcript of Testimony filed." The transcript of the testimony which forms a part of the return to the writ carries the stamp: "Los Angeles Office Industrial Accident Commission, State of California. Filed Dec. 13, 1943, R. E. Mustoe, Asst. Secretary." The return to the writ also contains an order by said assistant secretary to transcribe the testimony which was made and filed on December 8, 1943. In its answer to the petition for the writ herein, it is reiterated that when the commission made its findings and award herein on January 5, 1944, it "had before it, and the commission fully considered, the findings and recommendation of the hearing referee, and the testimony adduced at the hearing."

Thereafter, on February 11, 1944, referee McCredie dictated a memorandum recommending to the commission that defendants' petition for rehearing be denied, in which the evidence was again summarized and the statement made that "There is a very definite conflict in the medical evidence."

Under section 5310 of the Labor Code, St.1937, p. 293, the Industrial Accident Commission is given the right to "appoint one or more referees in any proceeding, as it may deem necessary or advisable, and may refer matters arising out of the same proceedings to different referees. * * * Any referee appointed by the commission has the powers, jurisdiction, and authority granted by law, by the order of appointment, and by the rules of the commission. * * *"

"The referee shall report his findings in writing to the commission within fifteen days after the testimony is closed. The report shall be made in the form prescribed by the commission and shall include all matters required to be included in the order of reference or by the rules of the commission. * * *" Sec. 5313, Labor Code.

"Upon the filing of the report of the referee, the commission may confirm, adopt, modify, or set aside the same or any part thereof and may, with or without further proceedings, and with or without notice, enter its order, findings, decision, or award based in whole or in part upon the report of the referee, or upon the record in the case." Sec. 5315, Labor Code.

In Nielsen v. I.A.C., 220 Cal. 118, 122, 29 P.2d 852, 854, it was held by the Supreme Court that questions of the weight of the evidence and the credibility of the witnesses "are for the commission, and, if there is any evidence or reasonable inference which will support the commission's finding, the reviewing court has no power to disturb it."

Section 5703 of the Labor Code enumerates those matters which the commission may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, in addition to sworn testimony presented at an open hearing. These matters include "Reports of attending or examining physicians."

In the instant cause there exists a direct conflict in the medical testimony and it was incumbent upon the commission to decide the case one way or the other. It was impossible for the commission to believe both the reports of Dr. Traughber on the one side and the reports of Dr. Cass and Dr. Camero on the other. In other words, the evidence offered by the applicants for compensation, if believed by the commission, is ample to support the finding that a blood clot formed as a result of the operation and that this clot lodged in the decedent's lung, thereby causing an abscess proximately causing his death on May 22, 1943. It should also not be overlooked that Dr. Cass reported decedent's heart normal just before the operation, and it is inconceivable, even to a layman, that Dr. Cass would have operated on Mr. Fernholtz if he had the serious heart condition described in the reports of Dr. Cass and Dr. Camero which were introduced in evidence by petitioners.

A careful examination of the entire record discloses that all parties to the proceeding before the commission were afforded a full and complete opportunity to present their evidence and that such evidence was before the commission and considered by it at the time it made its decision on January 5, 1944.

The order awarding compensation to the widow and minor child of the deceased employee is therefore affirmed.

DORAN and WHITE, JJ., concur.

67 Cal.App.2d 477

PEOPLE v. KELLNER.

Cr. 3839.

District Court of Appeal, Second District, Division 2, California.

Jan. 5, 1945.

1. Criminal law 🔑1144(13)

A reviewing court must assume in favor of verdict every fact which trial court could have reasonably deduced from the evidence.

2. Burglary 🔑41(1)

Evidence sustained trial court's implied finding that accused aided and abetted others in burglarizing a home, warranting accused's conviction of burglary in the first degree. Pen.Code, § 31.

3. Burglary 🔑36

In burglary prosecution, proof of knowledge on part of accused that his companion had been involved in charge of automobile theft was admissible as tending to establish that accused was aware of questionable character of the person accused was accompanying on the trip to the house which was to be burglarized. Pen.Code, § 31.

Appeal from Superior Court, Los Angeles County; William B. McKesson, Judge.

Eugene L. Kellner was convicted of burglary in the first degree, and he appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

Martin S. Ryan, of Los Angeles, for appellant.

W. J. WOOD, Justice.

Eugene L. Kellner, the appellant, was found guilty of the crime of burglary in the first degree by the court sitting without a jury. On this appeal from the judgment he contends that the evidence is insufficient to sustain the conviction.

The evidence establishes that at about 10:30 p.m. on January 29, 1944, the residence of Arthur B. Miner in San Pedro was forcibly entered and about one hundred bottles of liquor were stolen. Appellant and Frank Powell accompanied Carl Lueckeman and William MacCall in an automobile from Beverly Hills to San Pedro. When they arrived in San Pedro Lueckeman and MacCall entered a drug store and called a number on the telephone but received no response. They thereupon purchased a pair of rubber gloves. All four then went in the automobile to the vicinity of the Miner residence. Appellant and Powell remained in the car, which was parked with its lights out, while the other two entered the house, removed the liquor and carried it to the curbing. Lueckeman then returned to the car and drove it to the point where the liquor had been placed on the curbing. The four boys then loaded the liquor into the car, whereupon appellant stated, "Let's get out of here." The car was driven to Glendale, and later to Beverly Hills, where the liquor was transferred from Powell's car to appellant's car. Later it was left at a gas station with a friend of appellant. After his arrest appellant told one of the officers that he had drawn the conclusion from the purchase of the rubber gloves and from subsequent conversations with the others that they were going to steal some whiskey. He also stated that he expected to get a bottle of whiskey for helping.

[1, 2] A reviewing court must assume in favor of the verdict every fact which the trial court could have reasonably deduced from the evidence. We are satisfied that the trial court could reasonably conclude that appellant knew of the intention of Lueckeman and MacCall to commit a burglary, that he went with them and remained near the scene of the burglary with the purpose of giving aid to them in any way necessary to complete the crime, and that he did in fact aid them in removing the stolen liquor from the scene of the burglary and in thereafter concealing it. All persons concerned in the commission of a crime are guilty as principals, whether they directly commit the act constituting the offense or aid and abet in its commission. Penal Code, § 31. The evidence is ample to sustain the implied finding of the trial court that appellant aided and abetted Lueckeman and MacCall in burglarizing the Miner residence.

[3] The court did not err in permitting the prosecutor to ask appellant on cross examination whether at the time of the commission of the offense in question he knew that MacCall had been involved in "difficulties with the law—criminal matters". The witness replied that he knew that MacCall had been in difficulty concerning a car that did not belong to him. The evidence was not admitted for the purpose of proving an offense not charged in the information or to establish the intent with which MacCall entered the Miner residence. The prosecution was attempting to prove knowledge on the part of appellant that MacCall and Lueckeman intended to commit a burglary. Proof of knowledge on the part of appellant that MacCall had been involved in the charge of the theft of an automobile was admissible as tending to establish that he was aware of the questionable character of the man he was accompanying on the trip to the house which was to be burglarized. Such knowledge gives support to the contention of the prosecution that appellant was not ignorant of the purpose of his companions.

The judgment is affirmed.

MOORE, P. J., concurs.

McCOMB, Justice (concurring).

I concur in the judgment. I do not concur in the statements contained in the last paragraph of the opinion. In my judgment the evidence was inadmissible. It was not, however, prejudicial in view of the other evidence in the record, and under section 4½ of article VI of the State Constitution such error must be disregarded.

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67 Cal.App.2d 278

MALONEY v. MALONEY.

Civ. 14695.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1944.

1. Divorce 🔑302, 308

In action for divorce, order awarding children to the mother and requiring husband to provide for their support was a proper judgment.

2. Courts 🔑30

Where jurisdiction of the person or of the res has once attached, it is not defeated by removal of the person or of the res beyond jurisdiction of the court.

3. Courts 🔑30

Jurisdiction once acquired is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of action was made.

4. Divorce 🔑289

Where children at time husband brought divorce suit were within jurisdiction of trial court, husband submitted himself to court's jurisdiction and trial court had power to make order awarding custody of children to wife, notwithstanding husband at that time had departed from state with children.

◆

Appeal from Superior Court, Los Angeles County; Elmer D. Doyle, Judge pro tem.

Action by Paul Donald Maloney against Marguerite Maloney for divorce and joint custody of minor children, wherein defendant filed a cross-complaint. From a judgment awarding sole custody of the children to defendant and ordering plaintiff to pay defendant alimony for their support, plaintiff appeals.

Affirmed.

Bertram H. Ross, of Los Angeles, for appellant.

Charles E. Beardsley, of Los Angeles, for respondent.

MOORE, Presiding Justice.

The question for decision is whether the superior court in an action for divorce filed by the husband may make an order against him relative to the custody of the minor children, after he had departed from the state with the children.

On January 6, 1944, plaintiff filed his complaint for divorce and requested that custody of the two minor children be granted to himself and defendant jointly and that the court make "an order directing the plaintiff to pay a reasonable amount for the support and maintenance of said minor children." The cross complaint was filed on January 25. Defendant alleged the extreme cruelty of her husband and prayed for divorce, for the sole custody of the children, and for an order compelling plaintiff to pay for their support.

The last time defendant saw her children was on February 19, 1944. After that time plaintiff took the children to the state of Nevada and there instituted action for divorce and caused notice thereof to be served upon his wife in the city of Los Angeles. Plaintiff absented himself from the trial in the court below. Findings were filed in accordance with the allegations of the cross complaint awarding the custody of the minor children to the defendant and ordering plaintiff to pay defendant $80 per month for their support.

The appeal is grounded upon the sole proposition that "a court has no jurisdiction to award the custody of children when the children are not physically present within the state" at the time the decree is entered. In other words, plaintiff invokes the jurisdiction of the superior court of this state to adjudicate his grievance and to determine the question of the custody of his children and then denies that the same court has jurisdiction to make an order upon the subject presented by his own pleading. In this he is altogether out of line with the traditional concept of justice, of the powers of courts whose aid he seeks and of the rights of his adversary whom he has charged as unfaithful to her obligations. This fallacious contention is based upon an erroneous interpretation of those decisions which have clearly defined the powers of a court over persons within, as contradistinguished from its powers over persons without, its jurisdiction, or who have had notice of the action only by substituted service.

[1-4] The order awarding Mrs. Maloney the custody of her children and requiring her husband to provide for their support is a proper and correct judgment. Marts v. Marts, 15 Cal.App.2d 224, 59 P.2d 170. No factor was wanting to clothe it with the quality of finality. Numerous decisions are reported in support of the proposition that where jurisdiction of the person or of the res has once attached it is not defeated by the removal of the person or of the res beyond the jurisdiction of the court. 15 Corpus Juris, p. 824; 21 C.J.S., Courts, § 93. Jurisdiction once acquired is not defeated by subsequent events which might have prevented jurisdiction had they occurred before personal service of the action was made. Bigelow v. Washburn, 98 Wis. 553, 74 N.W. 362. When the action was commenced by plaintiff the children were in California under the joint control of their parents. By his very act in commencing the action plaintiff submitted not only himself to the jurisdiction of the court but also the res, that is, his status as husband and as father. The court thereafter had the power to enter an effective judgment for him or against him, in personam, relative to any substantial allegation of the pleadings. Neither the mere physical departure of himself nor that of the children from California in the least altered the jurisdiction of the court completely to determine the controversy which he had lithely initiated. State v. Rhoades, 29 Wash. 61, 69 P. 389. Plaintiff cannot question the jurisdiction which by his own act he conferred. Although the children are beyond the territorial limits of California, they are still under the jurisdiction of the court below (Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815, 818, 70 A.L.R. 518), which attached at the time the suit was filed.

The authorities cited by plaintiff in support of his appeal (De La Montanya v. De La Montanya, 112 Cal. 101, 44 P. 345, 32 L.R.A. 82, 53 Am.St.Rep. 165; Warren v. Warren, 127 Cal.App. 231, 15 P.2d 556; In re Chandler, 36 Cal.App.2d 583, 97 P.2d 1048; Boens v. Bennett, 20 Cal.App.2d 477, 67 P.2d 715; Steele v. Steele, 152 Miss. 365, 118 So. 721; Cody, 21 Sask.L.R. 391) are not pertinent. In those cases, either no personal service was ever had upon the party against whom the appealed judgment had been entered, or the children involved were outside of the jurisdiction of the court from a date prior to the commencement of the action. All of them are founded upon the inefficacy of substituted service of process as a means of obtaining a judgment in personam.

Judgment affirmed.

W. J. WOOD, J., concurs.

McCOMB, J., deeming himself to be disqualified, did not participate in the foregoing decision.

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67 Cal.App.2d 315

McNEILL et al. v. REDINGTON.

Civ. 14467.

District Court of Appeal, Second District, Division 3, California.

Dec. 15, 1944.

Hearing Denied Feb. 8, 1945.

1. Injunction 🔑128
Nuisance 🔑33

Trial court's findings, on supportable evidence, that business of operating drop forge plant was one expressly permitted by zoning ordinance and that the methods of operation were reasonable and necessary, warranted denial under statute of injunctive relief against plant operators. Civ. Code, § 3479; Code Civ.Proc. § 731a.

2. Trespass 🔑18

Statute prohibiting issuance of injunction to restrain operation of a business in any zones where operation is permitted by ordinance, and prohibiting such use to be declared a nuisance, does not bar right to recover for damages to adjoining property, as an invasion in the nature of a trespass, by operation of a drop forging plant in a zone where its operation was permitted. Civ.Code, §§ 3479, 3514; Code Civ.Proc. § 731a.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by W. S. McNeill and others against Robert S. Redington, individually and doing business under the fictitious firm name and style of Brandy Forging Company, to enjoin the operation of defendant's plant, on ground that it damaged plaintiffs' property and interfered with their use and enjoyment of the same, and for damages. Judgment for defendants, and plaintiffs appeal.

Reversed with directions to retry issue of damages.

Joseph R. Vaughan, of Los Angeles, for appellants.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for respondent.

FOX, Justice pro tem.

This action arises out of defendant's operation of a drop forging plant which transmitted damaging vibrations and noises to the nearby homes of plaintiffs. In the first cause of action, plaintiffs sought to enjoin the plant operation, alleging that it damaged their homes and unlawfully interfered with their use and enjoyment of the same. In succeeding separate causes of action, the various plaintiffs set forth the damage to the physical structures of their respective homes and the injury they have sustained in the comfortable enjoyment thereof, caused by the operations of defendant's plant, and seek compensation therefor. Judgment went for the defendant. The plaintiffs have appealed.

All the nineteen homes of plaintiffs were built prior to 1935. Some were built prior to 1927. They are situated within distances varying from 100 to 525 feet of defendant's plant. Eighteen of these homes are occupied by the owners. The nineteenth is occupied by plaintiffs Henriques, as tenants. Defendant's predecessor began operating this plant in 1940, using one 1100 pound steam hammer. There is no evidence of the effect, if any, on these surrounding homes from the operation of the plant by such predecessor. Defendant commenced operating the plant in July, 1942. Defendant uses two 1100 pound steam hammers, one 600 pound electric hammer, one 300 pound drop hammer, a steam boiler and certain other machinery incidental to plant operations. In the operation of said plant defendant heats metal in furnaces to a red hot state and then subjects such metal to hammers, thus forming it to the desired specifications. The plant is operated on a schedule of twenty-four hours a day.

The area in which these homes and defendant's plant are located is classified as Zone M–3 and was so zoned by Ordinance No. 1494, New Series, as Amended, of the County of Los Angeles, adopted in 1927.

The parties stipulated that: "considered apart from the effect of Section 731a of the Code of Civil Procedure, the present and past operations by defendant in said plant transmit injurious vibrations to the residences of plaintiffs and create noise which seriously interferes with the use and enjoyment of their property as residences and constitutes a nuisance as that term is defined in Civil Code, Section 3479, of a character which clearly and substantially invades the rights of plaintiffs." It was also stipulated: "That actual physical damages have been caused by the operations of the plant to plaintiffs' residences; that actual damage has been suffered by plaintiffs in their use and enjoyment of their property."

Plaintiffs produced evidence showing the character and extent of the damage that was done to their homes. This evidence showed that defendant's operations caused the ceiling and walls, both interior and exterior, to crack; excessive settling of foundations, porches, floors and chimneys and loosening of cupboards, window frames, plumbing fixtures, mantels, tile copings and door casings. The estimated cost of repairs for the twelve homes inspected varied from $400 to $700 each. This evidence on the question of damage was not controverted by the defendant.

The trial court found that in the operation of said plant "certain noises are caused which interfere with plaintiffs' comfort." Also, that said operations caused "lateral vibrations in the earth, which vibrations can be felt by the plaintiffs in their homes, and that said lateral vibrations have injured the homes of said plaintiffs in that cracks have appeared in the plaster, and that windows in some of the houses have become loose and rattle upon occasion and during the time that the defendant herein is using the hammers."

The defendant in support of the judgment relies solely on section 731a, Code of Civil Procedure. That section was added to the code in 1935. The portion of said section that is here material reads as follows:

"Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation."

Three questions are presented on this appeal: (1) Is County Ordinance No. 1494, New Series, as Amended, sufficiently specific to meet the requirements of section 731a, Code Civil Procedure, and thus make said section applicable here; (2) are plaintiffs entitled to injunctive relief; and (3) are they entitled to damages?

[1] The said ordinance divides the unincorporated area of Los Angeles County into sixteen zones, one of which is Zone M–3. In subdivision (b) it is "declared that in the creation by this ordinance of the respective zones * * * the Board of Supervisors have given due and special consideration to the peculiar suitability of each and every zone herein created for the particular uses enumerated therefor, the area requirements, density of land occupancy, and the necessary, proper and comprehensive groupings and arrangement of the various industries, businesses and population of the unincorporated area of the County of Los Angeles and in relation with established plans in the incorporated areas of said county in accordance with a well-considered plan for the development of the entire County, paying particular attention to those areas in said unincorporated territory wherein more densely populated communities have arisen, giving to such communities urban characteristics." It is provided by an amendment to said subdivision that "Except as herein other wise provided, any building, structure, improvement, or premises may be erected, constructed, established, altered, enlarged, used, occupied, or maintained in said Zone M–3 without any restriction under the provisions of this ordinance as to the use or occupancy thereof * * *." Then follow certain exceptions with which we are not concerned. It is true that drop forging plants are not specifically mentioned as one of the indus-

tries authorized to operate in Zone M–3, but neither are other industries which may operate in said zone specifically mentioned. It is, however, unmistakably clear that the class of industry which includes drop forging plants is expressly permitted to operate in that zone. The trial court, therefore, correctly found that "the business operated by defendant in and upon said premises, is one expressly permitted by said ordinance." This finding sufficiently determines that the provisions of section 731a, Code Civil Procedure, are applicable to this case.

In order to determine the effect of said code section on the situation here presented it must be pointed out that the trial court found that the operation, and manner of operation, of said plant by the defendant is reasonable and necessary and that the defendant does not employ unnecessary and injurious methods of operation but on the contrary "the methods of operation employed by said defendant are reasonable and necessary." Under these findings and in view of the express provisions of said code section, the trial court properly denied plaintiffs injunctive relief.

[2] Are the plaintiffs entitled to recover damages? We think they are. From the evidence, the stipulations of the parties and the court's findings, it is clear that actual physical damages have been caused to plaintiffs' homes by the operation of defendant's plant; and, also, that actual damage has been suffered by plaintiffs in their use and enjoyment of their homes. Apart from the provisions of section 731a, Code Civil Procedure, the plaintiffs would be entitled to recover the damages thus sustained. Tuebner v. California St. R. Co., 1884, 66 Cal. 171, 175, 4 P. 1162; Judson v. Los Angeles Suburban Gas Co., 1910, 157 Cal. 168, 172, 106 P. 581, 26 L.R.A.,N.S., 183, 21 Ann.Cas. 1247; Dauberman v. Grant, 1926, 198 Cal. 586, 590, 246 P. 319, 48 A.L.R. 1244; Fendley v. City of Anaheim, 1930, 110 Cal.App. 731, 737, 294 P. 769. The plaintiffs' right to recover damages in these cases and others of like character is tied in with the circumstance that the defendant's acts constituted a nuisance. Such a plaintiff was, prior to the adoption of section 731a, Code Civil Procedure, entitled to both injunctive relief and damages under section 731, Code Civil Procedure. It is not necessary, however, for us to determine the effect of section 731a, Code Civil Procedure, on a plaintiff's right to recover damages where his cause of action is on the theory of a nuisance because in their separate and individual causes of action the plaintiffs in the instant case have pleaded that the operations of defendant's plant constituted an invasion of their property in the nature of a trespass. The evidence and findings sustain the allegations. Section 731a, Code Civil Procedure, then has no application because it does not purport, either expressly or by implication, to extend to trespassory invasions of another's property. Its provisions do not therefore, bar the right of plaintiffs to recover for the damages they have sustained.

The case is not, in principle, unlike McKenna v. Pacific E. Ry. Co., 1930, 104 Cal. App. 538, 286 P. 445, insofar as the operations of the defendant constituted an actionable invasion of plaintiffs' property. In that case the defendant railway company owned a certain strip of land in the city of Los Angeles, running in a generally northwesterly direction from its station near Fourth and Hill Streets to First Street and Glendale Boulevard, a distance of nearly one mile. Said company entered into a contract with Twohy Bros. Company for the construction of a tunnel or subway between these points for electric railway use. McKenna owned a lot with a house thereon at Fourth and Boylston Streets, about seventeen feet from the west line of this tunnel (projected to the surface). The construction company in boring the tunnel used dynamite, and from the explosions the plaintiff's property was damaged by the shaking of the ground and building or by concussion or both. In affirming plaintiff's right to recover for the damage thus sustained, the court said (104 Cal.App. at page 543, 286 P. at page 447): "We see no reason for differentiating between responsibility for damage done by physical projectiles or missiles and responsibility for damage done by vibration or concussion." See, to the same effect: Colton v. Onderdonk, 1886, 69 Cal. 155, 10 P. 395, 58 Am.Rep. 556; McGrath v. Basich Bros. Const. Co., 1935, 7 Cal.App.2d 573, 46 P.2d 981; 35 C.J.S., Explosives, § 8, p. 239, and cases cited under note 13. These decisions are simply a practical application of the principle stated in section 3514, Civil Code, that "One must so use his own rights as not to infringe upon the rights of another."

The judgment is reversed with directions to retry only the issue of damages.

DESMOND, P. J., and SHINN, J., concur.

67 Cal.App.2d 374

KOSLOFF v. KOSLOFF.

Civ. 14484.

District Court of Appeal, Second District, Division 3, California.

Dec. 20, 1944.

1. Divorce 🔑235

The matter of awarding the innocent spouse alimony is left, in first instance, to trial court's discretion which is not arbitrary, but must be exercised along legal lines, taking into consideration circumstances of parties, their necessities and financial ability of husband; and in a legal sense discretion is "abused" whenever, in its exercise, a court exceeds bounds of reason, all the circumstances before it being considered. Civ.Code, § 137.

See Words and Phrases, Permanent Edition, for all other definitions of "Abuse of Discretion".

2. Divorce 🔑249(2)

There is no rule requiring that terms of property settlement in separation agreement be adopted in divorce decree, but, unless court specifically declares agreement to be illegal and against public policy, agreement stands, and may be treated as independent contract subject to such construction and judicial disposition as terms and circumstances warrant.

3. Divorce 🔑249(2), 261

Where divorce decree modifies or supersedes some provision of property settlement agreement, one party may have concurrent remedies, but a defaulting party may be bound by both the decree and the agreement.

4. Divorce 🔑254

Where wife suing for divorce prayed for custody of minor children, for award for support of children, and for alimony for herself, in accordance with prior separation agreement, interlocutory decree accepting portion of agreement relating to custody and maintenance of children, but not mentioning other portions of agreement, required reversal as leaving parties in doubt whether decree intended to adopt or reject agreement, and as not determining issue presented.

5. Judgment 🔑20

A judgment must be "definitive", in that decision itself must purport to decide finally rights of parties on issues submitted by specifically denying or granting remedy sought by action, and every definitive determination of rights of parties in proceeding before a competent tribunal is a "judgment".

See Words and Phrases, Permanent Edition, for all other definitions of "Definitive" and "Judgment".

6. Husband and wife 🔑278(1)

The provision in a property settlement agreement between husband and wife made in contemplation of divorce that husband should pay monthly $100 for wife's support and $100 monthly for support of two minor children, payments to wife to terminate upon her remarriage, was not unreasonable where by agreement wife assumed the care of the children, wife was not employed, possessed no other income and was required to pay rent from funds provided, and agreement showed husband's ability to pay such sums.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action for divorce by Shirley Kosloff against Maurice Kosloff. From a portion of an interlocutory decree of divorce entered upon default which failed to approve a property settlement agreement which plaintiff and defendant had executed, or to provide for payment to plaintiff of alimony and support, the plaintiff appeals.

Reversed and remanded for modification of decree.

Ray Sandler, of Los Angeles, for appellant.

Maurice Kosloff, pro se.

DESMOND, Presiding Judge.

Plaintiff appeals from that portion of an interlocutory decree of divorce, entered upon a default hearing, which, while awarding her a divorce, failed to approve a property settlement agreement which she and her husband had executed or to provide for payment to her of alimony and support. This appeal is not contested by respondent.

On August 6, 1942, plaintiff filed a separate maintenance action against defendant. Thereafter, and on the 10th day of August, 1942, the parties entered into a property settlement agreement wherein they agreed "to settle and adjust between themselves the provisions which shall be made for the support of First Party [plaintiff] and the minor children and to adjust, liquidate and forever settle between themselves all rights and claims of each as against the separate property of the other and as against the community property of both." It provided, among other things, that the defendant was to pay plaintiff "for her support and maintenance and for the term of her natural life" the sum of $100 a month, it being "specifically understood and agreed that the said sums provided to be paid by Second Party [defendant] to First Party shall be paid for the support and maintenance of First Party, and any and all obligations of Second Party to pay or contribute any sum or thing of value whatsoever to First Party for her support and maintenance shall be completely fulfilled by the payment of the sums herein provided to be paid. Provided, further, that in the event the marital relationship of the parties shall hereafter be terminated by divorce and in the event First Party shall thereafter contract another valid marriage, any and all obligation of Second Party to pay or contribute toward the support of First Party shall terminate upon the date of such remarriage." It further provided that the care and the custody of the two minor children was to be given to plaintiff and "Subject to the order of any court of competent jurisdiction, Second Party shall pay to First Party for the support and maintenance of the said minor children, the sum of Fifty Dollars ($50.00) per month for each child, or a total of One Hundred Dollars ($100.00) per month, payable upon the 1st day of each and every month thereafter." Here follow certain other provisions respecting an additional cash payment of $1,000 to plaintiff, attorney's fees, and the disposition of certain household furniture and furnishings and two automobiles. The agreement also contains the following provisions: "Ninth: The payments herein provided for shall be, and it is hereby expressly agreed that the same shall be accepted by First Party upon the following conditions: 1. In payment of Second Party's obligation to maintain and support First Party during her natural life. 2. In full payment, discharge and satisfaction of, and for all dower, and right of dower, of First Party in any and all property now, or heretofore owned, or which may hereafter be acquired by Second Party wherever situated. 3. In full payment, discharge and satisfaction of all right, title and interest, claims or demands of any and every character of First Party in or to any money, property, property right or thing of value now, or hereafter owned or acquired by Second Party. * * * Thirteenth: It is understood that in any legal action or proceeding relating to the marital status of the parties, this agreement will be introduced in evidence in such cause and that the terms and provisions hereof may be, and become a part of any decree or judgment which may be rendered by any court of competent jurisdiction in such action. * * * Sixteenth: The parties agree that they have made a careful study of the terms and provisions of this agreement for the purpose of insuring a final, definite, fair, just and equitable settlement between them which the parties hereto, after careful study and consideration, declare this agreement to be."

On the same day, namely, August 10, 1942, plaintiff filed an amended complaint for divorce on the ground of cruelty, alleging among other matters, that plaintiff "has no means or income with which and by which to prosecute this action, to defray the costs thereof or to maintain and support herself and said minor children"; and that defendant "is an able-bodied man and has financial means with and by which to provide support and maintenance for plaintiff and the said minor children. That plaintiff and defendant heretofore entered into an agreement in writing, a copy of which is hereto attached, and marked 'Exhibit A', and by this reference made a part hereof, which said agreement determines and settles mutual rights and obligations of the parties. That defendant is well able to pay and provide the sums therein agreed to be paid and provided." The prayer of the complaint sought, among other things, the custody of the two minor children, Ella Mae, age 15 years, and Jerry, age 13 years; the approval of the agreement; a judgment "in accordance with the terms and provisions of said agreement"; an order that defendant "pay to plaintiff the sums in said agreement provided to be paid"; and for "such other and further relief as the Court may deem meet and just in the premises."

All the material allegations of the complaint were proved by plaintiff and corroborated and the property settlement agreement was introduced and received in evidence. In addition to the testimony concerning defendant's acts of cruelty, the following took place during the trial:

"The Court: [Addressing plaintiff on the witness stand] Well, how much do you think it will cost to keep them [the two minor children of the parties] and maintain them? A. Well, I have been earning about $200.00 a month. I have been spending $200.00 a month on them.

"Q. How could you spend $200.00 a month on children of that age? A. I mean with the rent.

"Q. I am asking you about the children. That is all I am interested in right now. A. You mean about the food?

"Q. I cannot make it any plainer than I have made it. I have asked the question twice. I will just have to use my own discretion. Anything further? You want the custody of the children, I suppose? A. Yes, your Honor.

"Q. And what do you do for a living? A. I do not do anything. I just stay home and take care of the children; I have been ill.

"Q. By Mr. Sandler: Mrs. Kosloff, one or two more questions: You have been receiving pursuant to the property settlement, $200.00 a month? A. Yes, sir.

"Q. And do you know how the allowance of that $200.00 is divided up? A. Yes, and the children each get $50.00 and I get $100.00 for myself.

"Q. And does it take just about that $200.00 to support yourself and your children? A. Yes, sir, every bit of that. * * *

"The Court: * * * The plaintiff will take her decree and the custody of the two children, and as long as the parties have agreed on that amount I won't change it, although I think it is altogether too much for the support of two children of this age, but I will make the award for the support of the children, but I will split it up, because I never make an award in a lump sum for two or more children. So he will be ordered to pay $50.00 a month for each child. Now, do you want that to be paid to the court trustee or direct?

"Mr. Sandler: I think it would be all right to pay it direct, your Honor.

"The Court: In one payment a month?

"Mr. Sandler: The way the agreement reads, your Honor—

"The Court: I do not care how the agreement reads.

"Mr. Sandler: In one lump sum would be satisfactory.

"The Court: On what day?

"Mr. Sandler: On the 1st of the month.

"The Court: All right, then he will be ordered to pay $50.00 a month for the support of each one of the children, payable on the first of each month commencing April 1st, 1943. * * *"

The interlocutory decree of divorce which was signed by the trial judge awarded the custody of the minor children to the plaintiff and made provision for their support, but showed as cancelled the following paragraphs which were not adopted by the court:

"It is hereby further ordered, adjudged, and decreed that the Agreement of the parties entered into on or about the 10th day of August, 1942, be, and the same is, hereby approved, and defendant is ordered to make each and every payment, and do and perform each and every act therein provided;

"It is hereby further ordered, adjudged and decreed that defendant pay to plaintiff for her support and maintenance the sum of One Hundred Dollars ($100.00) on the 31st day of March, 1943, and a like sum of One Hundred Dollars ($100.00) upon the last day of each and every month thereafter during the natural life of the plaintiff; provided, however, that said payments may be terminated in the event plaintiff contracts another valid marriage.

"It is hereby ordered, adjudged and decreed that plaintiff be, and she is hereby awarded all of the household furniture and furnishings of the parties, now in the possession of the plaintiff, together with that certain 1937 Ford automobile to be henceforth her sole and separate property, and that defendant be, and he is, hereby awarded that certain 1937 Packard automobile to be henceforth his sole and separate property."

This decree was silent concerning the property settlement agreement, made no provision for the support of plaintiff, and made no disposition of any of the property, community or separate, belonging to the parties.

[1-5] In support of her appeal, plaintiff relies upon but one case, Makzoume v. Makzoume, 1942, 50 Cal.App.2d 229, 123 P.2d 72, 73. In that case, involving a factual situation almost identical with the case at bar, the plaintiff-wife appealed from a portion of the interlocutory decree which failed to confirm the property set-

tlement agreement and failed to award her any alimony. The action was one for divorce; the property settlement agreement was pleaded and received in evidence; and the wife prayed for support money for the minor child of the parties and alimony for herself. That case was heard before the same trial judge who heard the case at bar, and while the plaintiff was awarded the custody of the minor child and provision made for its maintenance, the court did not specifically mention the agreement nor did it make any provision for plaintiff's support. On appeal the portions of the decree appealed from were reversed and the cause was remnaded for modification. It is interesting to note that in that case, as here, there was a sufficient showing to entitle plaintiff to some award in the nature of alimony, there being "no showing to the contrary." Since the Makzoume case is available in our reports and since in our opinion it answers satisfactorily the questions involved in the present case, we do not quote from it at length, but the following extracts are pertinent and are adopted with our approval as governing the situation presented by this appeal:

"In all actions of this character the matter of awarding the innocent spouse alimony is left in the first instance to the discretion of the trial court. Sec. 137 of the Civ.Code. But this discretion is not arbitrary. '* * * it must be exercised along legal lines, taking into consideration the circumstances of the parties, their necessities, and the financial ability of the husband. * * * In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason,—all the circumstances before it being considered.' 1 Cal.Jur. 965. * * * The failure to approve or disapprove the settlement agreement leaves the issues of the litigation unsettled and in confusion. There is no rule requiring that the terms of such an agreement be adopted in the decree, but 'Unless the court specifically declares the agreement to be illegal and against public policy, the agreement stands and may be treated as an independent contract subject to such construction and judicial disposition as the terms, facts and circumstances warrant. Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826; Gummerson v. Gummerson, supra, 14 Cal.App. 2d 450, 58 P.2d 394; Armstrong v. Armstrong, supra, 132 Cal.App. 609, 23 P.2d 50. If the decree modifies or supersedes some provision of the agreement, one party may have concurrent remedies, but a defaulting party may be bound by both the decree and the agreement.' Robertson v. Robertson, 34 Cal.App.2d 113, 117, 93 P. 2d 175, 178.

"Herein lies the detriment to the appellant in the form of the decree appealed from. If the agreement had been approved by the trial court she would have the concurrent remedies of enforcing its terms, either by direct action on the contract, or by summary proceedings in the divorce action. The form of the decree entered does not determine this issue, which was properly presented and tried. By accepting the portion of the agreement relating to the custody and maintenance of the minor child, and the portion relating to attorney's fees, the judgment leaves the parties in doubt whether it was intended to adopt or reject the agreement. The rule applicable here is well stated in 33 C.J., at page 1102, et seq.: 'A judgment must be definitive. By this is meant that the decision itself must purport to decide finally the rights of the parties upon the issue submitted, by specifically denying or granting the remedy sought by the action. The converse of this proposition is also true, and every definitive determination of the rights of the parties in a proceeding before a competent tribunal is a judgment.'"

[6] Since the appellant in the instant case, by the terms of the agreement which she made with her husband, assumed the care of her two minor children, and since the court granted her their custody with the knowledge that she was not employed and, according to her complaint, was not possessed of "means or income with which * * * to maintain and support herself and said minor children," we would not consider unreasonable a monthly allowance of $200 for the support of the household, especially where the wife pointed out the necessity of paying rent from the funds provided and the property settlement agreement, which was admitted in evidence, showed the ability and obligation of the husband to pay that sum. If the trial court felt that the allowance of $50 per child was too much, he had power to order a smaller sum paid for the children's support and a larger amount for their mother. Instead, as we have seen, he allowed her nothing, nor did he make any order as to the disposition of the property of the parties.

The portion of the decree appealed from is reversed and the cause remanded for modification of the decree in accordance with the views herein expressed.

PARKER WOOD, J., and FOX, J. pro tem., concur.

67 Cal.App.2d 382

PEOPLE v. MILLER et al.

Cr. 3829.

District Court of Appeal, Second District, Division 3, California.

Dec. 21, 1944.

1. Gaming ⚷98(5)

Evidence supported conviction of occupying premises with books, papers, or paraphernalia to record bets on result of horse racing. Pen.Code, § 337a, subd. 2.

2. Criminal law ⚷452(1)

Police officer, who testified that he had investigated and arrested 300 or 400 persons for bookmaking and had testified in court as result of such investigations, and that he was familiar with manner in which bookmaking was being conducted in Los Angeles county, was competent to testify concerning interpretations of betting markers which were seized upon defendants being arrested on charge of occupying premises for purposes of recording bets on horse races. Pen.Code, § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Joseph F. Miller and Edgar L. Smith were convicted of violating section 337a, subd. 2, of Penal Code, making it an offense for any person to keep or occupy a room or inclosure with books, papers, or paraphernalia for purpose of recording bets upon the results of horse races, and they appeal.

Affirmed.

Henry C. Huntington, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

FOX, Justice pro tem.

Defendants appeal from a judgment of conviction for violating subdivision 2, section 337a, of the Penal Code, and from the order denying their motion for a new trial. Said subdivision makes it a crime for any person to keep or occupy a room or enclosure of any kind with books, papers or paraphernalia for the purpose of recording bets upon the results of horse races. A jury was waived, and by stipulation the cause was submitted to the trial judge upon the transcript of the testimony adduced at the preliminary examination and the exhibits introduced thereat.

The defendants are charged with having committed the offense in a garage located at 545 South Maple Avenue, in the city of Los Angeles, on September 29, 1943. Officer Boswell and a fellow officer had the premises and the defendants under observation for approximately two hours prior to the arrest of the defendants about 2:30 in the afternoon of said date. From time to time they saw defendants Smith and Miller walk out of the entrance of the garage and walk up and down the street. On one occasion Officer Boswell saw a man cross the street from a Union building that is almost directly opposite the garage, and approach defendant Miller. After a short conversation the man handed defendant Miller some money. On two other occasions when men came from the Union building the officers followed them to the door of the garage and "by peeking around this door" Officer Boswell observed two of these men hand defendant Smith some money. When the officers entered the garage they found three or four men sitting and standing around, looking at scratch sheets. When they walked in defendant Smith winked at these men and nodded. One of the men threw a scratch sheet under the sofa upon which he was sitting. The other men got up, laid their scratch sheets on the table and walked out. In three or four minutes a man by the name of Robins entered the place and asked defendant Miller, who was seated at a desk, "What was the name of that horse that paid 3.20 to win?" No reply appears to have been made to Robins. He then went over to the desk and started looking through a scratch sheet which was lying there. He said, "I think I'll bet on this horse." He pulled a wallet out of his hip pocket, turned around and looked in the direction of the open door. Defendant Smith was standing 12 or 14 feet away—directly outside the door. Robins then "got sort of a startled look on his face and started to walk out * * *." The officers stopped him and asked him his business in there. "He said he came in to try on a coat that he was making for Smith." He did not, however, explain why he did not have the coat with him. Neither of the defendants made any comment about the Robins incident or the statements which he made. There was an adding machine on a desk in the corner from which the officer took about two feet of tape which was introduced in evidence. He also recovered three scratch sheets at that time. The defendants were then arrested. There was also introduced in evidence an adding machine tape about three feet long, and a paper captioned Metropolitan Scratch Sheet, under date of September 27, 1943. These had been taken from this place the day before, at which time the officer saw and talked to defendant Smith. Before leaving the place the telephone rang and the officer answered the call. The party wanted to place a bet. The telephone rang several times after that but the officer was unable to get any more conversations.

The officer testified that the signs, symbols, figures and letters on the scratch sheets set forth racing information. They give, according to his testimony, "the name of the tracks and location, and the names of the horses that are running at various tracks, and the jockeys that are purported to ride the particular horse on that certain date, the possible condition of the track, and probable post time." The witness also gave an interpretation of the adding machine tapes. He said they were betting markers. He also pointed out that scratch sheets and betting markers are part of the paraphernalia commonly used by bookmakers.

Neither of the defendants took the witness stand or offered any evidence in their behalf.

[1] The defendants contend that the evidence is insufficient to establish: (a) That they kept or occupied the garage where they were arrested; and (b) that they kept or occupied the room with books, papers or paraphernalia for the purpose of recording or registering bets upon the results of horse races. Neither of these contentions is well founded for it cannot be said, as a matter of law, from the facts and circumstances herein recited and the inferences that the trial court could reasonably draw therefrom, that the implied finding of the trial court on each of these issues lacked sufficient evidentiary support.

[2] The final contention is that the testimony of Officer Boswell concerning the interpretations of the betting markers (Exhibits B and C) was inadmissible on the theory that no proper foundation therefor had been laid. This is based on the testimony of the officer that the code system used in this case was not one in general use in this vicinity. The officer testified he had investigated and arrested 300 or 400 persons for bookmaking and had testified in court as to the results of these investigations. He also testified he had made a study of, and was familiar with, the manner in which bookmaking is conducted in Los Angeles County; that he was familiar with the papers, books and paraphernalia, and with the signs, symbols, letters and figures used by bookmakers in this county. He showed his familiarity with several different codes and appeared to understand the code used in this case. The exhibits he used were taken from the garage in question and one was removed from the adding machine just before the arrest of defendants. We see no reason for holding that the officer's interpretation of the betting markers was not properly admissible in evidence. People v. Newman, 1944, 24 Cal.2d 168, 148 P.2d 4; People v. Onofrio, 1944, 65 Cal.App.2d 584, 151 P.2d 158.

The judgment and order are affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

67 Cal.App.2d 268

In re SCHNELL'S ESTATE.

BROWN v. SCHNELL et al.

Civ. 14663.

District Court of Appeal, Second District,
Division 1, California.
Dec. 13, 1944.

Husband and wife 🔑249, 273(1)

Where husband and wife were domiciled in California at time of husband's death, and realty had been acquired in New York after marriage, the proceeds of sale of such realty constituted community property, and hence were subject to statute providing that upon death of either spouse one-half of personalty wherever situated acquired after marriage while domiciled elsewhere, which would not have been separate property of either if acquired while domiciled in California, shall belong to surviving spouse. Probate Code, §§ 201.5, 228, 229.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

In the matter of the estate of August Schnell, deceased, wherein Ben H. Brown, as Public Administrator of the County of Los Angeles, and as the appointed administrator of the estate of Anna Schnell, deceased, filed a petition in the estate of August Schnell for an order to determine interest therein, which petition was contested by William Schnell and others, who were legatees under the will of August Schnell. From an adverse judgment, the petitioner appeals.

Reversed.

Catlin & Catlin, Frank D. Catlin, Henry W. Catlin, and William E. Woodroof, all of Los Angeles, for appellant.

Riccardi, Webster & Donahue, Leonard L. Riccardi, Wilton W. Webster, and William J. Donahue, all of Pasadena, for respondents and contestants.

YORK, Presiding Justice.

Ben H. Brown, as public administrator of the County of Los Angeles and the duly appointed administrator of the estate of Anna Schnell, deceased, filed his petition in the estate of August Schnell, predeceased husband of said Anna Schnell, for an order to determine interest therein, alleging that Anna Schnell was the surviving wife of August Schnell; that they had lived together as husband and wife for approximately fifty years; that all of the property in the possession of August Schnell at the time of his death was acquired during the married life of the parties and hence was community property.

Contestants are legatees under the last will of August Schnell, and by their opposition to the petition allege that the property left by August Schnell, deceased, was not community property but his sole and separate property.

The court found, in effect, that while the parties were married in 1893 and lived together as husband and wife until the death of August Schnell on December 1, 1942, that the estate of August Schnell "does not consist of community property, but on the contrary, consists of the separate property of the said decedent"; that it was not acquired during the married life of said parties; and "that the Estate of Anna Schnell is not entitled to any part of the property of said August Schnell, deceased." Anna Schnell died on December 7, 1942.

From a judgment or decree which was thereafter entered in accordance with the findings, the administrator of the estate of Anna Schnell, deceased, prosecutes this appeal, urging that (1) the direct evidence aided by legal presumptions discloses that all of the property of the estate of the husband was acquired during the married life of the parties; (2) the estate of Anna Schnell, Anna being the surviving widow of August, is entitled to one-half of all the property acquired during the married life of the said parties; (3) the material findings of fact do not conform to nor are they supported by the evidence, and therefore the judgment based thereon cannot be sustained.

Appellant also urges that the instant situation is governed by the provisions of section 201.5 of the Probate Code: "Upon the death of either husband or wife *one-half of all personal property,* wherever situated, heretofore or hereafter *acquired after* marriage by either husband or wife, or both, *while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, shall belong to the surviving spouse;* the other one-half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the debts of the decedent and to administration and disposal under the provisions of Division III of this code." (Emphasis added.)

Contestants concede that they "have no issue with the appellant with respect to the effect of Section 201.5 upon *personal property,* so long as it can be established that said personal property, wherever acquired, would not have been the separate property of either spouse if acquired while domiciled in the State of California, but do not concede that the proceeds from the sale of real property situated in a sister state, acquired after marriage, come within this classification."

August Schnell by his last will executed on May 14, 1930, declared in paragraph 3 thereof that "all property in which at date hereof I have any interest or which at this date stands in the name of myself or myself and wife is my separate property, except the homeplace which is the property of myself and wife in joint tenancy."

By subdivision (a) of paragraph 4 of the will, decedent left all his personal effects to his wife; by subdivision (b) of the same paragraph he left one-half of his remaining estate to his wife, "if she survive distribution thereof to her. If she dies prior thereto, then to her living heirs at law." After various bequests to relatives and friends, said testator by paragraph 5 of the will devised and bequeathed to his wife one-half of the residue of his estate, real and personal, "wherever situate including all lapsed and failed legacies * * * provided she survives distribution thereof to her. Any portion thereof not distributed to her prior to her decease shall go to her living heirs at law determined according to the laws of succession of the State of California then in force relating to separate estates."

At the hearing of the instant petition and the opposition thereto, testimony to the following effect was presented:

Anton Maier testified he had known August Schnell since 1913; that he met him in Los Angeles; that in 1918 or 1919 the Schnells moved to California, and that the witness and his wife and Mr. Schnell and his wife took many trips around the country and in 1928 took a trip to Europe together; that during the time he knew him, Mr. Schnell was "sort of retired already; but before that time he had a business, a coffee business, selling coffee and tea" in Brooklyn; that Mr. Schnell told the witness that "when he came to this country he worked as a coal miner, and after that he worked as a grocery clerk, and then he started in peddling groceries himself and after that he had different business"; that he did not have much money at that time; that just before he was married he peddled groceries and slept in a barn; that "he (Mr. Schnell) told me that he had made money in Brooklyn by coffee and tea, and besides he did some clipping of coupons and so forth and made money. And then he speculated a good deal on the stock exchange * * * After he was married."

On cross-examination, the witness testified that Mr. Schnell "told me he was hard up at certain times.

"Q. When was he hard up at certain times? A. Well, when he got married.

"Q. That is just your conclusion, isn't it? A. That is my conclusion. * * *

"Q. Was his wife ever present when you were discussing about his financial affairs? A. Oh, yes, many a time; many a time. * * *

"Q. Did he tell you how much he came to California with? A. Oh, he had quite a sum of money there when he came to California. I know he speculated on the stock exchange and he had the business in Brooklyn; had property there, and houses there.

"Q. He had three houses, as a matter of fact, back there, didn't he? A. Yes.

"Q. And sold them and got somewhere around $40,000 for the three of them, is that right? A. I don't know.

"Q. You don't know how much, but you know he sold three houses? A. Three houses, yes.

"Q. And he brought the money from the sale of those houses out here. A. That is right, yes."

Mrs. Wilhelmina Bunde testified that she met the Schnells in 1927; that they were friends visiting back and forth and taking trips together; that both Mr. and Mrs. Schnell mentioned the fact that they were going to celebrate their golden wedding anniversary in May, 1943. In answer to the question: "Did Mr. Schnell ever say what business he was in when he was married?", the witness replied: "Well, I think they started the coffee business after they were married. I don't know what he was in before.

"Q. Did he tell you this? A. Yes.

"Q. Where was the coffee business? A. In Brooklyn.

"Q. Do you know whether this wife, Anna, helped him in that business? A. Yes, she did.

"Q. What did she do, if anything? A. She was at the cash register. * * *

"The Court: This is what he told you? He told you she operated the cash register? A. Well, they both spoke of it together when he talked about it."

This witness also stated that Mr. Schnell told her he made most of his money in the coffee business. "He said, 'That is where we made our money.' * * * she said, 'When I sat at the cash register on Saturday and the money came rolling in, I thanked the Lord for the money.'

"Q. Did he ever state what if any property or money he had when he was married? A. No.

"Q. Did he ever say anything about what they had accumulated since marriage? A. No; he didn't mention that."

On cross-examination:

"Q. Did he ever tell you about having some real estate back there, Mrs. Bunde? A. Oh, yes.

"Q. And that it was sold? A. Well, I don't know about that.

"Q. You didn't know that it had been sold? A. No."

Martin Bunde, husband of the last witness, testified he had known the Schnells since 1927; that Mr. Schnell told him he made his money in the coffee business in Brooklyn and that his wife helped him. "I remember of him talking once when he said, 'I like a woman that can help me in my coffee business.' And he spoke of their working together. They had no children." In answer to the question: "Do you know whether or not he started the coffee business before or after he was married? Did he ever tell you?", the witness stated: "I think it was at the time that he was married * * * I don't recall a definite statement. But he was first a miner, and then he was a grocery clerk, and then I believe peddling groceries himself."

In the light of the above testimony regarding the acquisition of the deceased husband's property, it doubtless would have constituted community property had the Schnells been domiciled in California at the time such property was acquired, for it is clear that the husband had little or no property at the time of his marriage and also that his wife assisted him in accumulating the property thereafter acquired.

In re Estate of Perkins, 21 Cal.2d 561, 570, 134 P.2d 231, holds that sections 228 and 229 of the Probate Code apply to all property subject to probate proceedings in California, regardless of its prior status in a foreign jurisdiction; and that under these sections the personal estate of a decedent domiciled in California, which was acquired outside the state during the marital relationship, and in which a predeceased spouse had some interest, may be reclassified under the law of the domicile for succession purposes, whether or not the foreign ownership is substantially the same as the property would have had if acquired in California.

With respect to the interpretation of the terms of section 201.5 supra, there appears in 31 Cal.Law Review at page 334, a note to the following effect: "In 1935 the legislature added to the Probate Code, under the designation of section 201.5, a succession statute specifically covering the rights of the surviving spouse in personal property acquired while the parties were domiciled elsewhere, which would not have been separate property if acquired while domiciled in this state. Unlike the earlier legislation which had been held unconstitutional, this statute did not purport to stamp the property with a 'community' label. Furthermore, it did not undertake to provide for rights of succession in anyone other than the surviving spouse. It attempted no extraterritorial extension of the provisions of section 228 of the Probate Code, which, on the death of the surviving spouse, provides for the succession to what had been community property during the lives of the two spouses. Four justices of the supreme court, however, (In re Estate of Perkins, 21 Cal.2d 561, 134 P.2d 231, 239) were willing to overlook this omission and to reclassify the property according to California community property law categories. * * *"

In the dissenting opinion of Mr. Justice Traynor, In re Estate of Perkins, supra, is the following comment regarding section 201.5, Probate Code: "This section is based on the theory that succession to property acquired by a husband and wife before they were domiciled in this state should be subject to the rule governing the succession to property acquired by spouses domiciled here. It applies only in the case of a surviving spouse and does not extend to such cases as the present one involving heirs other than a surviving spouse. The Legislature was apparently not then ready to devise a provision comparable to section 201.5 that would apply to such situations."

Since the proceeds of the real property sold in New York constituted the community property of the husband and wife herein, it appears that such property was subject to the provisions of section 201.5 of the Probate Code, in view of the fact that both husband and wife were domiciled in California at the time of the husband's death. In re Estate of Perkins, supra.

For the reasons stated, the judgment appealed from is reversed.

DORAN and WHITE, JJ., concur.

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67 Cal.App.2d 400

DUNN et al. v. SANTA CRUZ COUNTY.

Civ. 12703.

District Court of Appeal, First District, Division 2, California.

Dec. 26, 1944.

1. Dedication 🔑44
Highways 🔑17

Evidence of use of road for many years by any person desiring to use it did not compel finding that it was a public road, but it might be considered with the other evidence on question whether owners intended to dedicate road to public use. St. 1935, p. 303, § 904.

2. Evidence 🔑23(1)

It is common knowledge that temporary detours are made over private roads in rural areas during reconstruction of public roads and that it is common practice to improve such private roads for such temporary use without any intention of accepting such roads as public roads. St. 1935, p. 303, § 904.

3. Action 🔑6

In action for declaration that road traversing private property was a public road, burden was on plaintiffs to prove affirmative allegations of their complaint. St.1935, p. 303, § 904.

4. Dedication 🔑44
Highways 🔑17

Evidence that road for many years had been used by any one caring to use it, that road was temporarily used for a detour during reconstruction of another road, and that certain work had been done thereon by county made case for trier of facts as to whether there had been a dedication by acceptance of road as a public road, and sustained finding that it was not a public road. St.1935, p. 303, § 904.

5. Dedication 🔑44

The intention to dedicate to public land for roadway must be clearly proved.

6. Dedication 🔑44

To prove dedication of a neighborhood or country roadway, much stronger evidence must be presented than is required in proof of such dedication of a street in a town or city.

◆

Appeal from Superior Court, Santa Cruz County; A. R. Cotton, Judge.

Action by J. E. Dunn and another against the County of Santa Cruz for a declaration that a certain road was a public road and for a judgment for damages for alleged failure of defendant county to replace a fill across a creek or gulch traversed by said road. Judgment for defendant, and plaintiffs appeal.

Affirmed.

John H. Leonard, of Santa Cruz, for appellants.

Stephen Wyckoff, District Attorney, of Santa Cruz, for respondent.

SPENCE, Justice.

Plaintiffs sought a declaration that a certain road was a public road and also sought a judgment for damages for the alleged failure of the defendant county to replace a fill across a creek or gulch which said road traversed. Defendant denied practically all material allegations of the complaint and the trial court found in favor of defendant. Plaintiffs appeal from the judgment entered upon the findings of the trial court.

Plaintiffs contend that several findings of the trial court are not sustained by the evidence. We will discuss, however, only the finding that this road was not a public road as plaintiffs concede that "all their rights are dependent upon this finding being declared erroneous."

The road in question was a small country road which ran for about one-half mile from the Soquel-San Jose road to plaintiffs' property. It was not a through road but it merely traversed the property of the owner of the land bordering on the Soquel-San Jose road and served plaintiffs and one other permanent resident. There was a gulch or creek-bed in close proximity to the Soquel-San Jose road which had been formerly crossed by means of a bridge, which bridge was later replaced by a fill. This fill was washed out during the heavy rains in February, 1941, and the defendant county refused the demand of plaintiffs that it repair or replace said fill. Thereupon, plaintiffs commenced this action.

Plaintiffs' claim that said road was a public road was not based upon any express dedication or upon any formal acceptance by the defendant county. Said claim was based solely upon a showing that for many years the road had been open and had been used by anyone who cared to use it; that the county had slightly reinforced the bridge across this gulch in 1926 at a time when it was planned to use said bridge temporarily for a detour during the reconstruction of the Soquel-San Jose road; and that in 1935 and 1936 certain P. W. A. crews had torn down the bridge and constructed a wooden culvert which was thereafter covered with a fill by the county road crew by the use of excess material from the work on the Soquel-San Jose road.

We need not pause to consider whether such showing would have sustained a finding that said road or any part thereof was a public road. We need only concern ourselves with the question of whether such showing compelled such finding.

[1, 2] The evidence of the use of this road for a number of years did not necessarily compel a finding that it was a public road. Streets and Highways Code, § 904, St.1935, p. 303. The most that can be said is that the evidence of such use might have been considered with other evidence on the question of whether the owners intended to dedicate the road to public use. Lantz v. City of Los Angeles, 185 Cal. 262, 268, 196 P. 481. But there was other evidence showing that plaintiffs and other owners and their predecessors had referred to the road in conveyances made or accepted by them as a "private road," which evidence tended to negative any intention on the part of said owners to dedicate said road to public use. Furthermore, the evidence of the slight reinforcement of the bridge in 1926 and of the covering of the culvert with a fill in 1936 did not necessarily show an acceptance by the county of any alleged dedication. It is a matter of common knowledge that temporary detours are made over private roads in rural areas during the reconstruction of public roads and that it is common practice to improve such private roads for such temporary use without any intention of accepting said roads as public roads. With respect to the fill, the evidence showed that this was made under agreement with the owner of the property which adjoined the Soquel-San Jose road in consideration of his granting a right of way along the Soquel-San Jose road.

[3-6] The burden was upon plaintiffs to prove the affirmative allegations of their complaint and we are satisfied that the trial court was entirely justified in concluding that plaintiffs had failed to sustain the burden of proving that there had been either a dedication or acceptance of the road as a public road. See Niles v. City of Los Angeles, 125 Cal. 572, 58 P. 190; DeMartini v. San Francisco, 107 Cal. 402, 40 P. 496; Lyons v. Schwartz, 40 Cal.App.2d 60, 104 P.2d 383. As was said in Lyons v. Schwartz, 40 Cal.App.2d at page 65, 104 P.2d at page 386, "The courts have consistently held that the intention to dedicate to the public land or a roadway must be proven clearly and unequivocally. When the dedication rests upon acts and conduct, the intent must clearly appear. Burk v. City of Santa Cruz, 163 Cal. 807, 127 P. 154. It is also necessary in order to prove the dedication of a neighborhood or country roadway that much stronger evidence be presented than is required in proof of such dedication of a street in a town or city. Quinn v. Anderson, 70 Cal. 454, 11 P. 746; Harding v. Jasper, 14 Cal. 642." As we view the evidence before us, the most that can be said is that the question of whether the road was a public road or a private way was a question of fact for the trial court and we are of the opinion that its finding that it was not a public road is amply sustained.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

67 Cal.App.2d 307

PEOPLE v. HARRIS.

Cr. 3800.

District Court of Appeal, Second District, Division 3, California.

Dec. 14, 1944.

1. Sodomy 🔑6

Evidence supported conviction of sex perversion. Pen.Code, § 288a.

2. Sodomy 🔑6

In prosecution for sex perversion, fact that in describing the offense the boy upon whom offense was allegedly committed used a singular noun where ordinarily plural form is used in naming certain part of body did not establish that evidence did not measure up to reasonable moral certainty required in order to sustain conviction. Pen.Code, § 288a.

3. Kidnapping 🔑5

Evidence that defendant induced 15 year old boy to enter automobile by oral threats and by causing boy to believe that he was a plain clothes policeman supported conviction of kidnapping.

4. Criminal law 🔑1121(1)

Defendant's assertion that there was some inherent improbability in testimony of prosecution witnesses presented nothing for review without specifying particulars.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Johnnie L. Harris was convicted of kidnapping and of violating section 288a of the Penal Code, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

DESMOND, Presiding Justice.

A jury found defendant guilty of kidnapping and of violating section 288a of the Penal Code of California. He appeals from the judgment "and from the whole thereof" upon the grounds that the evidence offered at his trial was insufficient to sustain a judgment of conviction and that the verdicts rendered by the jury were contrary to law and the evidence.

Examining the transcript, we find that an attempt was made by appellant to establish an alibi which would be sufficient to protect him from adverse verdicts on the offenses which, according to the complaining witness, were committed between 8 and 10 o'clock of the night of August 31, 1943. He was unsuccessful in that attempt, the jury preferring to accept the testimony of the complaining witness, a boy of fifteen years named Henry, and his companion, William, of the same age. It appears from their testimony that they were employed by a catering company in the southern part of Los Angeles, and on the night in question, shortly after 8 o'clock, quitting time, they started to walk north on the west side of Central Avenue. When they arrived near 51st or 52nd Street they were hailed by the appellant, who was seated in an automobile on the opposite side of Central Avenue. Both boys described the automobile to the jury as a "four door gray sedan," Henry later saying that "It was a grayish, real light brown. It looked more like a grayish color, a light tan." Upon rebuttal he testified that he recognized a car viewed by him in a parking lot during the trial, following testimony of appellant's sister, Mrs. Murphy, as the same car he was in with the defendant on August 31, 1943. A photograph of this car was introduced in evidence showing it to be a two-door automobile. Mrs. Murphy had testified that it was her automobile, describing it to the jury as a 1937 Pontiac two-door sedan, dark gray in color and carrying license number 67B591. This is the same number which William swore he copied on a piece of newspaper from the license tag of the car in which he saw appellant drive Henry away. He further testified that he showed that number to the police officer and that he saw appellant at the Newton Street police station about two hours later.

Henry testified that in the back of the car in which he was taken away he saw a red pocket handkerchief and a light socket, both of which articles were introduced in evidence. They were later identified by Mrs. Murphy as belonging to her. Toward the close of the trial Henry was asked to explain why he testified that he thought there were four doors on the automobile, and answered: "Because it is a long sedan, and I was riding in the front seat, and there was as much room in the back seat as there was in the front seat, but I never did get out of the back door, and I figured it to be a two door sedan. Q. You mean a four door sedan? A. I mean a four door sedan." This explanation apparently was accepted by the jury as satisfactory, possibly because of the further statement of Henry under cross-examination that he did not open any door to leave the car and got in the back seat when ordered there by the appellant, but "crawled over the seat, over the front back of the seat," meaning undoubtedly over the back of the front seat. The jurors, being satisfied that Mrs. Murphy's two-door automobile was the one in which Henry was taken away, were then in position to determine whether his account of what occurred that night was worthy of credence.

As to the kidnapping charge, Henry's story was corroborated by William, no material variances appearing in the testimony of the two boys. This was to the effect that the defendant represented that he was sent by Smoot Smith, sheriff of Dallas County in Texas, to get a boy named Freddy Brooks, saying, according to William, "And I am going to take you boys down," and "I asked him then if he had any identification to show that he was an officer, and he said, 'Never mind,' that we must go and get in the car, and he got Henry's pocket book there and gave it back to him, and I started walking away from the car and he said, 'If you don't want a damned broken leg you had better come back here, boy,' and I walked back to the car and he said he had a picture, and he said he was going to see if it was one of you all, and I asked him to show us the picture if he had it, and he said no, that his friend had it, and when he said that he said, 'I am going to take Henry and leave you here, Turner,' and he says, 'I will bring him right on home, you go and get in bed and I will bring him home, or either send him home,' and I said, 'O.K.,' and when he got in the car I saw he did, he went over there, and I said that he might be a police officer, and he got in the car, and he opened the door there, and I asked Henry for seven cents for car fare, and when the car pulled away I got his car license, and I got his license number, and walked down seven blocks on Central Avenue and I called the officers, the first one of the officers there. * * * He [appellant] asked Henry where did he live in Dallas, and he said that he lived in East Dallas, on Spring avenue." According to Henry appellant then said: "'Well, * * * Henry, I had better take you down.' He said, 'William, I will let you go, you look like a pretty good boy,' and he said, 'If you are not the one,' he said, 'I will bring you home or see you get back home.' I thought that he was a plain clothes police officer, and I was kind of afraid. * * * Then I got in the car."

[1] Henry then told the jury that appellant drove with him in a southerly direction to the neighborhood of the Goodyear plant, where he stopped on a dark street and directed him to get in the back seat. "He said, 'You get in that back seat,' and I said, 'I am not going in the back seat,' and I thought maybe that he had a weapon of some kind, and I didn't want him to hurt me." Then followed in complete detail the boy's recital of the manner in which he was mistreated by appellant, constituting to anyone who reads the record a violation by defendant of section 288a of the Penal Code.

[2] Some point is made by appellant's counsel of the fact that in describing the offense the boy used a singular noun where ordinarily the plural form is used in naming a certain part of the body, and argues on the basis of People v. Angier, 1941, 44 Cal.App.2d 417, 112 P.2d 659, that "such evidence does not measure up to that approach to reasonable moral certainty which the law requires in order to convict a man upon this charge." We have read the Angier case and find that it reverses a conviction of violating section 288a, the testimony of two children, aged seven and five, being couched in such artificial, childhood language concerning parts of the human anatomy and of the acts of the defendant that it could not be said that, beyond a reasonable doubt, the offense charged had been committed. But in the instant case no such uncertainty arises, the fifteen year old com-

plaining witness being explicit in every detail.

[3] While appellant makes no argument and cites no authority in support of the claim that his conviction of the crime of kidnapping is unsupported by the evidence, we feel that such claim is effectually refuted by the recent case of People v. Brazil, 1942, 53 Cal.App.2d 596, 128 P.2d 204. There, a gun was exhibited and the complaining witness was told to get into the automobile because the defendant was going to take her to the police station. While no gun was displayed in the instant case, the orders of the defendant were carried out under fear induced by oral threats. Henry testified, when asked whether he got into the car willingly: "Well, he threatened my friend and I thought that he was a plain clothes police, and so I got in the car to keep from having any trouble, because I didn't want to get in any trouble with no police."

[4] Appellant asserts that there was some inherent improbability in the testimony of the prosecution witnesses, but in what particular he does not specify and we cannot see any basis for the assertion, under the rule and authorities quoted in People v. Meyers, 1943, 62 Cal.App.2d 24, 144 P.2d 60.

The judgments are affirmed.

SHINN, PARKER WOOD, JJ., concur.

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67 Cal.App.2d 341

DIGGS v. EL ROYALE CORPORATION et al.

Civ. 14666.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1944.

Hearing Denied Feb. 15, 1945.

Vendor and purchaser 🔑18(4)

An apartment building owner's mailed letter, notifying building manager that owner intended to cancel management agreement and that manager's option to purchase building ceased on posting of such notice, as provided in option agreement, terminated such agreement, as word "posting" therein meant to place in mail.

See Words and Phrases, Permanent Edition, for all other definitions of "Posting".

W. J. WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by Jackson Diggs against the El Royale Corporation and another for a declaratory judgment that plaintiff's option to purchase named defendant's apartment building was not revoked. Judgment for defendants, and plaintiff appeals.

Reversed.

George Acret, of Los Angeles, for appellant.

Martin Goldman, of Los Angeles, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before the court without a jury in a declaratory relief action to have an option declared unrevoked, plaintiff appeals.

The essential facts are these:

On April 15, 1943, plaintiff and defendant El Royale Corporation entered into an option agreement whereby plaintiff was given the sole and exclusive right and option to purchase upon certain terms the El Royale Apartments owned by defendant corporation. This agreement contained among others the following provision:

"This option may be exercised only by written instrument signed by the Optionee or his heirs, executors, administrators or assigns, and delivered to an officer of El Royale Corporation, or to Martin Goldman, attorney for said Corporation, personally, or deposited in the United States mail by registered letter, postage prepaid, addressed to Martin Goldman, Attorney, 9000 Sunset Boulevard, Los Angeles, California, on or before the 1st day of May, 1944, provided, however, that the Management Agreement under date of 15th April, 1943, entered into between the El Royale Corporation and Jackson Diggs, whereby said Jackson Diggs is employed by the El Royale Corporation as exclusive agent to rent and manage the El Royale Apartments, shall not have theretofore been cancelled, it being the understanding of the parties hereto that the within option shall cease and determine upon the posting of written notice of intention to cancel the aforesaid Management Agreement by the El Royale Corporation, and that all rights of said Jackson Diggs, or his assigns, under this option shall cease upon the date of the posting of the aforesaid notice."

"* * * The consideration for this option is the exercise by the parties hereto of the Management Agreement hereinabove referred to."

On the same day they entered into a management agreement concerning El Royale Apartments which contained among others this provision.

"This agreement between parties may be cancelled at any time by either party upon thirty days (30 days) written notice of such intention. In event that Owner elects to cancel under this provision, from the time of posting of said notice all authority and powers of the Agent shall be subject to control by Owner and shall be exercised only with the approval of Fred E. Keeler, II, representing the Owner.

"2. The Agent Agrees:

"(A) To accept and does hereby accept the management of the said premises for the period and upon the terms herein provided, and agrees to furnish adequate and competent services necessary for the renting, operating and managing of said premises."

On August 7, 1943, plaintiff received through the mail a letter from defendant corporation reading thus:

"August 6, 1944

"Mr. Jackson Diggs
"c/o El Royale Apartments
"450 No. Rossmore
"Los Angeles, California

"Dear Sir:

"This is to advise you that the El Royale Corporation does hereby notify you that it is their intention to cancel the Management Agreement between yourself and the El Royale Corporation respecting the El Royale Apartments, and you are further notified that in accordance with the terms of the Option Agreement executed in connection with the said Management Agreement, said Option does, by the posting of this notice, cease and determine, and that all of your rights, or the rights of your assigns, under this option do, by the posting of this notice, thereby cease.

"Very truly yours,
"El Royale Corporation
"MG/rb By Martin Goldman
"Attorney for El Royale Corp."

This is the sole question necessary for us to determine:

Was the option agreement terminated on August 7, 1943, by the letter from defendant corporation to plaintiff dated August 6, 1943, set forth supra?

This question must be answered in the affirmative. The agreement expressly provided that the "option shall cease and determine upon the posting of written notice of intention to cancel the aforesaid Management Agreement" by defendant corporation "and that all rights of" plaintiff "or his assigns, under this option shall cease upon the date of the posting of the aforesaid notice."

It is conceded that on August 7, 1943, plaintiff received from defendant corporation a letter through the mail reading in part as follows: "that it is" defendant corporation's "intention to cancel the Management Agreement between" plaintiff and defendant corporation respecting the El Royale Apartments, and plaintiff was notified "that in accordance with the terms of the Option Agreement, executed in connection with the said Management Agreement, said Option does, by the posting of this notice, cease and determine, and all of your rights, or the rights of your assigns, under this option do, by the posting of this notice, thereby cease."

The foregoing notice meets the exact requirements of the provision of the option contract for its termination. There is not any ambiguity in the contract and there is not any basis for a different and other construction for this provision of the agreement.

"Posting" means to place in the post office or in a letter box.

2 Webster's New International Dictionary, Second Edition, (1939) Page 1927, defines "post" as follows:

"To dispatch by the post or mail; to place in the post office or mail box for transmittal; to mail; as, to *post* a letter."

VII Oxford English Dictionary, (1933), Page 1163, III–6b, defines "post" thus:

"To send through the post office; to put (a letter, etc.) into a post office or letter-box for transmission by the post."

Funk & Wagnalls Practical Standard Dictionary, (1938), Page 886, gives this definition of "post."

"To place in the post-office or in a letter-box."

Allen's Synonyms and Antonyms (1938), Page 300, defines "post" as "mail."

In view of the foregoing definitions, there can be no question that the word "posting" as used in the option agreement meant to place in the mail. This, it is conceded, defendant corporation did with its letter of August 6, 1943.

The various authorities cited by plaintiff are factually distinguishable from the present case. None of them are in point and it will serve no useful purpose to discuss them here. A mere reading of such cases as Penn v. Dyba, 115 Cal.App. 67, 1 P.2d 461, and Kramer v. Sanguinetti, 33 Cal.App.2d 303, 91 P.2d 604, show that they are inapplicable to the facts in the present case.

In view of our conclusions it is unnecessary for us to consider other points urged by plaintiff.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

W. J. WOOD, Justice (dissenting).

I dissent. The instrument executed by the parties on April 15, 1943, gave to plaintiff for a valuable consideration an option to purchase the property involved for the sum of $500,000 on or before May 1, 1944. The parties concurrently executed a management agreement giving plaintiff the management of the property, which was subject to cancellation by defendant on thirty days notice. The option agreement is of considerable length and is printed on eight pages of the appendix to plaintiff's brief. On the fifth page there appears the statement that the "option may be exercised * * * on or before May 1, 1944, provided, however, that the Management Agreement * * * shall not have theretofore been cancelled, it being the understanding of the parties hereto that the within option shall cease and determine upon the posting of written notice of intention to cancel the aforesaid Management Agreement. * * *" This language was placed in the instrument by defendant's attorney. Plaintiff, who is not a lawyer, did not obtain legal advice.

An option relating to the sale and purchase of real estate is a contract by which the owner of property gives to another the exclusive right to purchase the property at a stipulated price and within a specified period. When given for a valuable consideration, as in the present case, the owner may not cancel the optionee's right to purchase during the period specified in the contract. 25 Cal.Jur. 506; Reese Co. v. House, 162 Cal. 740, 124 P. 442. If an instrument purporting to confer an option is cancellable at any time by the owner it lacks an essential element of an option. It is in effect merely an offer to sell which can be withdrawn at any time before the offer is accepted. A purported option which gives the owner the right to cancel at any time permits him to eliminate the purported optionee upon the appearance of a prospective purchaser. It is claimed by plaintiff that such a purchaser appeared in the present case, whereupon notice of intention to cancel was posted, resulting, according to defendant's claims, in the termination of plaintiff's rights. Defendant conveyed the property to a third party within 30 days from the posting of notice to plaintiff.

When two or more contracts are made at the same time relating to the same matters between the same parties and are parts of one transaction they are to be construed together. Civil Code, § 1642. It is manifest from a reading of the option agreement and the management agreement that it was the intention of the parties that plaintiff should have a real option to purchase. The agreements did not constitute a mere offer to sell, revocable at any time before acceptance. This view is supported by several well established rules of construction, which, in my opinion, are applicable to the case and which compel a reversal of the judgment. A contract must be so interpreted as to give effect to the intention of the parties. If the terms of a promise are in any respect uncertain the contract must be interpreted in the sense in which the promisor believed at the time of making it that the promisee understood it. Particular clauses of a contract are subordinate to its general intent. Civil Code, §§ 1649, 1650. Repugnant clauses in a contract are subordinate to the general intent and purpose of the whole contract. Words in a contract which are wholly inconsistent with the main intention of the parties are to be rejected. In cases of uncertainty the language in a contract should be interpreted most strongly against the party who caused the uncertainty to exist. Civil Code, §§ 1652, 1653, 1654. The conclusion is inescapable that the language beginning with the expression, "it being the understanding of the parties", is repugnant to the general intent of the whole contract; that the officers of defendant corporation believed at the time of the making of the contract that plaintiff understood he was to have an option cancellable on thirty days notice. The language in question was inserted by defendant's counsel and should be interpreted most strongly against defendant. In my opinion the contract of the parties should be given the construction that in accordance with the intent of the parties defendant gave to plaintiff a real and effective option to purchase the property and did not give merely a revocable offer to sell. Defendant should not be allowed to escape its obligation.

The judgment should be reversed.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

67 Cal.App.2d 415

DAVIS v. STEWART.

Civ. 12733.

District Court of Appeal, First District
Division 2, California.

Dec. 28, 1944.

Hearing Denied Feb. 19, 1945.

1. Landlord and tenant 🔑125(1)

In absence of express covenant binding him so to do, landlord is under no obligation to put demised premises in any particular condition.

2. Mortgages 🔑611

Where deed conveying land to defendant was declared a mortgage and defendant surrendered possession of premises, in action to recover for rent from the premises not collected by defendant, defense that premises rented were not suitable for purpose of the tenant, and that such premises were not occupied continuously, was not available where character of premises was not changed and there was evidence that there was at least some occupancy at all times.

3. Appeal and error 🔑1010(1)

Trial court's finding of fact cannot be disturbed on appeal, if supported by evidence.

4. Mortgages 🔑617

Where deed conveying premises to defendant was held a mortgage and defendant surrendered possession of the premises, in action for accounting of rents, evidence justified a judgment against defendant for uncollected rentals on the ground that he failed to exercise the care of a reasonably prudent man in attempting to effect collection.

5. Judgment 🔑720

Where deed conveying premises to defendant was declared a mortgage and defendant surrendered possession and plaintiff brought an action for accounting, attempt of defendant to try again the issues which were tried on a first trial was unavailing under the doctrine of res judicata. Civ.Code, § 1479.

6. Appeal and error 🔑760(1)

Where appellant did not set forth in his brief any part of record supporting assertion of error respecting application of payments to principal instead of to interest, contention could not be considered on appeal.

7. Appeal and error 🔑1201(6)

Where all demands which were fully matured at the time prior action was commenced were completely adjudicated, and there was nothing left for further judicial action, judgment rendered therein was final, and plaintiff was authorized after remittitur to file a supplemental complaint presenting demands accrued subsequent to issues pleaded in original complaint.

8. Judgment 🔑721

A judgment in a prior action which was affirmed on appeal is res judicata as to the costs incurred by the parties prior to its rendition.

9. Costs 🔑209

Where defendant did not timely attack cost bill, filed by plaintiff who prevailed in action, allowance of such costs was res judicata. Code Civ.Proc. §§ 1033, 1034.

10. Appeal and error 🔑792

Notice of appeal not filed within 60 days from date of entry of judgment was required to be dismissed by District Court of Appeal at its own motion. Code Civ. Proc. § 939.

◆

Appeal from Superior Court, Marin County; Benjamin C. Jones, Judge.

Action by Alice Maud Davis against A. L. Stewart for a final accounting. From a judgment for plaintiff, defendant appeals.

Affirmed.

Leander L. James and Charles D. Sooy, both of San Francisco, for appellant.

Martinelli & Gardiner, of San Rafael, for respondent.

STURTEVANT, Justice.

This is the third appeal in the above entitled action. Davis v. Stewart, 31 Cal. App.2d 574, 88 P.2d 734; Davis v. Stewart, 53 Cal.App.2d 439, 127 P.2d 1014. The facts are fully set forth in those decisions. After the remittitur went down in the case last mentioned, and on or about October 1, 1942, the defendant surrendered possession of the premises in dispute. Later the plaintiff filed a supplemental complaint asking for a final accounting of defendant's stewardship from February 29, 1940 to October 1, 1942.

[1-3] The plaintiff alleged and introduced proof to the effect that the defendant so negligently and carelessly operated said premises that he has failed to collect the rentals due therefrom. The trial court made findings on said issues in favor of the plaintiff as to rentals due from three several tenants.

The Graham Lumber Company, one of the tenants so in arrears, held a lease to one parcel. It was used by said company for a lumber yard. Immediately adjacent to that parcel is an unimproved tract about 100 ft. square. Under an oral agreement the Graham Lumber Company occupied the additional ground as an over-flow lumber yard during a period of three months and paid $25 per month. At the end of that period it continued to occupy said lot but for the extended period defendant did not collect any rents from such tenant. Nor did the defendant attempt to evict said tenant. There is no evidence said oral agreement was ever cancelled. He now asserts that the ground was low, overflowed tidewater lands not suitable for a lumber yard. It does not appear that the ground was otherwise when said tenant entered thereon. In the absence of an express covenant or stipulation binding him so to do, the landlord is under no obligation to put the demised premises in any particular condition. (15 Cal.Jur. 690). Again the defendant contends said lot was not occupied continuously. It is enough to say that there was evidence that there was at least some occupancy at all times and the finding to that effect may not be disturbed.

[4] The other two tenants held leases, occupied parts of the premises, and paid the rentals set forth in their leases into a fund in a reputable bank for the benefit of the legal owner. As Mr. Davis was asserting rights to said moneys and Mr. Stewart was making cross demands, the other two tenants filed interpleader suits. The defendant made no attempt to bring said actions to trial. As to each of the three tenants the most that can be said is that there was some conflict in the evidence but there was evidence of the want of care of a reasonably prudent business man. The defendant was therefore liable for the uncollected rentals. Murdock v. Clarke, 90 Cal. 427, 439, 27 P. 275.

[5, 6] Basing his contention on the claim that said judgment was interlocutory the defendant asserts that the trial court erred in applying certain payments to payments of principal instead of applying said payments on interest which had accrued. Civil Code, section 1479. To that contention there are two replies. The contention is an attempt to try again the issues which were tried on the first trial. The defendant had no right to do so. The judgment dated March 31, 1941, had become res judicata. Carpenter v. Pacific Mut. Life Ins. Co., 13 Cal.2d 306, 315, 89 P.2d 637. In the second place appellant does not in his brief set forth any part of the record showing any facts supporting his assertion. The record shows that at one time the defendant produced what he claimed to be a correct statement of the account as he claimed the facts warranted. That statement was not copied by the reporter. The exhibits were not brought up. There is nothing in the record showing how payments were applied by the trial court in framing the said judgment dated March 31, 1941. Nor is there a claim that during the last trial the trial court erred in not following the rule stated in section 1479 of the Civil Code.

[7] As stated above the defendant contends that the judgment of March 31, 1941, that is the judgment before the court in Davis v. Stewart, 53 Cal.App.2d 439, 127 P.2d 1014, was final in part only and was interlocutory in so far as it purported to settle the account pleaded at that time. We find no merit in that contention. It involved contracts which clearly presented many severable demands. All demands which were fully matured at the time said action was commenced were completely adjudicated. By the terms of said record at that time nothing was left for further judicial action. It was therefore a final judgment. Gunder v. Gunder, 208 Cal. 559, 282 P. 794. After the remittitur went down the plaintiff filed a supplemental complaint presenting demands that accrued subsequent to the issues pleaded in the original complaint. That she had the right to do. Higgins v. San Diego Savings Bank, 129 Cal. 184, 61 P. 943; 1 C.J.S., Actions, § 103, p. 1323. Prior to the filing of the supplemental complaint it could not be said that there were or would be further issues to be tried in said action. Under the foregoing circumstances we think the record does not show that the judgment dated March 31, 1941, was interlocutory in whole or in part.

[8] The defendant claims he should have been credited with his costs on the first appeal. Davis v. Stewart, 31 Cal.App.2d 574, 88 P.2d 734. He admits said costs were not included in the judgment dated March 31, 1941, but he now seeks to have said costs included in his expenses. But the judgment last mentioned purported to cover the accounts down to and including February 29, 1940. The first decision was rendered March 31, 1939. When defendant's cost bill was filed, and what it contained, is not shown except by an "Appendix" set forth at the end of defendant's brief. It sets forth a statement which does not purport to be a copy of any part of the record. In the brief it is also stated that "The trial court denied defendant the right to introduce this statement and ordered it stricken out." No reference is made to any part of the record. The plaintiff replies that the later judgment dated March 31, 1941, covered or should have covered all expenditures prior to that date. Continuing she asserts that said judgment is res judicata as to such expenditures. Scrimsher v. Reliance Rock Co., 1 Cal.App.2d 382, 393, 36 P.2d 688. That reply we think is sound.

[9] The defendant objects to rulings allowing the plaintiff costs. Finding No. 11 is as follows: "That upon the 3rd day of April, 1941, and within three days after the entry of the judgment and decree entered herein upon the 1st day of April, 1941, plaintiff filed herein her cost bill upon the trial pursuant to which said judgment was entered, and in and by said cost bill claimed costs in the sum of $239.75; that no motion was made to tax said costs or to strike said bill or any portion thereof from the files; that upon the 1st day of October, 1942, plaintiff (respondent on appeal from said judgment) filed herein her cost bill on appeal and therein claimed costs on appeal in the sum of $355.18; that no motion to tax said costs or to strike from the files any portion of said cost bill on appeal was made herein at any time." Then in finding No. III the trial court found among outlays to be repaid to the plaintiff, "Cost bill filed by plaintiff 4/3/41 $239.75 Cost bill on appeal filed 10/1/42 $355.18." The defendant objects to both allowances but he does not state any specific grounds nor cite any authority. The plaintiff states: "Plaintiff filed this cost bill within five days after the entry of the judgment of March 31, 1941. If defendant was dissatisfied with the costs claimed, the law allowed him five days within which to express his dissatisfaction and move to have the costs taxed. Code Civ.Proc. Sec. 1033. He did not do so. Nor did he question the cost bill on his appeal from the said judgment of March 31, 1941. Two years after the entry of said judgment and almost a year after its affirmance on appeal, the defendant asked the court in the present action to tax the said costs. The trial court soundly refused to disturb the cost bill for the obvious reason that the matter, like other matters urged by appellant, was res judicata." The bill filed October 1, 1942 was for costs in favor of the party prevailing on appeal. No timely attack was made on it. The present attack comes too late. Code Civ.Proc. Sec. 1034.

[10] On August 5, 1943 the defendant served and filed two notices of appeal. Both purported to be taken from the judgment entered June 8, 1943. The second also purported to be a notice of appeal from the judgment entered March 31, 1941. The last attempt to appeal from that judg-

ment was not made within sixty days from the date of the entry of said judgment and was therefore ineffective, Code Civ.Proc. Sec. 939. As the facts appear in the record it is the duty of this court to dismiss said appeal of its own motion. (2 Cal.Jur. 396, Appeal & Error, Sec. 165). It is so ordered. The appeal from the judgment dated June 8, 1943 is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

Hearing denied; SCHAUER, J., dissenting; SPENCE, J., not participating.

67 Cal.App.2d 425

PEOPLE v. ABRAHAM.

Cr. 3834.

District Court of Appeal, Second District, Division 3. California.

Dec. 29, 1944.

1. Gaming 🔑75(1)

A violation of statute making it crime to occupy building with paraphernalia for purpose of recording bets on horse races is complete when it is shown that accused occupies place with papers and paraphernalia for purpose of recording bets on horse races. Pen.Code, § 337a, subd. 2.

2. Gaming 🔑93(5)

Under statute making it an offense to occupy place with papers and paraphernalia for purpose of recording bets on horse races, the purpose for which place or room was being occupied need not be established by direct evidence, but may be gathered from surrounding circumstances shown by evidence. Pen.Code, § 337a, subd. 2.

3. Criminal law 🔑260(11)

If circumstances shown in evidence reasonably justify finding of violation of statute making it offense to occupy place with papers and paraphernalia for purpose of recording bets on horse races, a reviewing court is not warranted in disturbing the finding. Pen. Code, § 337a, subd. 2.

4. Gaming 🔑98(5)

Evidence was sufficient to sustain conviction for occupying place with papers and paraphernalia for purpose of recording bets on horse races. Pen.Code § 337a, subd. 2.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Michael Abraham was convicted of occupying a place with papers and paraphernalia for purpose of recording bets on horse races, and he appeals.

Affirmed.

Pearlson & Singer, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Carl S. Kegley, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant appeals from a judgment of conviction of the crime of violation of Section 337a, subdivision 2, of the Penal Code. According to the provisions of that section and subdivision, it is a crime for any person to keep or occupy any building with books, papers or paraphernalia for the purpose of recording bets upon the results of horse races. Trial by jury was waived, and by stipulation the cause was submitted to the trial judge upon the reporter's transcript of the preliminary examination. Defendant contends that the evidence was insufficient to support the judgment.

A police officer testified that on January 11, 1944, he and another police officer observed defendant for approximately 10 minutes before they arrested him; that during that time defendant and three other men were in a service station building; that during a part of that time the officers were standing by the sidewalk about 30 feet from the building, and during a part of that time they were 3 or 4 feet from the building; that the building was about 16 feet square, and the walls thereof, except the lower 3 feet, consisted principally of glass; that the men who were in the station with defendant would look, at various times, at a scratch sheet and racing forms, and then have a conversation with defendant who was sitting at a desk; that on one occasion one of the men, after looking at a scratch sheet, handed some currency to defendant, and thereupon the defendant made a notation on a piece of white paper; that defendant answered the telephone and while he had the telephone receiver to his ear he made notations on a pad of paper; that the officers entered their automobile which was parked at the curb and drove to the station door, left the automobile and went immediately into the station building; that when they entered the building the defendant had a pad of paper in his hand, and they took the pad of paper from him. That pad of paper, and some loose sheets of paper with writing thereon, were received in evidence as exhibit A. He testified further that they took 2 Metropolitan scratch sheets, 2 National scratch sheets, and 2 racing forms, which were on the desk and which were dated January 11, 1944. Those papers were received in evidence as exhibit B. He testified further that they arrested defendant, searched him and he had $365 in his pocket; that he (witness) had made a study of bookmaking as it is conducted in Los Angeles County, had investigated at least 400 bookmaking cases, and had testified in court in bookmaking cases at least 300 times; that he compared the names which were on exhibit A with the names on exhibit B and found that the names appearing on exhibit A also appeared on exhibit B as the names of horses running in the races on January 11, 1944; that the writing and figures on the exhibits related to horse races; that he (witness) answered the telephone in that building and a man asked for the result of a certain race; that he answered the telephone again and a lady said, "Hello, Mike," and he said, "Mike has gone across the street to get some cigarets," and she said, "This is Mrs. Cameron. I want $1.00 across on 'Which Ace'"; that he checked exhibit A to see if the name, "Mrs. Cameron," was on one of the sheets of paper therein as a bettor, and he found that it was; that he had known the defendant for some time before he went into the building, and when he went in he said, "Hello Mike," and defendant said, "Hello, Ginder [the name of the witness]"; that he (witness) said, "How long have you been here?" and defendant said, "A little over a year"; that the witness said, "How about the other fellows?" and defendant said, "They have nothing to do with this. They have nothing to do with the bookmaking or the business, it is my place."

The defendant did not testify and did not offer any evidence.

[1-3] A violation of section 337a, subdivision 2, is complete when it is shown that the accused occupied a place with papers and paraphernalia for the purpose of recording bets on horse races. "[T]he purpose for which the place or room was being used and occupied need not be established by direct evidence, but may be gathered from all the surrounding circumstances shown by the evidence." People v. Barnhart, Cal.App., 1944, 153 P.2d 214, 218. "If the circumstances shown in evidence reasonably justify the finding of guilt by the trial court, a reviewing court is not warranted in disturbing the finding." Ibid.

[4] The evidence was legally sufficient to support the judgment.

The judgment is affirmed.

DESMOND, P. J., and FOX, Justice pro tem., concur.

67 Cal.App.2d 386

NEWMAN v. FIREMEN'S INS. CO. OF NEWARK, N. J.

Civ. 14246.

District Court of Appeal, Second District, Division 1, California.

Dec. 22, 1944.

Hearing Denied Feb. 19, 1945.

1. Insurance ⟹**665(3)**

In action on fire policy, evidence was insufficient to support defense that defendant canceled previous policy issued to plaintiff and notified him that no further insurance would be granted him by defendant. St.1935, p. 505, §§ 330, 332; § 333, subds. 1, 2; §§ 334, 335(a).

2. Insurance ⟹**665(3)**

In action on fire policy evidence was insufficient to show insured's intent to practice deception on insurer with respect to identity of insured or property covered by policy.

3. Insurance ⟹**258**

Intent of insured to deceive insurer as to identity of insured and property covered by fire policy is not essential to render policy void for concealment of such material facts by insured in applying therefor. St.1935, p. 505, §§ 330, 332; § 333, subds. 1, 2; §§ 334, 335(a).

4. Insurance ⚷258

An applicant for fire policy was not bound to disclose fact that he was person previously notified by insurer that no insurance would be granted him after cancelation of previous policy issued to him or fact that property described in application was same as that covered by such previous policy, in absence of inquiry by insurer or of supposition or reason for supposition by applicant that insurer was ignorant of such facts. St.1935, p. 505, §§ 332, 333, 335.

5. Insurance ⚷665(7)

In action on fire policy, evidence warranted finding that insured's statements to insurer as to value of insured realty and insured's claims for items of personalty, alleged to have been lost or damaged by fire, were untrue and made knowingly with intent to defraud insurer, so as to bar recovery.

6. Appeal and error ⚷1008(1)

Whether insured's false statements to insurer as to value of realty covered by fire policy and claims for items of personalty lost or damaged by fire were knowingly made with intent to defraud insurer was fact question for trial court.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Action by A. J. Newman against the Firemen's Insurance Company of Newark, N. J., on a fire insurance policy. Judgment for defendant, and plaintiff appeals.

Affirmed.

Claude A. Watson and Bernard Brennan, both of Los Angeles, for appellant.

Hindman & Davis, of Los Angeles, for respondent.

PER CURIAM.

Appellant as plaintiff in the court below instituted an action against respondent as defendant to recover for loss caused by fire, on an insurance policy issued by the defendant company. After a trial by the court judgment was rendered against appellant and in favor of respondent; and appellant has appealed from the judgment so rendered.

The insurance policy in question was written on a standard form for fire insurance in California; and the insured was named therein as Dr. A. J. Newman, who is the appellant. The total amount of the insurance was $3,000, $2,000 thereof covering the dwelling house at 6200 Buena Vista Terrace, in the City of Los Angeles, and $1,000 thereof covering household furniture and personal property at the same address. The period of the policy was from noon, September 20, 1940, to noon, September 20, 1943. The fire which is claimed to have caused the loss, for which appellant seeks recovery under the policy in question, occurred on September 16, 1941. In the answer to the complaint herein respondent admitted the occurrence of the fire, but denied the loss as claimed by appellant and set up three separate defenses. The first and second separate defenses were based on the following provision of the policy: "This entire policy shall be void, (a) if the insured has concealed or misrepresented any material facts or circumstances concerning this insurance or the subject thereof; or (b) in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." Respondent's first separate defense included the following paragraphs.

"II. That prior to the execution and delivery of said policy, this defendant had insured plaintiff under the name of 'Jacob Newman' for loss by fire to building and contents allegedly located at #976 Pine Grove, Los Angeles, California; that in the years 1937 and 1939, plaintiff so insured under the name of 'Jacob Newman' claimed loss and damage by fire to said property against this defendant under said policy; that this defendant paid the plaintiff the loss claimed by the fire of 1937, but that under claim made for loss in 1939, this defendant, by reason, among other reasons, of the fact that plaintiff had included in his claim various and sundry items which were claimed lost and damaged by the fire of 1937 in claim made thereon, resisted said claim, and thereafter compromised the same and cancelled said policy and notified plaintiff that no insurance would be granted by this defendant company to plaintiff thereafter.

"III. That plaintiff applied to an agent of this defendant representing Pittsburgh

Underwriters Department of this defendant for the policy of insurance sued upon herein, for insurance, insuring him in the name of 'Dr. A. J. Newman,' representing to said Agent that he was a doctor and entitled to said insurance; plaintiff represented the location of said property to be #6200 Buena Vista Terrace, and represented his true name to be 'Dr. A. J. Newman'; that the location of #6200 Buena Vista Terrace and the building situate thereat is the same location as #976 Pine Grove, Los Angeles, California, and the building located thereat the same as that located or claimed to have been located at #976 Pine Grove, Los Angeles, California, and plaintiff herein is the same person as the person representing himself previously as 'Jacob Newman', and the property for which loss is claimed herein is the same property alleged damaged and destroyed by fire in the losses of 1937 and 1939.

"IV. That plaintiff, in so applying for said insurance, concealed from this defendant material facts, to-wit: That the property attempted to be described in the policy of insurance in the policy in suit herein as #6200 Buena Vista Terrace was the same property and the location the same as that which he had previously described as the property located at 976 Pine Grove, Los Angeles, California, and that he, 'Dr. A. J. Newman,' was the same person who had previously represented himself to be 'Jacob Newman', and the property for which loss is claimed herein is the same property alleged damaged and destroyed by the fire in the losses of 1937 and 1939."

The second separate defense was based upon certain alleged and specified false statements made by appellant in connection with his claim of loss. The third separate defense was based upon appellant's alleged refusal to answer questions concerning material matters relating to said insurance and the subject thereof, and, as to other matters, making false and evasive answers, thereby preventing a complete examination. This last defense is based upon a provision of the policy reading, "and the insured shall exhibit to any person designated in writing by this company all that remains of any property herein described, and shall submit to examination under oath, as often as required by any such person, and subscribe to the testimony so given."

The trial court found all of the allegations of the foregoing separate defenses to be true. Appellant contends that there is not sufficient evidence to support such findings, and that there is also insufficient evidence to support a finding against appellant's allegation of total loss. Appellant also contends that the decision of the trial court is contrary to law.

[1] In regard to the allegation contained in paragraph II of the first separate defense, to the effect that the defendant company "cancelled said policy and notified plaintiff that no insurance would be granted by this defendant company to plaintiff thereafter," the only evidence found in the record upon this subject is that given by the superintendent of the fire division of respondent's organization, as follows: "Our record shows we had a policy for Jacob Newman, 976 Pine Grove Avenue, and that we had to take a loss sometime in 1939, I believe, and that we subsequently paid another loss. And at the request of the Los Angeles Department, or, on the information, rather, of the Los Angeles Department to me—we have what we call a K.O.; that is 'Keep Off', we had marked our records not to accept any further insurance from Jacob Newman for 976 Pine Grove Avenue." There appears to be no evidence that the previous policy was cancelled or that appellant was notified that no insurance would be granted to him thereafter. The testimony just quoted is merely to the effect that respondent's records were marked for the purpose of avoiding acceptance of any further insurance from appellant for 976 Pine Grove Avenue. The testimony merely refers to what appears to have been an inter-office or inter-departmental communication within respondent's organization, and a matter only within the knowledge of respondent's agents, servants, or employees, and not one communicated to appellant. In any event, such evidence does not support a finding that the previous policy had been cancelled and appellant had been notified that no further insurance would be granted him by respondent.

[2, 3] Appellant testified that he used the name of Dr. Jacob Newman and the name of Dr. A. J. Newman. It is not disputed by respondent that appellant is known as "Dr. A. J. Newman." In this connection, there was offered and received in evidence on behalf of respondent, a

document entitled "Agreement for Submission to Appraisers," which had been executed by appellant in connection with the claim of loss for the fire occurring in 1939. At the end of this document two signatures appear; the first, "Alfred J. Newman"; and directly under the first signature appears the signature "Jacob Newman." The deposition of appellant taken with reference to the fire occurring February 17, 1939, introduced in evidence in the present case on behalf of respondent, was signed "Alfred J. Newman." According to the record, appellant was known as Alfred Jacob Newman and also as Jacob Newman. Appellant testified that his full name was Alfred Jacob Newman. The trial court found it to be true that the property in question was known as number 6200 Buena Vista Terrace. The following testimony was given by appellant as to the address:

"Q. Where do you live? A. The legal description is 976 Pine Grove Avenue, Los Angeles.

"Q. What do you mean by legal description? A. The property cannot be reached easily from the north, to get off, so I advertise it as 6200 Buena Vista Terrace.

"Q. Has the city government at any time fixed any name for that street? A. Yes, Pine Grove.

"Q. What number on Buena Vista? A. 6200.

"Q. Is it on the corner? A. It is in the middle of nowhere; a mountain and canyon on one side and a canyon on the other side."

It appears from the testimony of respondent's superintendent that respondent, insurer, had a record of the location of 976 Pine Grove Avenue.

As to the matter of misrepresentation and concealment on the part of appellant in obtaining the policy of insurance on which the present suit is based, respondent states in its brief that the facts were admitted by appellant in his testimony. Appellant gave the following testimony regarding the circumstances under which appellant ordered the policy in question.

"Q. When you applied for this policy, you say over the telephone, to Mrs. Lundeburg—A. Yes.

"Q.—had you previously discussed insurance with her? A. No, sir; not at all.

"Q. How did you know she was in the insurance business? A. I asked the exchange that I belonged to to recommend me to an insurance broker who was a member of the exchange, and they gave me her name and address; and I called her up and asked her to issue a policy.

"Q. Now, you hadn't met her previously? A. No, sir; I don't believe I ever met her at all.

"Q. When you called her up, did you tell her your name was Dr. A. J. Newman? A. That's right. I probably told her Dr. Newman was calling and she asked me for the initials, and I must have given her A. J.

"Q. You are not a doctor? A. I have several titles of doctor, as Doctor of osteopathy, chiropractics, naturopathy, and Doctor of Divinity, and several others. * * *

"Q. When you called up Mrs. Lundeburg, you told her you were Dr. A. J. Newman and wanted insurance? A. No; I said, 'Dr. Newman calling, and I want insurance,' She said, 'What are your initials' And I said, 'My initials are A. J.'

"Q. You told her how much insurance you wanted? A. I must have.

"Q. Well, you would remember that? A. Oh, yes.

"Q. Did you tell her how much the building was worth? A. I don't think so.

"Q. Tell her—A. There was no discussion. I just told her I wanted $2000 on the house. Maybe she asked what I wanted, and I thought that would be sufficient.

"Q. You gave her the address at 6200 Buena Vista? A. That's right.

"Q. And told her what kind of house it was? A. Well, don't know whether she questioned it. I think she must have asked me whether it was a brick house or frame dwelling. It shows that on the policy. She must have asked.

"Q.—I am asking you your recollection. A. I can't remember the details.

"Q. And you received the policy through the mail? A. Yes, sir. I don't remember exactly, but I think it came by mail, because I never met the lady at all personally."

It does not appear from the evidence that appellant requested insurance in respondent company or that appellant knew or was aware that the agent from whom appellant ordered the policy was agent for respondent.

The record is devoid of any evidence from which there might be inferred an intent on the part of appellant to practice deception, either with respect to appellant's identity or with respect to the identity of appellant's property. However, an intent to deceive is not essential in such cases. Telford v. New York Life Ins. Co., 9 Cal. 2d 103, 69 P.2d 835. The matter of concealment of material facts in applying for a policy of insurance is governed by the provisions of article 1 of Chapter 3, Part 1, Division 1, of the Insurance Code, St. 1935, p. 505 et seq. Section 330 thereof gives the definition of concealment: "Neglect to communicate that which a party knows, and ought to communicate, is concealment." Section 332 provides: "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining." Section 333 reads in part as follows: "Neither party to a contract of insurance is bound to communicate information of the matters following, except in answer to the inquiries of the other: 1. Those which the other knows. 2. Those which, in the exercise of ordinary care, the other ought to know, and of which the party has no reason to suppose him ignorant. * * *" Section 334 sets forth the test of materiality: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Section 335 provides in part: "Each party to a contract of insurance is bound to know: (a) All the general causes which are open to his inquiry equally with that of the other, and which may affect either the political or material perils contemplated."

The facts stated to respondent's agent by appellant, in applying for fire insurance, were not false. The evidence shows that appellant was known as "Dr. A. J. Newman." As a matter of fact, from all that appears in the record, it cannot be definitely determined that appellant was not entitled to use the title of doctor; although this question is not material to the risk involved here. It is sufficient for the purposes of the present case to note that appellant was known by such title, or used such title. The evidence reveals, and the court found that the property in question was known by the street number 6200 Buena Vista Terrace; although it appears also to have been known, and perhaps more accurately, as 976 Pine Grove. No inquiry was made of appellant as to previous loss experience or as to further identity of the property or a more specific description of the location thereof, or as to further identity of appellant personally. There is no evidence that appellant knew that he and his property had been placed on respondent's "Keep Off" list; and there is no evidence from which it can be reasonably inferred that appellant suspected he had been so listed. Mere evidence of a prior dispute over a loss and a compromise thereof would furnish no reasonable ground for supposing respondent would refuse to provide future coverage of the property. The settlement of the claim might, if anything, tend to lead appellant to believe his claim to have been just, and that respondent had admitted its mistake in first denying the claim. From all that appears in the evidence, appellant was ignorant of the fact which made his prior loss a material matter, and which made disclosure of the allegedly concealed facts material, namely, that respondent had placed the risk in its "Keep Off" file, and that respondent no longer desired to cover the risk. Were it not for the fact that respondent had so listed the risk involved, there would be no reason for appellant to have disclosed the prior address and loss, and the fact that appellant was the same person as Jacob Newman, unless the law imposes such a duty on an applicant for fire insurance under the circumstances. The question, therefore, is whether there is a duty on the part of an applicant for fire insurance to give information disclosing prior losses, in the absence of an inquiry on the subject.

A case closely analogous to the present case is that of E. A. Boyd Co. v. United States Fidelity & Guaranty Co., 35 Cal. App.2d 171, 94 P.2d 1046 (hearing denied by Supreme Court), wherein an employee who had been previously guilty of embezzlement was included in the coverage of a fidelity bond. The employer knew that the employee had been guilty of embezzlement, which offense had been committed in a former employment; but the defendant insurer had covered this previous loss. The employee's name had been added to the schedule of coverage under the fidelity bond as Merwin L. Devin.

The insurer had the name of M. L. Devin in its records as a former embezzler, when an employee of the Bank of America; and the insurer also had a record of having paid a part of the bank's loss on that account. Under such circumstances the court held the defendant insurer charged with knowledge of the former embezzlement; and it is stated in the opinion that the fact that the name appeared on the records of the insurer as M. L. Devin instead of Merwin L. Devin was not material.

At page 180 of 35 Cal.App.2d, at page 1050 of 94 P.2d, it is stated: "Where the bond contains no clause rendering it void for former defalcations of an assured person and no questions are asked of the insured regarding the character or honesty of a bonded employee, and no misstatements are made regarding material facts, the failure to voluntarily disclose the fact that the employer knew of a previous charge involving the dishonesty of an employee which occurred seven years before the application is made to bond him the insured may not be charged with fraud or concealment which will render the bond void, particularly when the insurer is possessed of facts which should place a reasonably prudent person on inquiry regarding that offense, or omission. (cases and authorities cited)" The court then quotes from 3 Cooley's Briefs on Insurance, 2d ed., stating: "In the authority last cited, at page 1970, after reviewing the authorities concerning undisclosed statements, it is said: 'From these cases the rule may be deduced that facts which the insurer knows, *or which he is bound to know, and may therefore be presumed to know, need not be disclosed.*'" (Italics included)

It is true that the decision in the Boyd case, last cited, was placed upon the ground of an estoppel operating against the insurer. But the court in that case also held that what had been said regarding the estoppel of the insurance company, which was created by its knowledge of the uncommunicated facts, did not conflict with the provisions of the Insurance Code, above quoted. Moreover, the facts and circumstances presented in the Boyd case were such as to have warranted a decision in that case based solely upon authority of the pertinent provisions of the Insurance Code.

[4] In the present case, as has already been pointed out, there was no misstatement of facts. There was merely a failure on the part of appellant to reveal that he was the same person as Jacob Newman and that 6200 Buena Vista Terrace was the same premises as 976 Pine Grove Avenue. From all that appears in the record, respondent had the means of ascertaining the uncommunicated facts; and, under the circumstances presented, the facts in question were such as could have been ascertained by respondent in the exercise of ordinary care. There is no evidence in the record on which to base an inference that appellant supposed respondent to be ignorant of the facts left undisclosed, or from which to infer that appellant had any reason to suppose respondent ignorant of such facts. In the absence of inquiry, therefore, appellant was not bound to disclose such facts upon applying for the fire insurance involved. Secs. 332, 333, and 335, Insurance Code, supra. Cases cited by respondent upon the question of concealment are all distinguishable from the present case upon the facts.

However, in regard to the second separate defense and the findings thereon, the record reveals that the testimony of appellant upon cross-examination, with respect to items of personal property for which he claimed a loss, was generally vague; and appellant frequently professed a failure to remember the source from which, or the time when many of the articles were acquired. In view of the fact that the loss which formed the basis of appellant's present suit was the third loss by fire on the premises in question, and that a number of items claimed by appellant as lost in the present case were identical or similar to items claimed as lost in the previous fire, it was material for respondent to obtain information which would serve to differentiate between items previously claimed as lost and the items claimed as lost in the present instance. One such item was that of dishes. In connection with the proof of loss for the second fire, which occurred on February 17, 1939, claim was made for total loss in the sum of $7.50 for one set of dishes, and in the sum of $50, as a total loss, for one lot of dishes and utensils. There was also a claim as for a complete loss of dishes, in the present case, also in the sum of $50. The same situation occurred with regard to certain robes and other apparel, articles of furniture and books. Appellant testified that between the second and the last fire, a period of about two years, he had acquired articles worth $15,000 or $20,000 or more. It should be mentioned here that the evidence of appellant's circumstances during this time, of his mode of living, his home and surroundings, was generally so inconsistent with such a statement that an inference of doubt as to the truth thereof would have been justified on the part of the trial court.

The following appears in the record as to the cross-examination of appellant: "Q. Then you didn't acquire all these things in here between the second and third fires—in Defendant's Exhibit E—between the second and third fires? A. No, there were many articles that remained from the last fire, that were not destroyed.

"Q. You told us a minute ago that all of these articles were acquired between the dates of the second fire and the third fire? A. Not all.

"Q. I will hand you this list and then ask you to go over it and point out to me and the Court what of the articles listed in there you had at the time of the second fire. (Handing document to witness) A. Well, I had the dishes.

"Q. You had the dishes? A. Yes, sir.

"Q. They weren't damaged or destroyed in the first fire or second? A. They were destroyed in the last.

"Q. I am asking you what in that list there, which of those items you had at the time of the second fire. A. The second or last?

"Q. The second. A. These dishes might have been new from the second fire—between the second and third fires.

"Q. I am not asking you how you acquired $15,000 to $20,000 worth of merchandise in less than two years; I want to know whether any of the merchandise listed in there was merchandise you had on hand and saved from the second fire. A. I don't know whether the dishes were.

"Q. Did you save any dishes from the second fire? A. I don't remember.

"Q. Go through there and show me any of the articles that you had at the time of the second fire that you still had and were in good usable shape at the time of the third fire—do you understand what I mean? A. Yes.

"Q. In other words, show me from that list the articles that you did not acquire between the time of the second and the third fires. A. Well, one or two beds.

"Q. By that you mean you saved one or two beds out of the first fire? A. I think so.

"Q. Tell me of your best recollection. A. That is as far as I can remember. I think a couple of the beds that were saved in the second fire remained—there were so many beds in the house—and the quilts, there might have been a couple that were not destroyed in the second fire that were removed and destroyed in the last fire.

"Q. And when you say there might have been a couple—A. Yes, I believe they were not all destroyed by fire. And some of the linens might have remained from the second fire.

"Q. Did they? A. I don't remember actually if they did save the linens. Then the portieres, they were acquired in the last year. This sewing machine I think I bought too in the last year.

"Q. You heard what I said—I said, pick out what you had. A. A couple of dressers remained from the second fire.

"Q. Were those women's dresses or misses' dresses? A. Dressers.

"Q. Oh, dressers? A. Yes.

"Q. What else? A. Gas heater—a couple of gas heaters might have been there from before—I think I had a half dozen of them.

"Q. Did you have a half dozen of them at the time of the second fire? A. No, I don't think so. At the time of the last fire I had a half a dozen; at the time of the second fire I might have had them.

"Q. You have two beds saved and two dressers saved from the second fire. Do you want to say some gas heaters were saved from the second fire? A. Might be.

"Q. Were they or were they not? A. I don't remember.

"Q. Go down the list. A. A silk robe and prayer robe.

"Q. How many silk robes? A. I think one of these silk robes was from Dr. Little.

"Q. That was saved? A. I can't remember them now, what I had there—there were so many of them. And the carpet, the carpets were new, acquired in the last year. Books, there might have been some books saved from the second fire. * * *

"Q. At the time of the second fire, you claim you had two radios and that they were both destroyed by the fire, did you not? A. I don't remember.

"Q. I will hand you the list that you say was prepared under your direction—A. Some tools might have been there from the second fire.

"Q. Let's get this matter of the radio straightened first: Well, I will let that go for the time being. A. I don't remember which ones were remaining and which were acquired during that year.

"Q. Talking about the radios now? A. Yes. Well, I don't know how many radios I had, or whether they were destroyed in the second fire, or whether they were acquired the year previous—I might have saved something. I don't know.

"Q. Go on down the list and show us. A. I don't seem to find anything. Maybe an electric iron remained. But all these things were acquired in the last year before the fire. Might have been an electric heater saved from the last fire, but I don't know. I can't make an absolute positive statement that they were. There was very little left from the second fire.

"The Court: Wait until he asks you a question.

"Q. By Mr. Davis: This $15,000 and $20,000 worth of personal property that was contained in this house at the time of the last fire, you say has all, except these few articles you have mentioned, been acquired in a year? A. I think so."

Under cross-examination appellant could not remember whether he had made claim for destruction of certain prayer robes after the second fire, as appears from the following quotation from the record:

"Q. You did buy at least three of these prayer robes from George Little? A. I think so.

"Q. Before the second fire? A. Yes, that must have been before the second fire.

"Q. And you made claims for the damage and destruction of those prayer robes after the second fire, did you? A. I don't remember.

"Q. I am asking you. A. I don't remember whether I did, or not."

There was a claim for $75 made for prayer robes in the last fire; that is, part of the claim on which the present suit is based. In his proof of loss herein appellant claimed a whole loss of $8,000 for the contents of his dwelling. Appellant claimed a total loss of the building in the sum of $4,000. Appellant testified to having made extensive repairs and alterations to the building between the time of the second fire and the time of the last fire. Some of the alterations appear from appellant's testimony to have been rather elaborate. Appellant testified that he had made the house into one of eleven rooms instead of four rooms. He testified that the entire space of the house was 40x25. One of the improvements appellant claimed to have made to the house was the construction of a solarium on the roof, at a cost of about $150. Appellant also testified that he had built a picket fence on top of the house, around the roof. Photographs of the house were introduced in evidence on behalf of respondent. It was testified that these pictures depicted the condition observed at the premises immediately before the fire. It is to be noted that the picture which appears to show the entire expanse of the roof fails to reveal any evidence of a solarium or of a fence such as appellant claimed in his testimony to have constructed. The appearance of the building, from the photographs in evidence, would justify an inference that a value of $4,000 placed upon the house would be highly unreasonable. An insurance adjuster employed by respondent testified at the trial that after an examination of the premises and an investigation of the fire he came to the conclusion that the loss and damage to the contents of the dwelling would not exceed $200, and that the loss and damage to the structure would amount to approximately $500 or $600.

[5, 6] There is sufficient evidence in the record to warrant an inference on the part of the trial court that the statements of appellant relative to the value of the real property involved and the statements relative to the claim for various items of property allegedly lost and damaged were not true. Whether such statements were made knowingly and with intent to defraud the insurer was a question of fact for the trial court to decide. Pedrotti v. American Nat. Fire Ins. Co., etc., 90 Cal. App. 668, 266 P. 376; Singleton v. Hartford Fire Ins. Co., 127 Cal.App. 635, 16 P.2d 293. Upon the evidence presented, an inference of intentional falsity was more reasonably consistent with the facts than an inference of good faith. It cannot be said, therefore, that the facts warrant any

presumption of mistake or misapprehension on the part of the insured.

The evidence sustains the findings of the trial court to the effect that appellant knowingly and wilfully made claim for numerous and sundry items of property as totally lost and damaged by fire, which said items of property had been lost and destroyed by previous fires occurring in 1937 and 1939; that appellant knowingly, grossly overvalued each and every item for which claim was made in the documents presented in connection with the claim of loss, and in the examination with regard to the loss; and that appellant in his sworn proof of loss of January 9, 1942, swore that the loss on the building in question was $4,000, when in truth and in fact said loss and damage did not exceed $750; and that appellant made said statement with knowledge of the falsity thereof. Any one of the findings so made is sufficient to support the judgment.

In view of what has been said herein with respect to respondent's second separate defense, it is unnecessary to consider the third separate defense. In passing, however, it may be stated that such evidence as has been pointed out by the parties with respect to this defense does not appear sufficient to sustain the findings of the trial court in this respect.

For the foregoing reasons the judgment is affirmed.

KNIGHT et al. v. CITY OF LOS ANGELES.

Civ. 14546.

District Court of Appeal, Second District, Division 2, California.

Dec. 19, 1944.

Rehearing Denied Jan. 12, 1945.

Hearing Granted Feb. 15, 1945.

1. Municipal corporations 🔑741(1)

It is a prerequisite to maintenance of action to recover damages allegedly caused by negligent acts of municipality that a claim be filed with municipality as provided by statute. Gen.Laws 1937, Act 5149; Const. art. 1, § 14.

2. Municipal corporations 🔑741(3)

Knowledge of date of accident acquired by municipal officials other than through claim filed with municipality for damages caused by negligence of municipality does not cure defective allegation of date in claim. Gen.Laws 1937, Act 5149.

3. Municipal corporations 🔑741(2)

Neither a date in verification of claim for damages caused by negligence of municipality nor date of filing of claim constitute a compliance with statutory mandate that claim shall specify date of accident. Gen.Laws 1937, Act 5149.

4. Municipal corporations 🔑741(2)

Specification of date of accident in claim for damages caused by negligence of municipality merely by stating that accident occurred on and after a given date is insufficient. Gen.Laws 1937, Act 5149.

5. Municipal corporations 🔑741(2)

In specifying date of accident in claim for damages caused by negligence of municipality, the year, month and day should be stated. Gen.Laws 1937, Act 5149.

6. Municipal corporations 🔑845(1)

A claim against municipality for damage from flood waters verified May 1, 1941, and stating that during months of February and March, 1941, municipal officers and employees caused obstructions to be placed in flow of water so that water was impounded in front of claimant's property, did not contain a sufficient specification of date of accident upon which claim was based. Gen.Laws 1937, Act 5149; Const. art. 1, § 14.

7. Municipal corporations 🔑741(2)

A municipality is not required to notify person presenting claim for damages caused by negligence of municipality that claim is defective. Gen.Laws 1937, Act 5149.

8. Municipal corporations 🔑845(1)

The failure of municipality to advise claimants that claim for damage caused by flood waters was defective because of failure to specify exact date when damage occurred did not estop municipality from relying upon insufficiency of claim. Gen. Laws 1937, Act 5149; Const. art. 1, § 14.

9. Municipal corporations 🔑845(1)

Where claimant seeking recovery against municipality for flood damage had failed to file a claim containing sufficient specification of date damage occurred, claimants' offer of proof was immaterial and there was no error in declining the offer. Gen.Laws 1937, Acts 5149, 5619; Const. art. 1, § 14.

WOOD, J., dissenting.

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Action by William Knight and another against the City of Los Angeles to recover damages for injuries to real property allegedly resulting from the defendant's maintenance of a public street in a dangerous condition. From an order granting the plaintiffs' motion for a new trial, the defendant appeals.

Order reversed.

E. H. Delorey and Frank L. Simons, both of Los Angeles, for respondents.

Ray L. Chesebro and Victor P. Spero, both of Los Angeles, for appellant.

McCOMB, Justice.

This is an appeal from an order granting plaintiffs' motion for a new trial in an action to recover damages for injuries to real property alleged to have resulted from the maintenance by defendant of a public street in a dangerous condition.

So far as material here, the essential facts are these:

Plaintiffs brought an action, pursuant to the provisions of the Public Liability Act of 1923, Statutes of 1923, page 675, Deering's California General Laws, Act 5619, to recover damages for injuries to real property alleged to have been caused by the action of defendant municipality in maintaining a public street in a dangerous condition. At the time of the trial it was stipulated that there should be first tried the issue of the legal sufficiency of the claim[1] filed with defendant by plaintiffs. There was introduced in evidence plaintiffs' claim a copy of which is set forth in a footnote to this opinion.

Defendant objected that the claim was

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[1] The claim reads thus:

"Claim for Damages.
"Duplicate for City Attorney
"Received May 6 1941
Referred to Husar
Entered ——
"To the City of Los Angeles
Claim No. ——
Name of Claimant—Wm. Knight and Mrs. Charlotte Knight
Address of Claimant—4200 Franklin Avenue
City and State—Burbank, California
Phone Number—GRanite 7695

Dates	Particulars	Amounts
	Amount of damages caused to this date at 3463 Primera Street, Los Angeles, California, such damages and injury being of a continuous and continuing character.	$11,500.00

"This matter arises and grows out of the following matters and things, to wit:

"(a) A failure, neglect, and refusal of the City of Los Angeles, its agents and employees, to properly install, construct, maintain, keep in repair, control and care for sewers, sewage pipes, drains, conduits, devices, ditches, gutters, dams, diverting and flood control works at the front of and adjacent to claimants' property, all of which caused large amounts of flood, surface and storm waters arising in, along and upon Primera Street and adjacent territory, together with mud, silt and debris, to come in and under the property of claimants and damage them in the amount hereinbefore stated, all to the damage of the claimants in the amount hereinbefore set forth.

"(b) The design, preparation and making of the plans and specifications for the work and improvements in, upon, and along Primera Street, and the plans and specifications for the work and improvements aforesaid in, along and upon Primera Street were defective and faulty.

"(c) The location, alignment and methods of maintaining said work and improvements, etc., in, upon and along Primera Street, are dangerous and wrong, all of which caused the lateral support to said property, and its improvements thereon to be removed, causing the undermining of the foundation, floors, underpinnings and joists of the improvements existing on said property, all of which resulted in the settling of, cracking and damaging of the floors and walls of the same.

"(d) The failure to provide properly for the protection of claimant's property and the improvements thereon, caused the undermining, disintegration, slipping, sinking and settling of the land and improvements above described belonging to this claimant; the improvements thereon were damaged, injured and rendered unsafe and unfit for habitation and are now inaccessible, unmarketable and valueless.

fatally defective in that it failed to specify the date of the accident. The trial judge sustained the objection, whereupon plaintiffs offered to prove the allegations of their complaint including the allegations relative to the claim filed by them. This offer was denied and the action was dismissed and judgment entered in favor of defendant. Thereafter a motion for a new trial was granted. It is from this last order the present appeal is prosecuted.

It is necessary for us to determine three questions which will be stated and answered hereunder seriatim:

First: *Did plaintiffs' claim substantially specify the date of the accident which is the basis of the present action?*

This question must be answered in the negative and is governed by the following pertinent rules of law:

[1] 1) In an action to recover damages brought pursuant to the provisions of Article I, section 14 of the Constitution of the State of California alleged to have been caused by the negligent acts of a municipality, it is a prerequisite to the maintenance of such action that a claim be filed with the municipality as provided in Act 5149, Statutes of 1931, page 2475, Deering's California General Laws 1937, page 2204. Powers Farms v. Consol. Irrig. Dist., 19 Cal.2d 123, 126 et seq., 119 P.2d 717. See also Hall v. City of Los Angeles, 19 Cal.2d 198, 203, 120 P.2d 13.

"(e) That said existing conditions hereinabove alleged were known to the officers and employees of said City of Los Angeles; that said officers and employees possessed and had authority to remedy said defective and dangerous condition; that despite the fact that for many months last past said officers and employees had knowledge and notice and should have known of the defective and dangerous condition of said street and adjacent territory and despite the fact that said officers and employees had a reasonable time after notice thereof to remedy such defective and dangerous condition, nevertheless said officers and employees, after acquiring such knowledge and notice, failed and neglected for a reasonable time thereafter to remedy such defective and dangerous condition, and failed to take such action as was reasonably necessary to protect the property, together with the improvements thereon of the claimants herein against such damages and defective condition.

"(f) That on or about and during the months of February and March, 1941, the officers and employees of said City of Los Angeles, then and there being conversant with the conditions existing in and along Primera Street in front of claimant's property, instead of remedying same, did then and there and at said time negligently, carelessly and in violation of known engineering rules cause additional obstructions to be placed in the flow of water so that the same was impounded in front of claimant's property with no outlet other than through and under ground upon which claimant's house is located, resulting in a complete undermining and moving of the supports thereunder and a dropping down and falling away of the previous surface of said property, completely ruining and destroying the value of said property and the house and improvements located thereon.

"(g) That the officers and employees of the City of Los Angeles negligently and carelessly permitted conditions to arise and to thereafter continue to exist in, about and upon Primera Street, which resulted in a portion of said Street, adjacent and contiguous to claimant's property, being dislocated and moved to, toward and upon claimant's property, causing claimant's property to be in turn moved, dislocated and disrupted, thereby destroying the bases and foundations of the improvements thereon and causing the whole thereof to drop down and move both longitudinally and laterally.

"State of California }
"County of Los Angeles } ss.

"Wm. Knight, being sworn, deposes and says: That he is one of the claimant(s) in the above-entitled claim; that he has read the foregoing claim consisting of three sheets know(s) the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believe(s) it to be true.

"Wm. Knight

"Subscribed and sworn to before me this 1st day of May, 1941.

"(Seal) Duncan G. Cassell
"Notary Public in and for the County of Los Angeles, State of California.
"My Commission expires March 10, 1942

"Claim No. 7348
"Filed May 5– 1941
"At 9:30 A. M.
"Walter C. Peterson, City Clerk
"By A. C. Meloy, Deputy.

[2] 2) Knowledge of the date of the accident acquired by municipal officials other than through the claim filed with the municipality does not cure a defective allegation of the date in the claim. Powers Farms v. Consol. Irrig. Dist., supra, 19 Cal.2d at page 130, 119 P.2d 717.

[3] 3) Neither a date in the verification of a claim nor a date of the filing of a claim constitutes a compliance with the statutory mandate that a claim shall specify the date of the accident. Shipman v. Forbes, 97 Cal. 572, 575, 32 P. 599; Kelso v. Board of Education, 42 Cal.App.2d 415, 421, 109 P.2d 29.

[4] 4) It is not a substantial compliance with the requirement of Act 5149, supra, that the date of the accident be specified in the claim to allege that the accident occurred "on and after" a given date. Kahrs v. County of Los Angeles, 28 Cal. App.2d 46, 47 et seq., 82 P.2d 29.

[5] 5) To specify a "date" means to state the year, the month, and the day. Shipman v. Forbes, 97 Cal. 572, 574, 32 P. 599; Cole v. Board of Supervisors of Orange County, 27 Cal.App. 528, 530, 150 P. 784; Estate of Price, 14 Cal.App. 462, 463 et seq., 112 P. 482.

[6] From the foregoing rules, it is evident that unless the claim filed by plaintiffs specifies the date of the accident, it was fatally defective.

The only portion of the claim dealing with the date of the alleged accident is paragraph F, which reads as follows: "That on or about and during the months of February and March, 1941, the officers and employees of said City of Los Angeles, then and there being conversant with the conditions existing in and along Primera Street in front of claimant's property, instead of remedying same, did then and there and at said time negligently, carelessly and in violation of known engineering rules cause additional obstructions to be placed in the flow of water so that the same was impounded in front of claimant's property with no outlet other than through and under ground upon which claimant's house is located, resulting in a complete undermining and moving of the supports thereunder and a dropping down and falling away of the previous surface of said property, completely ruining and destroying the value of said property and the house and improvements located thereon."

Under rule 4, supra, it is evident that the foregoing provision of the claim filed by plaintiffs does not specify the day, month or year on which the accident occurred for which plaintiffs seek to recover damages. In fact the claim does not in any place state or attempt to state the date upon which the accident occurred for which plaintiffs seek damages. Paragraph F above quoted merely states that "on or about and during the months of February and March, 1941", defendant did certain acts which subsequently injured plaintiffs' property.

So far as appears from the claim the damage might have occurred in February, March or April since plaintiffs failed to specify in the claim the date upon which the accident occurred and the claim is fatally defective.

Decker v. City of Seattle, 80 Wash. 137, 141 P. 338; Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29; Sandstoe v. A., T. & S. F. Ry., 28 Cal.App.2d 215, 82 P.2d 216, are not applicable to the present case in view of the decision of our Supreme Court in Hall v. City of Los Angeles, supra. See dissenting opinion, 19 Cal.2d page 204, 120 P.2d page 16.

Second: *Is defendant estopped to deny that plaintiffs did not file a sufficient claim since defendant did not advise plaintiffs of the defect in their claim?*

[7, 8] This question must be answered in the negative. There is no duty upon a municipality to notify a claimant of a defect in a claim. The necessary elements of an estoppel are not present in the instant case. Plaintiffs rely on certain cases which are readily distinguishable from the one now before us.

In Farrell v. County of Placer, 23 Cal. 2d 624, 145 P.2d 570, representations were made by the agents of defendant upon which representations the plaintiffs relied to their detriment. The same situation obtained in Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547. In the present case, no representations were made by defendant which misled plaintiffs.

[9] Third: *Did the trial court err in declining plaintiffs' offer of proof?*

This question must likewise be answered in the negative. Plaintiffs' offer of proof was immaterial in view of the fact that they had not filed a claim meeting the requirements of Act 5149, supra. Hall v. City of Los Angeles, supra, 19 Cal.2d page 203, 120 P.2d 13.

For the foregoing reasons the order is reversed.

MOORE, P. J., concurs.

W. J. WOOD, Justice (dissenting).

I dissent. In my opinion plaintiffs in filing their claim made substantial compliance with the requirements of the statute. Plaintiffs did not intend to mislead. Defendant was not prejudiced or misled in any manner. In such circumstances substantial compliance is sufficient. Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216.

Rehearing denied; W. J. WOOD, J., dissenting.

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67 Cal.App.2d 467

PEOPLE v. OHMAN.

Cr. 3830.

District Court of Appeal, Second District, Division 1, California.

Jan. 4, 1945.

1. Criminal law ⇒1159(2)

The appellate court cannot retry the case, but is limited to deciding only whether upon the face of the evidence it can justly be held that sufficient facts could not have been found to warrant the inference of guilt. Code Civ.Proc. §§ 1847, 2061.

2. Criminal law ⇒1159(2)

The appellate court is not warranted in reversing a conviction on ground of insufficiency of evidence unless the court can say that upon no hypothesis whatever is there sufficient substantial evidence to support the conviction. Code Civ.Proc. §§ 1847, 2061.

3. Criminal law ⇒553

The jury is authorized to reject any testimony which was contradictory of that given by witnesses for the prosecution, if they conscientiously felt warranted in doing so after full consideration. Code Civ.Proc. §§ 1847, 2061.

4. Criminal law ⇒566

Evidence was sufficient to support conviction for grand theft, forgery of indorsement, and forgery arising out of the theft and sale of an automobile, as against testimony that the theft and sale of automobile was committed by one other than defendant.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Dorand Metro Ohman was convicted of grand theft, forgery of indorsement, and forgery, and he appeals.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Everett W. Mattoon, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the District Attorney of Los Angeles County, containing seven counts, the defendant was accused in counts one and seven of the crime of grand theft, in counts two and five of the crime of forgery of endorsement, while counts three, four and six charged the crime of forgery. Following the entry of not guilty pleas and trial before a jury, guilty verdicts were returned as to all seven counts. A motion for a new trial was denied and this appeal is prosecuted by the defendant from the judgment of conviction and from the order denying his motion for a new trial.

The sole ground relied upon by defendant for a reversal is that the evidence is legally insufficient to support the judgment of conviction. It therefore becomes necessary to epitomize the evidence presented at the trial. In that regard, the record discloses that Wilbur C. Abbott testified that he is engaged in the automobile business in the City of Los Angeles, that on or about November 10, 1943, he saw the defendant, who was accompanied by two other young men, at his place of business, about 10:30 o'clock in the morning. That the defendant brought in a 1941 Tudor sedan and inquired of the witness as to whether the latter desired to purchase an automobile. After driving the vehicle around the block, the witness made the defendant an offer of $965 for the same, which offer was accepted. Mr. Abbott then gave the defendant $300 in cash and stated he would give him the balance in a check. After making out a bill of sale, the witness asked the defendant to sign the same, which the latter did. The defendant affixed his signature to the bill of sale with Mr. Abbott's fountain pen while seated at the latter's desk and facing the witness. A receipt for the $300 partial payment on the automobile was signed by defendant with the name "M. D. Frassi." The defendant showed the witness an automobile registration card for 1943, made out in the name of "M. D. Fraissi, 3042 Grove Street, Oakland, California," and affixed the signature "M. D. Fraissi" thereon as the legal owner or lienholder of record with the Department of Motor Vehicles. The defendant also placed the signature of "M. D. Frissi" upon a 1943 automobile certificate of ownership made out to "M. C. Frassi, 3042 Grove Street, Oakland, Calif." The foregoing four documents were received in evidence.

When first seen by the witness, the registration card and automobile certificate of ownership did not have a signature in any of the places provided therefor. The witness testified that he went next door and borrowed $665 from a finance company. A check therefor was issued by a Mr. Owen M. Dair and made payable to John Sykes, a business associate of the witness. After the check was properly endorsed, it was given to the defendant.

Mr. Abbott described the other two men who accompanied the defendant as of the age of approximately 20 years. The defendant stated that the automobile was being sold because his two younger associates were going into the Merchant Marine service. Later on the afternoon of November 10th, the witness again saw the defendant who at that time was alone, and stated that he was unable to cash the check and asked for another one made out to him personally. Accordingly, the Figueroa Auto Loan Company, who issued the original check, issued a second check payable to the order of M. D. Frassi for $665, which the witness, Abbott, handed to the defendant in the presence of Mr. Dair. The automobile in question was later returned to Mr. M. D. Frassi, from whom it was stolen.

According to the witness Abbott, when the defendant brought the automobile to the sales lot on the morning of November 10th, he was asked for some identification. In response to this request, defendant showed Mr. Abbott as identification a tire inspection report, a draft card (certificate of registration under the selective service act) and an "A" book for gasoline, all of which papers contained the name, M. D. Frassi. The witness further testified that he has never received back any part of the $965 paid to the defendant in this transaction and that in addition he incurred expenses on the automobile for which he was never repaid.

The witness Abbott next saw the defendant when two police officers brought him to Abbott's office for identification, at which time the defendant denied knowing Abbott or that he had ever seen him before.

The next witness for the prosecution, Charles H. Dougherty, testified that he is an assistant cashier at the Hoover Branch of the Bank of America, having been employed there about 16 or 17 years; that on November 12, 1943, "a party supposed to be M. D. Frassi," whom he identified in the court room as the defendant, presented the aforesaid check for payment. The witness asked the defendant to endorse the check and identify himself, at which time defendant exhibited a social security and "draft" card. This witness testified positively that he saw the defendant write the name "M. D. Frassi" on the back of the check, and also the address "3042 Grove Street, Oakland, Calif.," whereupon he cashed the check and paid the defendant $665. On cross-examination the witness stated that there were some 15 or 20 people standing in line when the defendant came in but that he remembered him because he was a stranger, tall and light complected, as well as because of his features and the "build of him and all."

Owen Dair, who testified for the prosecution, stated that he is engaged in the automobile finance business under the name of "Figueroa Auto Loan Company." He corroborated the testimony of Mr. Abbott with reference to a loan of $665 on the automobile in question and he further testified with reference to the issuance of the second check, which he gave to Mr. Abbott in the presence of the defendant. This witness testified that he had "a good look" at the defendant and that he was "positive that this is the man that was there with Mr. Abbott at the time this check was given to Mr. Abbott."

John Tugwell, a witness on behalf of the people, testified that he is a detective attached to the forgery detail of the Los Angeles Police Department and one of the arresting officers in this case. That he took the defendant into custody on December 7th. He further testified that two other men, one named Cagney and the other DeWitt, both minors, had previously been arrested. This witness identified a white slip of paper upon which several signatures which appeared to be "M. D. Fraissi," spelled several different ways, were written, and testified that he saw the defendant write these exemplars.

Don E. Mire testified that he is a police officer of the City of Los Angeles, attached to the scientific investigation bureau as a handwriting expert. It was stipulated that he was "well qualified" as such an expert. He testified he had compared the signatures on the various documents signed in the presence of Mr. Abbott and Mr. Dougherty, the assistant cashier of the bank, with signatures appearing on the paper which officer Tugwell testified he saw the defendant write. The witness testified that it was his opinion that the person who signed the name "M. D. Frassi" on People's Exhibits 1, 2, 3, 4 and 5 was the same person who wrote People's Exhibit 6. The witness stated that there was a dissimilarity in the "D" and also in the capital "F" on People's Exhibit 2, but that there were many other similarities in the remainder of the writings. After explaining the dissimilarities, the witness stated that, taking into consideration the similarities existing in the signatures, they were all written by the same person.

Marion D. Frassi, the owner of the automobile, testified that he lived at 3042 Grove Street, in the City of Oakland, California; that in the month of November, 1943, he owned a 1941 Chevrolet two door sedan; that on November 9, 1943, he left the vehicle in front of his house in Oakland about five o'clock in the evening; that when he returned some fifteen minutes later it was gone. He testified he did not give any one permission to take the automobile nor to sign his name at any time in connection therewith. Next time he saw the vehicle, was on November 13th or 14th in a used car lot in Los Angeles. The witness further testified that none of the signatures appearing upon the aforesaid exhibits were genuine, and that in some instances his name was misspelled.

Testifying in his own behalf, the defendant stated that he was not in Oakland "this year or last year"; that he lived there in 1940 or 1941, but had not been there since. That he met Mr. Abbott for the first time on the day of his arrest when he was brought to Abbott's used car lot. He denied signing any of the documents introduced into evidence as People's Exhibits. The defendant testified that he is a carpenter and on November 10th was working for one Henry Cox on a job in Long Beach; that his foreman James Sparks "picked him up" and took him to work where he arrived at 8 o'clock in the morning; that he worked all of the day of November 10th, as well as on the 11th and 12th. He further testified that he worked from 8 o'clock until about 5 o'clock in the afternoon, and that his foreman drove him home.

James H. Sparks, who is defendant's foreman, testified that he took the defendant to work at about 8 o'clock in the morning on November 10th; that the job upon which the defendant was working was at 2210 Chestnut Street in the City of Long Beach. The witness also testified that he did not remain at the place of defendant's employment all day, but did return in the afternoon and drove the defendant to the latter's home.

Dale DeWitt, testifying for the defendant, stated that he is 16 years of age and, at the time of the trial, was confined in the County Jail; that prior to that time he was at the Preston School of Industry some three months. This witness testified that he was in Oakland in 1943 with another boy named Cagney; that he and Cagney stole the automobile here in question; that the defendant was not in Oakland at the time the automobile was stolen; that he did not see him in Oakland and that the defendant "did not have anything to do with the taking of the car." This witness testified that he and his companion drove the automobile to Los Angeles and sold it to a man whom he recognized in the courtroom as being Mr. Wilbur C. Abbott. The witness testified that Mr. Abbott drove the vehicle around the block, checked the motor number to see if it corresponded with the one on the "pink slip" and that he, the witness, signed the "pink slip" and the bill of sale for the car under the name of "Frassi." This witness stated positively that the defendant was not present at any time during the negotiations for the sale of the automobile. The witness further testified that he was unable to cash the check on the day he received it, that the following day was Armistice Day and that he and his companion waited until the next day. He stated it was he who returned with the original check and secured the second check made out in the name of Mr. Frassi. The witness further stated that he practiced copying Mr. Frassi's name from a driver's license and some other papers belonging to Mr. Frassi which the witness found in the automobile. The witness further testified that he personally cashed the check and described the denominations in which the $665 was given to him. This witness testified that when he and his companion were arrested, the officers took $111 from Cagney and found five hundred and some odd dollars on the person of the witness. After the witness testified he was in the county jail, he was asked "for what," to which he replied "four counts of armed robbery and four stolen cars and forgery." He testified that the defendant was his cousin whom he had known since he was three years old.

The assistant cashier of the bank, Charles H. Dougherty, was recalled in rebuttal and testified he had never seen the witness Dale DeWitt, and further stated that he was certain the defendant was the man who cashed the check, because "he looked like a young man who used to go with one of my nieces."

Don E. Mire, the handwriting expert, was recalled and testified that, in his opinion, based upon a comparison of signatures made by the witness DeWitt with those on the People's Exhibits, that the witness DeWitt did not write the signatures appearing upon the aforesaid People's Exhibits. In support of his conclusion, he gave his reasons, pointing out dissimilarities in the various exemplars.

In support of his sole ground of appeal, which is "insufficiency of the evidence", appellant urges: (1) That a large sum of money was found on the persons of Cagney and DeWitt; (2) that Dale DeWitt testified that he was the one who stole the automobile in Oakland, drove it to Los Angeles, sold the same to Mr. Abbott and received the sale price thereof; furthermore, the said DeWitt testified that he alone forged the name of the legal owner of the vehicle on the various documents introduced into evidence and that he alone cashed the check given in part payment of the purchase price; (3) that James H. Sparks testified that he took appellant to work on a construction job at Long Beach, some 20 miles distant from Los Angeles, on the morning of November 10, 1943, and returned the appellant from work about four o'clock on the same afternoon.

However, opposed to the foregoing was testimony of Marion D. Frassi, which clearly established the corpus delicti of the crimes charged against the defendant. Such being the case, it became necessary for the prosecution, in order to obtain a conviction, to prove only the participation of the defendant in such crimes. To that end the prosecution introduced the evidence we have hereinbefore narrated. Such evidence consisted of testimony which positively identified appellant as being in possession of the stolen automobile, as the one who sold the same to Mr. Abbott, as well as being the person who signed Mr. Frassi's name to the bill of sale, the receipt, the automobile registration card and the certificate of ownership. The bank cashier testified that appellant endorsed the check in his presence, presented the same for payment and received the proceeds thereof, while Mr. Dair, of the automobile finance company, testified that appellant was the man who accompanied Mr. Abbott to the finance company office to obtain the second check issued in the sales transaction. A handwriting expert gave it as his opinion that appellant wrote the several signatures on the allegedly forged documents introduced into evidence and that Mr. DeWitt did not, as he testified, sign the documents in question.

[1] It is not within the province of an appellate tribunal to retry the case and to make inferences from the facts proved. That function belongs to the trial court. The appellate court is limited to deciding only whether upon the face of the evidence it can justly be held that sufficient facts could not have been found to warrant the inference of guilt. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[2] Unless we can say that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached by the triers of fact, we are not warranted in directing a reversal of the judgment on the ground of insufficiency of the evidence to support it.

Appellant does not contend that the incriminating evidence against him is either manifestly false or inherently improbable, but urges that it was outweighed, overbalanced and overcome by the testimony offered in opposition thereto. Undoubtedly, the testimony offered in contradiction of the prosecution's evidence and in support of appellant's alibi, afforded opportunity for a persuasive argument to the jury against the probability of appellant's guilt being established beyond a reasonable doubt, but we find nothing in the positive and direct testimony presented by the prosecution from which a reviewing court could justly conclude that such testimony is per se unbelievable, and that it was therefore the jury's duty not only to disregard it but to accept appellant's denial of any wrongdoing upon his part and to give full faith and credence to the testimony of DeWitt and the evidence offered in support of appellant's claimed alibi.

[3, 4] Obviously, reviewing judges are in no position to determine the credit which should be accorded to witnesses or to weigh their testimony. Undoubtedly, it is for that reason that our constitution provides that the appellate courts are not authorized to review evidence, except where, on its face, it may justly be held that it is insufficient to support the ultimate issue involved, in which case it is obviously not a review of a question of fact but purely one of law. People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1114. In conformity with the spirit and intent of this constitutional provision it has been ordained by the legislature that the jury are the exclusive judges of the credibility of witnesses, Code Civ.Proc. § 1847, and are also the judges of the effect and value of evidence addressed to them, save and except in those instances where it is declared by law that it shall be conclusive, Code Civ.Proc. § 2061. From the foregoing rules, it is manifest that the jury in the instant case were authorized, if they conscientiously felt warranted in doing so, after full and fair consideration thereof, to reject any testimony which was contradictory of that given by witnesses for the prosecution. People v. Phelan, 123 Cal. 551, 557, 56 P. 424; People v. Wright, 4 Cal.App. 704, 706, 89 P. 364; People v. Turpin, 10 Cal.App. 526, 530, 102 P. 680. It is very clear from the verdict, that the jury concluded that on November 10, 1943, the appellant was not working on the job at Long Beach, but was at the used car lot of Mr. Abbott and sold him the stolen automobile; obtained the money and check paid therefor and cashed the check in question. How can this court determine how the testimony given in contradiction of evidence of those facts impressed the jury? It may be that the very manner of the witnesses giving such testimony was itself, in the judgment of the jury, a complete contradiction of the truth of their statements. It may be (and who can gainsay their right to do so?) that the jury felt justified in disregarding in toto the testimony of appellant and the witnesses produced in his behalf. And if they did, may an appellate tribunal declare that they were wrong in so doing and in effect say to the jury "You misinterpreted the manner in which appellant and the witnesses produced by him testified; you should have given their statements full weight and credit, and should have disregarded the positive and direct testimony in contradiction thereof." Were this court to assume the position just described, we would clearly be invading the province of the jury by passing upon the weight of testimony and the credibility of witnesses. Where witnesses have testified in direct opposition to each other, no one has ever doubted the right of a judge or jury to believe one witness as against another. Common experience and knowledge teaches us that the most complete and conclusive contradiction of the truth of a witness' testimony is his own manner on the witness stand when giving it. The peculiar advantages which juries and trial judges have of determining whether witnesses are entitled to credence, not upon what they testify to, but by their manner of testifying, has given rise to the familiar rule that reviewing courts will not and cannot set aside verdicts of juries or findings of the trial court based upon evidence on which there appears to exist a substantial conflict.

Furthermore, it must be remembered that a motion for a new trial was made in the case with which we are here concerned and denied by the trial judge. He also had the witnesses before him, was fortified with an opportunity to observe their manner and demeanor on the stand, their apparent candor or absence of the same, and the reasonableness or unreasonableness of the statements they made. Unless he believed the testimony of the People's witnesses and disbelieved the testimony proffered by the defense in contradiction thereof, it was not only his privilege but his duty to grant a new trial. By his action in denying the motion for a new trial, the judge of the court below concurred in the verdict of the jury which rejected, as they had a right to do, the testimony offered by appellant and accepted as true evidence given by the prosecution witnesses.

For the reasons herein stated, the judgment and the order denying defendant's motion for a new trial are, and each is, affirmed.

YORK, P. J., and DORAN, J., concur.

67 Cal.App.2d 452

EVANS v. SAN JOAQUIN COUNTY et al.

Civ. 7105.

District Court of Appeal, Third District, California.

Jan. 2, 1945.

Hearing Denied March 1, 1945.

1. Taxation ⚷535

Statute requiring refund of "taxes erroneously or illegally collected" does not require that such taxes must be erroneous or illegal taxes in order to justify refund thereof. St.1941, p. 2114, § 5096.

2. Taxation ⚷535

Where realty owner which in order to obtain redemption of realty from tax sale was required to pay delinquent realty taxes and in addition personalty taxes assessed against a prior owner subsequent to tax sale and made a lien on such realty, and paid personalty taxes under protest and redeeming owner was not enriched at expense of county because county had lien for such taxes presumably fully securing such taxes on other realty of prior owner redeeming owner was entitled to have amount paid for personalty taxes refunded. St.1941, p. 2114, § 5096; Pol.Code, § 3817.

Appeal from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by Ralph W. Evans, as Building and Loan Commissioner of the State of California, against County of San Joaquin and others for a refund of taxes. From a judgment for plaintiff, defendants appeal.

Affirmed.

Chester E. Watson, Dist. Atty., and Robert N. Blewett, Asst. Dist. Atty., both of Stockton, for appellants.

Charles H. McDonald, of San Francisco, for respondent.

ADAMS, Presiding Justice.

On November 29, 1929, the Pacific States Savings and Loan Company (hereinafter referred to as Pacific States) became the holder of a deed of trust executed by the legal owner of a certain parcel of property in San Joaquin County. Thereafter, on or about August 5, 1935, this property was conveyed by its owner to Charles C. and Nettie Roe, subject to the lien of the deed of trust. The Roes failed to pay the general property taxes assessed against and levied upon it for the fiscal year 1935–36, and on or about the 24th day of June, 1936, it was sold to the State of California, pursuant to the provisions of the Political Code. At the time Charles C. and Nettie Roe took title to the parcel involved in this action, they were the owners of an adjoining parcel, and the two parcels were assessed as one by the County of San Joaquin for the purpose of levying general property taxes thereon for the fiscal years 1937–38 and 1938–39. Located upon this adjoining parcel was certain personal property owned by Charles C. Roe, which personal property was also assessed by the County of San Joaquin for the years 1937–38 and 1938–39, and a lien for the payment of taxes thereon was impressed by the county upon both parcels of real property. The Roes meanwhile had defaulted in their payments under the deed of trust and the trustees named therein, on December 28, 1938, executed a trustees' deed of said property to Pacific States. Thereafter the Building and Loan Commissioner took possession of the assets of Pacific States and on March 28, 1940, applied to the auditor of the County of San Joaquin for an estimate of the amount necessary to be paid in order to redeem the said real property from the sale thereof to the State of California, in accordance with the provisions of Section 3817 of the Political Code. Defendants contended that in order to redeem, it was necessary for plaintiff to pay the sum of $721.77 which sum included $545.77 which was the amount of the tax on Roe's personal property, with interest and penalties, for years subsequent to the sale to the state. Plaintiff contended that the only amount which it should be compelled to pay was the tax upon the real property in controversy. The auditor refused to furnish an estimate excluding the personal property taxes, and refused to allow a redemption of the real property without payment by plaintiff of the whole sum of $721.77. Plaintiff then paid the said sum under written protest and thereafter presented to the board of supervisors of the county a claim for refund of $545.77. This claim was denied, whereupon plaintiff brought this action. A demurrer to his complaint was sustained without leave to amend, and from the judgment for defendants which followed plaintiff appealed. This court reversed said judgment (Evans v. County of San Joaquin, 58 Cal.App.2d 799, 138 P.2d 805), holding that plaintiff's claim for a refund should have been allowed, and that the trial court erred in sustaining defendants' demurrer to plaintiff's complaint.

Thereafter defendants filed an answer to plaintiff's complaint, the cause was submitted to the trial court on an agreed statement of facts substantially as above set forth, and judgment for plaintiff followed. From that judgment defendants have appealed, contending that notwithstanding the prior decision of this court, plaintiff is not entitled to recover because the taxes which he paid on the personal property were valid taxes that were "legally and morally" due and owing to the county, that to refund them to plaintiff would result in an unjust enrichment of plaintiff at the expense of the county, and that under section 5096 of the Revenue and Taxation Code, St.1941, p. 2114, formerly sec. 3804 of the Pol.Code, refunds are allowable only when they have been illegally assessed or where, through error, they are paid more than once, and that what is paid on redemption of property is not the subject of a refund unless the taxpayer can show that the taxes were "erroneous or illegal."

[1] Section 5096, supra, provides that "On order of the board of supervisors, any taxes paid before or after delinquency *shall* be refunded if they were: * * * (b) Erroneously or illegally collected." (Italics added.) This section does not require that in order to justify recovery of taxes for which a refund is sought, such taxes must be "erroneous or illegal taxes." Refund is to be made where taxes have been "erroneously or illegally collected."

[2] In our previous decision in this case we held that the county could not legally exact from plaintiff payment of the taxes assessed against the personal property of the Roes, as a condition precedent to allowance of his right of redemption. Therefore, when the county auditor refused to furnish plaintiff with a correct estimate of the amount necessary to be paid by him, and exacted payment of the personal property taxes and penalties, plaintiff was denied a right given him by law, and the county erroneously and illegally collected from him taxes which, on the filing of a claim therefor, he was entitled to have refunded by the board of supervisors.

As for appellants' argument that plaintiff should not be permitted to recover because the personal property taxes were legally and morally due to the county, they may have been legally and morally due to the county from Roe to whom the personal property belonged; but the mere fact that the county impressed a lien upon both parcels of real property for the taxes due on the personal property did not make the debt plaintiff's debt, and imposed neither a legal nor a moral obligation upon plaintiff to pay the debt of the Roes. As for the argument that plaintiff will be unduly enriched at the expense of the county, the county still has a lien upon the one piece of real property as security for the personal property taxes and presumably can rely thereon for collection of such taxes.

Appellants cite four cases in support of their argument, to wit: Carton v. Board of Commissioners, 10 Wyo. 416, 69 P. 1013; Steele v. County of San Luis Obispo, 152 Cal. 785, 93 P. 1020; First Trust & Savings Bank of Pasadena v. County of Los Angeles, 206 Cal. 240, 273 P. 1066; and H. & W. Pierce, Inc. v. County of Santa Barbara, 40 Cal.App. 302, 180 P. 641. But in all of those cases the taxes which plaintiffs sought to have refunded were taxes imposed upon their own property, which they, therefore, had a moral obligation to pay; and recoveries were sought upon mere technical defects which were claimed to render the assessments void. Relief was denied upon the grounds that to permit plaintiffs to recover would permit them to avoid their just share of the public burden, and that, under the rule that he who seeks equity must do equity, one who refuses to pay a tax morally due from him cannot have the aid of a court of equity in avoiding such just debt on merely technical grounds. Couts v. Cornell, 147 Cal. 560, 82 P. 194, 109 Am.St.Rep. 168.

Plaintiff regularly pursued the course provided by section 5096, supra, and related sections, and since we held in our former decision that the amount which he sought to have repaid to him had been erroneously and illegally collected, it was the duty of the board of supervisors to allow his claim and order refunded the amount represented by the taxes on Roe's personal property and the penalties and interest thereon. Stewart Law, etc., Co. v. County of Alameda, 142 Cal. 660, 76 P. 481, cited in Easton v. County of Alameda, 9 Cal.2d 301, 303, 70 P.2d 640; Pacific Coast Co. v. Wells, 134 Cal. 471, 66 P. 657; Slade v. County of Butte, 14 Cal.App. 453, 112 P. 485; Palomares Land Co. v. County of Los Angeles, 146 Cal. 530, 536, 537, 80 P. 931.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

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67 Cal.App.2d 421

WILDE v. M. J. MURPHY, Inc.

Civ. 12747.

District Court of Appeal, First District, Division 2, California.

Dec. 29, 1944.

1. Mechanics' liens 🔑299

The right of holder of junior lien to redeem property sold under decree of foreclosure of mechanic's lien is purely statutory, and, in absence of a compliance therewith, a tender of the money required to redeem is ineffectual. Code Civ.Proc. § 702.

2. Mechanics' liens 🔑299

The holder of junior lien was not entitled to redeem property sold under decree of foreclosure of merchanics' liens, where purchaser in addition to purchase price paid for insurance premiums, taxes, maintenance, upkeep, etc., and junior lienholder tendered only the amount of purchase price plus interest. Code Civ.Proc. § 702.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action in ejectment by W. C. Wilde against M. J. Murphy, Inc. From a judgment for defendant, plaintiff appeals.

Affirmed.

W. C. Wilde, in pro. per.

John Milton Thompson, of Monterey, W. H. Orrick and Orrick, Dahlquist, Neff, Brown & Herrington, all of San Francisco, for respondent.

STURTEVANT, Justice.

In an action of ejectment the trial court made findings in favor of the defendant. From the judgment entered on those findings the plaintiff has appealed. The controversy arose out of the following facts: Both parties claim they succeeded to the title of Claribel H. Zuck. February 4, 1941, Claribel H. Zuck became the owner of the property in dispute. Thereafter she commenced the construction of two houses thereon. Before doing so she negotiated a loan of $5,000 from Nucleus Building & Loan Association, and to secure the payment of said loan she executed a trust deed in favor of certain trustees. During the following months the construction continued. The claims of laborers and materialmen were not paid and the claimants, including M. J. Murphy, Inc., filed mechanics' liens against said property. In February, 1942, M. J. Murphy, Inc., had become the assignee of said claims of lien and it commenced an action to foreclose said liens. Said action was commenced in the Superior Court of Monterey County. It was entitled M. J. Murphy, Inc. v. Claribel Haydock Zuck and W. C. Wilde. It was numbered No. 21835. In that action a judgment of foreclosure was entered June 18, 1942, and Silas W. Mack was named as commissioner to satisfy said judgment for $4,537.16. Later a sale was had and said commissioner sold said property to M. J. Murphy, Inc., for $100.

In the meantime A. G. Wilde, the wife of the plaintiff, commenced an action, No. 21004, against Claribel H. Zuck, took out an attachment and caused it to be levied May 5, 1941, on said property for $1,523.40.

Judgment in favor of Mrs. Wilde was entered. Later an abstract thereof was recorded in the office of the recorder of Monterey County on October 7, 1941. Thereafter, on December 11, 1941, a writ of execution was issued. On January 9, 1942, all of said property was sold by a constable of Monterey County to said A. G. Wilde. On January 12, 1942, she assigned to W. C. Wilde, this plaintiff, her interest in said property and the said constable's certificate. On January 30, 1943, the said constable executed his deed of said property. On May 10, 1943, plaintiff served a written notice on M. J. Murphy, Inc., and on Silas W. Mack that plaintiff redeemed said property. Said plaintiff accompanied said notice with his check in the sum $106.67—$100 the above mentioned purchase price and interest thereon at the rate of two-thirds of one per cent per month from July 28, 1942.

[1, 2] Under the foregoing facts the plaintiff claims he qualified as a redemptioner and that as such he was entitled to redeem. We think his claim may not be sustained. Section 702 of the Code of Civil Procedure states the procedure to be followed by one who attempts to redeem. In clear language it is stated that he must pay to the purchaser "the amount of his purchase, with two-thirds of one per cent per month * * * together with the amount of any assessment or taxes, and any reasonable sum of (for) fire insurance, maintenance, upkeep, or repair of the improvements upon the property * * *." Continuing, said section provides that if there is a disagreement between the purchaser and redemptioner as to whether the amount claimed for fire insurance, maintenance, upkeep, or repair is a reasonable charge the redemptioner shall pay to the clerk of the court the amount he concedes to be due and at the same time file a petition asking the trial court to determine the correct amount. It is further provided that the trial court will hear the petition and determine the amount. If the amount so determined exceeds the sum theretofore deposited by the redemptioner an additional sum must also be deposited with the clerk. Having received the full sum determined by the court the clerk of the court will then pay it to the purchaser. The privileges conferred by said section are purely statutory. In Bangham v. Michael, 179 Cal. 390, at page 392, 177 P. 161, at page 162, the court said: "The right of the holder of a junior lien to redeem property sold under a decree of foreclosure of a prior mortgage thereon is purely statutory, and, in the absence of a compliance therewith, a tender of the money required to redeem is wholly ineffectual for the purpose. The power of the sheriff or that of a commissioner acting in the matter is altogether statutory, and his acts are nugatory unless the provisions of the statute are pursued." That rule is sustained by the great weight of the authorities. See texts and notes as follows: Freeman on Executions, § 314; 36 Am.Jur. 175; 40 C.J. 761.

The findings are very full and complete. Among other things the trial court found that the purchaser, besides paying the purchase price, also paid for: "Premiums for fire insurance on said building $70.15; taxes on said real property $5.33; maintenance, upkeep and repair $3,069.27. That, in addition, Anderson-Doughtery, Hargis Co. (a corporation), at the special instance and request of defendant, performed necessary work on said buildings in connecting sewers, installing plumbing, water heater, sinks and toilets, and other work at a cost of $264.98; that said last mentioned sum has not been paid, but said defendant is obligated to pay the same to said Anderson-Dougherty Hargis Co. Total $3,409.73." Those amounts were found to be the reasonable sums and that the payments were made in good faith; that the parties disagreed as to the amount payable; that the plaintiff tendered no other sums; that he did not deposit his tender with the clerk; that he did not file a petition asking the trial court to determine the amount; that he did not attempt to redeem until ten months after the date of the purchase; that he stood by and saw the defendant making said expenditures; and that the plaintiff is acting in bad faith.

The plaintiff contends: "Tender and refusal is equivalent to payment in effecting completion of redemption and authorizes ejectment." He cites and relies on Leet v. Armbruster, 143 Cal. 663, 77 P. 653. But that contention is too broad. The court said on page 667 of 143 Cal., on page 654 of 77 P.: "* * * that a *proper tender*, even if refused, works a divestiture of the purchaser's estate, there can be no doubt. Our code declares (Civ.Code, § 1504) that an offer of payment, or other performance *duly* made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as performance." (Italics ours.)

But in that case the trial court held (143 Cal. at page 666, 77 P. at page 653) that the amount of the tender was sufficient. Tonningsen v. Odd Fellows' Cem. Ass'n, 60 Cal. App. 568, 570, 213 P. 710, is to the same effect. But in the instant case, as shown above, the trial court made findings fully supported by the evidence that the alleged tender was insufficient and that it did not comply with several provisions of the statute. Code of Civ.Proc. § 702.

A most casual reading of the provisions of section 702, Code of Civil Procedure, discloses that the trial court on the hearing of a petition filed thereunder will cause an order to be "entered in the minutes of said court [determining] the amount required for redemption." But no such order was asked and none was made. In reply the plaintiff now seeks in this proceeding to inject such matters as an issue; that is, he would in this proceeding inquire for what purposes the purchaser may make expenditures and for what amounts. The statute is not so written. Such matters are by the statute confined to the redemption proceeding.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

67 Cal.App.2d 483

STEIN v. BERTRAM et al.

Civ. 14514.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1945.

1. Evidence 🔑450(6)

Agreement that after principal had received $14,000, after first paying actual liabilities, costs and expenses paid out to third persons in order to complete subsequent business transacted, principal would pay agent the next $4,700 collected, was ambiguous as to whether the $14,000 was net or gross and evidence of negotiations and stipulations preceding and accompanying execution of the agreement was admissible to determine meaning of language used in agreement.

2. Appeal and error 🔑1071(6)

Failure of court to find that contract was uncertain or ambiguous before admitting evidence of meaning of language used in contract was not ground for reversal where from record finding on such collateral issue, if made, obviously would be adverse to appellant.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by E. S. Stein against Jerry Bertram and Jerry Bertram-Furniture, a fictitious firm composed of Jerry Bertram, to recover money allegedly due under a contract and for money had and received. Judgment for defendant, and plaintiff appeals.

Affirmed.

Alfred Gitelson, of Los Angeles (Sidney L. Gordon, of Los Angeles, of counsel), for appellant.

George Cohn, of Los Angeles, for respondent.

DORAN, Justice.

This is an appeal by plaintiff in an action to recover a specified sum alleged to be due under the terms of a contract between plaintiff and defendant; and a second cause of action was for money had and received. The trial court found for defendant, and from the judgment that followed, plaintiff appeals.

Briefly, it appears from the record that respondent was a merchant engaged in the furniture business. Appellant was a salesman in defendant's employ. Respondent had determined to liquidate the business, and in connection with said liquidation appellant performed certain services as salesman. A contract was executed between appellant and respondent fixing the terms of appellant's employment. It was in the form of a letter addressed to appellant which was approved of and signed by appellant. The language thereof in part is as follows: "On or about the 15th day of October, 1942, the undersigned did sell the furniture, furnishings, equipment and principal stock-in-trade in bulk; said sale is, for the purpose of brevity, hereinafter referred to as 'bulk sale.' Said bulk sale did not include the accounts receivable, certain unfinished furniture, and certain items of equipment. For your services in assisting the undersigned in effectuating said bulk sale, in assisting the undersigned in the collection of said accounts receivable and in selling the furniture, machinery and equipment not included within said bulk sale, and in filling certain orders which were received by the undersigned after said bulk sale, after the undersigned shall first have received the sum of $14,000.00, *after first paying the actual liabilities, costs, and expenses paid out to third persons, in order to complete the said subsequent business transacted* and the sale of said furniture, merchandise and equipment not included within said bulk sale, and the actual costs and expenses paid out to third persons, of collection of the said accounts receivable, including an allowance to the undersigned of the sum of $75.00 per week, against which there shall be credited any wages, salary or income received by the undersigned from any other source, from all of said property, including the bulk sale, accounts receivable, said merchandise, furniture and equipment not included within the said bulk sale, and from the orders filled thereafter, the undersigned does agree to pay unto you the next $4700.00 collected and received from said assets; and thereafter, to-wit, after the undersigned shall have received the said sum of $14,000.00 and you shall have received the said sum of $4700.00, to pay to you one-half of the net receipts." (Italics added.) It is the italicized portion of the above which is the basis of the dispute.

At the trial appellant suggested that the question of liability be tried first and in that connection stated, "In support of our suggestion to your Honor, our position is the question of liability is distinct and separable from the question of the amount of damages." Considerable discussion followed, at the conclusion of which the trial judge disposed of the matter as follows: "The Court: Well, if that involves the figures, that is all right. Let's take up the question of liability first and you can introduce whatever evidence you think is necessary even though it requires some bookkeeping to substantiate your contention."

In addition to the contract, considerable evidence was received relating to the sale of the merchandise, costs, expenses and profits, as well as evidence of the circumstances surrounding the execution of the agreement in question. It was contended by respondent at the trial that the language thereof meant, and it was the intention of the parties, that respondent "was to get the first $14,000.00 net to him, and then appellant was to receive the next $4,700.00." Appellant, on the other hand, contended that said $4,700 was due when the first $14,000 was received gross.

The trial court found for defendant and concluded that there was nothing due. Judgment was entered accordingly.

[1] It is contended by appellant that the contract in question "is clear and free from ambiguity and that the rights of the parties were governed and determined thereby." And that, "The trial court, therefore, erred as a matter of law in admitting into evidence the negotiations and stipulations preceding and accompanying the execution thereof and in admitting into evidence the surrounding circumstances at the time of the execution thereof." There is no merit to the contention. The question of liability depended upon the meaning of the language used by the parties in reducing the agreement to writing. Obviously the trial court determined that the language was not clear; there can be no criticism of the court's judgment in this regard. The evidence received therefore was proper.

[2] It is also urged that the court's failure to find as a fact, or conclude as a matter of law that the contract was uncertain and ambiguous, was error. Failure of the court to find on such a collateral issue is no grounds for complaint on appeal when from the record such a finding, if made, obviously would be adverse. Elliott v. Bertsch, 59 Cal.App.2d 543, 139 P.2d 332; Moore v. Hoar, 27 Cal.App.2d 269, 81 P.2d 226.

There being no errors in the record, for the foregoing reasons the judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 403

GUSTINE CITY v. SILVEIRA.

Civ. 7085.

District Court of Appeal, Third District, California.

Dec. 26, 1944.

Hearing Denied Feb. 19, 1945.

1. Municipal corporations 🔑408(1)

Municipal assessment proceedings are in invitum, and hence must be strictly construed against the taxing body and in favor of the property owner. St.1911, p. 730, as amended.

2. Municipal corporations 🔑294(3)

Under statute providing that notices of resolution of intention to effect municipal improvement should contain a statement of the day, hour, and place for hearing of protest by property owners, a notice which referred only to "Wednesday, the 13th day of October, at 7:30 o'clock p. m.", was not fatally defective because numerals "1920" were omitted. St.1911, p. 733, §§ 3, 5, as amended by St.1915, p. 1464.

3. Municipal corporations 🔑294(3)

The statute requiring notices of resolution of intention to effect municipal improvement to contain a statement of the day, hour, and place for hearing of protests was substantially complied with by notice which omitted the numerals "1920" even if such numerals were necessary to validity of the assessment proceedings, where resolution of intention was the only source of information to be used in body of the notice to be posted, and resolution contained the numerals "1920". St.1911, p. 733, §§ 3, 5, as amended by St.1915, p. 1464.

4. Municipal corporations 🔑294(3)

In determining whether posted notice of proposed municipal improvement was sufficient to inform property owner of the day, hour, and place of meeting as required by statute, entire notice should be considered, and hence where notice first recited that resolution was passed on September 27, 1920, and that it was posted on October 1, 1920, no reasonable person could understand that meeting was to be held in any other year than 1920. St.1911, p. 733, §§ 3, 5, as amended by St.1915, p. 1464.

5. Municipal corporations 🔑519(5)

A lien created by street assessment was not extinguished by city's payment of the bonds, since the two obligations are distinct. St.1911, p. 730, as amended.

6. Municipal corporations 🔑558

A city did not lose its right to foreclose street assessment liens because city had previously exercised the right to levy a special tax in addition to paying off the bonds, since foreclosure is a cumulative remedy. St.1915, pp. 1447, 1449, §§ 12, 16.

7. Municipal corporations 🔑564

City's action to foreclose street assessment liens created under Improvement Act of 1911 and Bond Act of 1915 was governed by four-year limitation statute, and not by two-year limitation statute, which applies to assessment for improvements proceedings for which are prescribed by legislation of any political unit other than the state. St.1911, p. 730, as amended; St. 1915, p. 1447, § 12; St.1927, p. 891, § 11 (c, d); Code Civ.Proc. § 329.

8. Municipal corporations 🔑562(1)

"Gustine City" could properly maintain an action to foreclose street assessment liens notwithstanding that city mistakenly was known and referred to as the "City of Gustine" in the improvement proceedings, where such mistake did not prejudice property owner. St.1911, p. 730, as amended.

◆

Appeal from Superior Court, Merced County; Andrew R. Schottky, Judge.

Action by Gustine City, a municipal corporation, against Maria Do Rosario Silveira, also known as Mariado Rosario Silveira, to foreclose street assessment liens. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hawkins & Hawkins and J. Lee Robertson, all of Modesto, for appellant.

C. R. Perrier, of Gustine, for respondent.

PEEK, Justice.

This is an appeal by the defendant from a decree of foreclosure of certain street assessment liens.

The evidence introduced was almost wholly documentary, and in the main undisputed. During the latter part of the year 1920 the respondent, a municipal corporation, initiated proceedings under the provisions of the Improvement Act of 1911, Statutes of 1911, page 730 as amended.

In accordance with the provisions of section 3 thereof, a resolution of intention was adopted by the board of trustees and duly published. A notice of improvement as specified in section 5 of said act was posted along the streets to be affected. The notice stated that the resolution of intention was passed on September 27, 1920; described the area to be improved, the type of improvement to be made and made reference to the original resolution on file in the office of the city clerk for further particulars. In the body of the notice it stated that on "Wednesday, the 13th day of October at 7:30 o'clock P. M. * * *" any person having objection might appear before the board to show cause why the work should not be carried out. The notice was dated October 1, 1920 and was signed by the superintendent of streets.

No protests being filed in accordance with said notice the respondent, under the provisions of the bond act of 1915, p. 1441, issued serial bonds, the last instalment of which matured on July 2, 1937. The money in the trust fund proved insufficient to meet the payments of principal and interest of the bonds when the same fell due, and the city levied a tax of ten cents on each one hundred dollar valuation of property in accordance with the provision of section 12, paragraph 2 of the 1915 act. The tax so levied was against all property holders within said city, including appellant, and was paid by her without protest. Notices of the amounts of the assessments were mailed to appellant and all other property owners. None of the assessments against appellant's property were paid, and on November 2, 1936, all became due and unpaid. On October 21, 1940, the city council instructed the city attorney to institute foreclosure proceedings of the lien created by the assessment against plaintiff's property, and on October 31, 1940, the present action was filed. All of the proceedings up to that time had been carried in the name of the City of Gustine, a municipal corporation. However, respondent's true corporate name was and is Gustine City, a municipal corporation, and it is in the latter name that the present proceeding has been prosecuted. A hearing was had on July 2, 1943, and judgment in favor of respondent was filed March 8, 1944. From that judgment defendant has appealed.

By her first contention appellant urges that the respondent did not acquire jurisdiction to proceed with the improvement in that it failed to strictly follow the requirements of the 1911 act as amended, Ch. 741, page 1464, Stats.1915, in particular section 3, which provides that before ordering any work or improvement the city council shall pass a resolution of intention which, among other things therein enumerated, "shall contain also a notice of the day, hour and place when and where any and all persons having any objections to the proposed work or improvement may appear before the legislative body and show cause why said proposed improvement should not be carried out * * *", and section 5, which prescribes that notices of the resolution shall be posted along the line of the proposed work and which specifies that the notices "shall contain also a statement of the day, hour and place * * *" for hearing of protest as provided in section 3. The basis for appellant's argument in this regard is that as this is an assessment proceeding, the ultimate result of which is to divest appellant of her title in the property, it therefore is a proceeding in invitum, and to be valid must comply strictly with all of the requirements of the statute. It is then urged that as the reference contained in the body of the notice referred only to Wednesday the 13th day of October, at 7:30 o'clock P. M. it was fatally defective, as the numerals "1920" were omitted. In support of such argument it is contended that as there were at least two Wednesdays which occurred on the 13th day of October subsequent to the date in question, one being on the 13th day of October 1937 and the other on the 13th day of October 1943, that therefore it could not be ascertained which date was meant.

[1] We are entirely in accord with appellant's first statement that such proceedings are in invitum, and according to the well established rule must be strictly construed against the taxing body and in favor of the property owner. But we are inclined to the belief that to carry the rule of literal compliance with the statute to the extreme urged by appellant is to advocate an absurdity. Except as previously mentioned, the record discloses no evidence, nor does appellant contend, that the omission of the figures "1920" affected in the slightest degree her knowledge that the work was to be done upon property owned by her, or that by such omission she had no knowledge of the time or place where she might appear and file objections to such work. Her argument in this regard is pre-

dicated upon the sole ground that as the figures "1920" were omitted, the city council did not strictly comply with the statute, and therefore it did not have jurisdiction to proceed with the improvements. The cases cited by appellant are readily distinguishable from the instant case in that they either relate to the sufficiency of recitals in tax deeds (Carter v. Chevalier, 100 Cal.App. 567, 280 P. 706), the priorities of tax or assessment liens (Woodill & Hulse Elec. Co. v. Young, 180 Cal. 667, 182 P. 422, 5 A.L.R. 1296), or the rule of strict construction in relation to the levying of inheritance taxes (Estate of Potter, 188 Cal. 55, 204 P. 826, and McDougald v. Boyd, 172 Cal. 753, 159 P. 168). None of the cases so cited involves questions of notice, or of the sufficiency thereof, as applied to a situation comparable to that now before this court.

[2] At the outset we do not place upon the wording "day, hour and place," the construction imparted to it by appellant. Surely the word "day" as used therein refers to the day of the week. The word "hour" can refer only to the hour of the day, and the word "place" can refer to nothing other than the place where objections could be made. If the rule of strict compliance is to be followed it must be admitted that nowhere in the sections relied upon by defendant is it required that the year in which such hearing is noticed shall be set forth. Obviously under the general rule applicable to such proceedings, if to confer jurisdiction upon the taxing body any statement is expressly required by the statute conferring such authority, and such statement is entirely omitted, no jurisdiction to proceed has been acquired, and the legal effect is the same as though no notice at all had been given. But such cannot be said of the present situation.

[3] Even if it be assumed that the numerals "1920" were necessary to the validity of the proceedings, it cannot be said that there has been an entire omission of a statutory requirement. At most it was but a clerical error. The original resolution of intention was the only source of information to be used in the body of the notice to be posted, and that resolution contained the figures "1920." Under such facts the error could have occurred only in transposing portions of the resolution of intention to the notice of improvement to be posted. It would seem, therefore, that under such circumstances a court might properly determine whether there has or has not been a satisfactory compliance with the statute. As stated in the case of Beck v. Ransome-Crummey Co., 42 Cal.App. 674, 682, 184 P. 431, 434:

"This judgment of what is a substantial compliance with the statute is to be exercised in the first instance by the trial court. If the case is one where a requirement of the statute has not been entirely disregarded, its determination of the question of substantial compliance ought to be controlling in the absence of an abuse of discretion * * *."

[4] Turning then to the record before us, the trial court found in its second finding, that the board of trustees of respondent city, in conformity with the requirements of the 1911 act, passed a resolution of intention, published the same and posted it in the manner provided in said act; that the omission of the figures "1920" in the notice was not misleading, and that the defendant could have acquired information regarding the year by referring to the original resolution of intention on file with the clerk of said city. This finding finds amplification by an extensive memorandum opinion filed by the trial judge wherein he stated that in determining whether or not the posted notice under attack was sufficient to inform a property owner of the day, hour, and place of the meeting, the entire notice should be taken into consideration, and as the notice first recited that the resolution was passed on September 27, 1920, and that it was posted on October 1, 1920, "no person of ordinary intelligence could reasonably understand that the meeting was to be held in any other year than the year 1920." We are in accord with these findings, for as already stated, to sustain appellant's contention in this regard and to hold otherwise, would be to adopt an absurd construction of the statute.

[5] Appellant admits the assessments in question were not paid by her but next contends that as the bonds were paid by the city, the lien created by such assessment was therefore extinguished. The end result of such contention would be that appellant could properly demand the return of her property from respondent free and clear of any assessment lien. That such is not the law is well illustrated by numerous citations beginning with Weber v. City of San Francisco, 1851, 1 Cal. 455. See also Stege v. City of Richmond, 1924, 194 Cal. 305, 319, 228 P. 461. Appellant by her

argument in this regard has apparently confused the payment of the bonds by the city to the bondholders with the debt owing to the city by the appellant. The payment by the city of the bonds as they matured could not be considered as a payment of the assessments by appellant to respondent, thereby releasing the assessment lien upon appellant's property. The two obligations are separate and distinct.

[6] In further support of such contention it is the apparent argument of the defendant that the respondent city had three alternatives: First, under Section 12 of the 1915 Act, to sell the property under a tax sale; secondly, under Section 16 of the same act, to levy a special tax, or thirdly under Section 11, subsection (c) of the 1915 Act, as amended, by St.1927, p. 891, to bring foreclosure proceedings; but as the city had previously exercised one of such alternatives and levied a special tax in addition to paying off the bonds, it lost its right to foreclose.

An answer to defendant's argument is found in the case of Hammond v. City of Burbank, 1936, 6 Cal.2d 646, 660, 59 P.2d 495, 502, wherein the court stated:

"The remedy of foreclosure, in our opinion, is not an alternative but a cumulative remedy, and is a remedy given to aid the city, not the bondholders."

It is also provided in part in Section 11(c) of the 1915 Act as amended by St. 1927, p. 891, as follows:

"* * * as a cumulative remedy, the same [past due assessments] when due and delinquent may by the order of the council be collected by suit brought in the superior court to foreclose the lien thereof."

[7] Appellant further alleges that respondent's action is barred by the lapse of time. The record discloses that the last installment owing by appellant to respondent was past due and delinquent on November 2, 1936, and that respondent's foreclosure action was filed on October 31, 1940. In support of her contention in this regard appellant relies upon Section 329 of the Code of Civil Procedure, which reads:

"An action for the foreclosure of a lien securing an assessment against real property for street improvements, the proceedings for which are prescribed by legislation of any political unit other than the State, may, when such assessment is made payable in installments pursuant to a bond or other written agreement executed pursuant to such legislation, be commenced at any time within two years after the date when the last of such installments becomes due." (Added by Statutes 1933, p. 2291.)

Respondent, however, replies that the present action is controlled by the quoted portion of subsection (c) of Section 11 of the 1915 Act and the further provision set forth in subsection (d) thereof, which in part is as follows:

"Such action shall be brought in the name of the city, and may be brought at any time prior to the expiration of four (4) years subsequent to the date of delinquency of the last installment due or to become due thereunder."

If appellant be correct, then obviously the statute has run against respondent's action. On the other hand if respondent's contention is proper, then its foreclosure action was filed two days before the statute would have run. While it is true that Section 329 of the Code of Civil Procedure is the latest valid expression by the legislature upon this subject, nevertheless said section cannot be said to apply to the present situation in that it covers only the foreclosure of liens securing assessments, "the proceedings for which are prescribed by legislation of any political unit other than the State." It must be admitted that in the present case the proceedings for street improvement were prescribed solely by the state under the Improvement Act of 1911 and the Bond Act of 1915, and therefore subsections (c) and (d) of Section 11 of the 1915 Act, as amended, must govern.

[8] We likewise find no merit in defendant's final contention. The foreclosure action herein was filed in respondent's true corporate name, Gustine City. The improvement proceedings, however, were all in the name of the City of Gustine. Appellant does not contend, nor could she, that respondent is not the true party in interest. Admittedly the action was entitled correctly. The fact that respondent mistakenly was known and referred to as the City of Gustine in the improvement proceedings surely did not confuse or mislead appellant to her detriment. See 13 Am.Juris. 270, and 6a Cal.Jur. 260, 261.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; CARTER, J., dissenting.

25 Cal.2d 422

PEOPLE v. GILBERT et al.

Cr. 4544.

Supreme Court of California.

Dec. 22, 1944.

1. Criminal law 🔑980(2)

A hearing for determination of degree of offense and punishment therefor is not a "trial" in technical sense, and is not governed by same strict rules of procedure as a trial.

See Words and Phrases, Permanent Edition, for all other definitions of "Trial".

2. Constitutional law 🔑270

Where defendants entered plea of guilty to charge of murder and stipulated that evidence which thereafter should be taken at trial of codefendant, who had entered plea of not guilty, could be considered by court for purpose of fixing degree of crime and sentence to be imposed and defendants were accorded full opportunity to produce evidence fixing degree of crime, no lack of due process in proceeding to determine degree of crime and appropriate punishment could be deduced from receipt of evidence introduced at codefendant's trial, regardless of whether the defendants or their counsel were absent from, or did not participate in, that trial. U.S.C.A.Const. Amend. 14.

3. Criminal law 🔑993

Evidence was insufficient to sustain modification of judgments, imposing death sentence for murder, on ground that defendants were promised that they would receive a life sentence if they pleaded guilty and that the promise was based on acts and conduct of officers of state and of defense counsel. Pen.Code, § 189; U.S.C.A.Const. Amend. 14.

4. Constitutional law 🔑257

Hope or belief of defendants that they would escape supreme penalty by pleading guilty, not founded on a false or fraudulent representation or promise, does not constitute extrinsic fraud or a denial of due process. U.S.C.A.Const. Amend. 14.

5. Criminal law 🔑997

Motion to vacate judgments, imposing death sentence for murder, on ground that plea of guilty was induced through extrinsic fraud, misrepresentation, coercion and wrongful persuasion, constituted application for relief in nature of writ of error coram nobis.

6. Criminal law 🔑251

Procedural rules of courts are a part of due process of law and must be observed in interest of orderly functioning of the administration of justice. U.S.C.A.Const. Amend. 14.

7. Criminal law 🔑980(1)

If original judgments imposing death sentence for murder were void because based on pleas of guilty induced by false or fraudulent promises, the pleas of guilty were a nullity and would not support judgments sentencing defendants to life imprisonment.

8. Criminal law 🔑980(1)

Trial judge signing conclusion that defendants were promised that they would receive life sentence if they entered plea of guilty and that state was estopped from imposing sentences of death was not in a position properly to proceed upon the pleas to adjudicate the further rights of either the state or the defendants.

9. Constitutional law 🔑270
Criminal law 🔑980(1)

Finding that judgments imposing death sentences for murder were based on perjured testimony given by defendants acting in reliance on promise that they would receive life sentences if they pleaded guilty did not furnish basis for concluding that defendants were victims of extrinsic fraud or were denied due process of law. Pen. Code, § 189; U.S.C.A.Const. Amend. 14.

10. Criminal law 🔑997

A party cannot invoke the extraordinary remedy of coram nobis on ground that at his trial the court was deceived as to material facts through the deliberately false testimony of the party himself.

11. Criminal law 🔑998

Sentence of death, once pronounced, is a solemn judgment which cannot lightly be vacated or modified. Const. art. 6, § 4.

12. Criminal law 🔑980(1)

The state will not, through its courts, pronounce judgment on a plea of guilty which has been procured by fraud or duress, or by any force which operates to preclude the exercise of free will and judgment by the party.

13. Criminal law ⚷273

An accused may gamble only at his own risk on the result of a plea of guilty when that plea is entered through the exercise of his judgment and unvitiated by fraud, duress or similar motivating influence.

14. Criminal law ⚷274

If accused claims that plea of guilty was procured by fraud or duress, or by similar motivating influence, he has burden of proof.

15. Criminal law ⚷997

The writ of error "coram nobis" is not intended to authorize any court to revise or review its judgments, but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented rendition of judgment and which, without any fault or negligence of the party, was not presented to the court.

See Words and Phrases, Permanent Edition, for all other definitions of "Coram Nobis".

16. Criminal law ⚷273

Mere advice or assurances by a private attorney will not vitiate a plea of guilty entered in reliance thereon but a contrary rule should prevail if statements of attorney amounted to an unqualified factual representation, which is untrue, that state or responsible officer thereof has entered into bargain purporting to commit state to give defendant a reward, in form of immunity or lesser punishment than he might otherwise receive, in exchange for plea of guilty, where such representation is apparently substantially corroborated by acts or statements of responsible state officer, is in good faith relied upon by defendant, and actually operates to preclude exercise of free will and judgment of defendant.

17. Attorney and client ⚷77

Private attorney is selected by party and is his agent.

18. Criminal law ⚷997

The affirmance of a judgment on appeal does not preclude granting of writ of error coram nobis, in an otherwise proper case.

19. Criminal law ⚷1024(1)

An order of trial court setting aside or modifying its previous judgment of death is an "order made after judgment affecting substantial rights of the people" within statute granting people right to appeal from such an order. Pen.Code, § 1238 (5).

See Words and Phrases, Permanent Edition, for all other definitions of "Order Made After Judgment Affecting Substantial Rights of the People".

◆

In Bank.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Max Leslie Gilbert and others were convicted of murder, and John Norman Lovelace moved to vacate the judgment and his plea of guilty, and Lyle Cecil Gilbert moved to vacate the judgment. From an order modifying the judgments imposing death sentence, the People appeal.

Reversed and remanded, with directions.

Robert W. Kenny, Atty. Gen., Frank Richards, Deputy Atty. Gen., Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for appellant.

Nathan O. Freedman and A. Wm. Christlieb, both of Hollywood, and Morris Lavine, of Los Angeles, for respondents.

PER CURIAM.

This is an appeal by the plaintiff from an order of the trial court by which it attempted to modify to life imprisonment, as to each of two defendants, judgments imposing the death penalty for murder, which judgments had been theretofore pronounced by that court and affirmed on appeal by this court. People v. Gilbert, 22 Cal.2d 522, 140 P.2d 9. The defendants had pleaded guilty to the crime charged, the trial court had taken evidence upon which it found that the murder was of the first degree (admittedly committed in the perpetration of robbery; Pen.Code, § 189), and had fixed the punishment as death. Each defendant appealed from the judgments then pronounced.

The proceedings in which the instant appeal is taken were had after the going down of the remittitur on the judgment of this court affirming the judgments so appealed from. One of the defendants (Lovelace) moved to vacate both the judgment and his plea of guilty; the other defendant (Lyle Cecil Gilbert) moved only "to vacate the judgment heretofore rendered." Lovelace predicated his motion on the ground that he "was deprived of his right of trial and induced to plead guilty * * * through extrinsic fraud, misrepresentation, coercion and wrongful persuasion practiced upon him," while Gilbert's motion was based on the contention that he had "been denied due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States." The trial court made written findings of fact and conclusions of law (presumptively in the view that an application for a writ of error coram nobis is a civil proceeding [see State v. Ray, 111 Kan. 350, 207 P. 192]), wherein it found that the defendants in entering their pleas of guilty and in giving certain false testimony "relied on the acts, conduct and appearances on the part of the State, as well as upon the statements of their own counsel, that life sentences would be pronounced and had been guaranteed." It held that the judgments originally pronounced were "null and void under the Fourteenth Amendment"; that "the defendants were denied the benefit of effective aid of counsel as guaranteed by the Fourteenth Amendment to the Constitution of the United States"; that such judgments were "based upon perjured testimony *given by the defendants themselves* [italics added], acting in reliance upon a promise that they would receive life sentences"; that such promise "was based upon acts and conduct on the part of officers of the State and of defense counsel, and that this constituted an agreement and bargain which *estopped* the State of California from imposing sentences of death in this case." *The court did not vacate the pleas of guilty but proceeded to pronounce new judgments, sentencing the defendants to life imprisonment.* As previously mentioned the People appeal. We find no law to sustain such action of the trial court upon the facts shown.

The conclusion that "the defendants were denied the benefit of effective aid of counsel as guaranteed by the Fourteenth Amendment" is based upon evidence that counsel for these defendants was not present at all times during the trial of one Max Gilbert and did not in that trial adduce testimony or cross-examine witnesses relative to the guilt of, or asserted mitigating circumstances affecting, these defendants.

The record does not disclose any dereliction of duty in this regard by defendants' counsel. It shows that these two defendants and Max Gilbert were charged jointly with four felonies: (1) The murder of police officer Lee N. Bunch; (2) the robbery of H. N. Griffin; (3) the attempted murder of Benjamin Bailuis; (4) the attempted murder of Charles Piercey. Four prior convictions of felony as against the defendant Lyle Cecil Gilbert and one against defendant Lovelace were also alleged. The codefendant Max Gilbert entered a plea of not guilty to all the charges. Each respondent entered a plea of guilty to the charge of murder in count 1 and denied the prior convictions. It was thereupon stipulated that the evidence theretofore adduced at the preliminary hearing and also the evidence which thereafter should be taken at the trial of Max Gilbert could be considered by the court for the purpose of fixing the degree of the crime and the sentences to be imposed. It was further agreed that the prosecution and the defendants "may introduce additional evidence if they so desire." Upon the hearing as to these defendants, subsequent to the Max Gilbert trial, the charges of prior convictions were found to be true, and, as above mentioned, the murder was found to be of the first degree and the death penalty was imposed.

[1, 2] On the prior appeal respondents, as appellants therein, contended that the trial court was guilty of an abuse of discretion, in that: (1) it refused to permit any evidence affecting appellants alone to be introduced at the trial of Max Gilbert; (2) it made remarks from the bench and asked questions pertaining to the crime of kidnaping, with which offense appellants were not formally charged; (3) at the time of judgment it read a prepared statement which appellants asserted indicated a conclusion previously reached "without taking into any account the evidence offered in behalf of the defendants"; and (4) assertedly it allowed public clamor in connection with another pending criminal case to influence its judgment in this case. In disposing of the first contention, that during the trial of Max Gilbert the trial court improperly refused to admit certain evidence not affecting Max Gilbert and relating only to the appellants therein (these respondents), we stated that (page 527 of 22 Cal.2d, at page 11 of 140 P.2d) "the record shows that during that trial counsel for appellants stated there were one or two things which did not concern Max Gilbert and about which she desired to question appellant Lovelace at that point, for the consideration of the court in determining the degree of the crime as to the appellants. The trial judge then stated, 'Well, I think we will take that up in subsequent proceedings.' This ruling of the trial court was in accordance with the prior stipulation and, moreover, the order of the proof rests in the discretion of the trial court. Although assigning as an abuse of discretion the refusal to receive the evidence at that time, appellants do not contend that the court refused to accord them a full opportunity to produce all the evidence they desired prior to fixing the degree of the crime." Certainly, in the light of the stipulation which was made, and the ruling of the trial court in respect thereto as above set out, defendants' counsel cannot now be held to have so neglected her duty in relation to defendants as to constitute a denial of "the benefit of effective aid of counsel as guaranteed" by the Constitution merely because she was not present during all of the trial of the codefendant Max Gilbert and did not take an active part in that trial except while her clients were on the witness stand. The ruling of the trial court at that time has been affirmed and the conduct of counsel conforming to it was proper. Furthermore, as pointed out in our opinion in the previous appeal (page 528 of 22 Cal.2d, at page 12 of 140 P.2d), "A hearing for the determination of the degree of an offense and the punishment therefor is not a trial in the full technical sense, and is not governed by the same strict rules of procedure as a trial. * * * and 'in considering evidence in aggravation or mitigation of the offense the court may consider many matters *"not admissible on the issue of guilt or innocence"* * * *.'" The guilt of the defendants was established by their pleas. No lack of due process in the proceeding to determine the degree of their crimes and the appropriate punishment can be deduced from the receipt of the Max Gilbert trial evidence, regardless of whether defendants or their counsel were absent from, or did not participate in, that trial.

The finding that "the defendants * * * were promised that they would receive a life sentence if they entered a plea of guilty and that this promise was based upon acts and conduct on the part of officers of the State and of defense counsel" is based upon evidence which in part is quoted and in part summarized as follows:

Defendant Lovelace stated by affidavit that "during the latter part of April or the first part of May, 1942, * * * Mrs. Bates [his then attorney] stated to this affiant that she had very good news, that she had reached an agreement with the district attorney's office and in particular with Deputy District Attorney Arthur L. Veitch * * * and the trial judge * * * [before whom the trial was scheduled] whereby the four charges then pending against this affiant would be reduced to one charge of murder, and this affiant would automatically be given a life sentence"; that "on or about July 13, 1942, in a conference * * * between * * * [defendant Lovelace], his mother Margaret Lovelace and the said Mrs. Bates, the said Mrs Bates again stated that she had talked with Judge McKay concerning this affiant, and that he had stated to her that he had never yet sentenced a man to death since he had been on the bench, which had been thirty-three years, who did not actually fire the fatal shot, and that he could not conceive of any circumstances in which he would do so, that District Attorney Veitch had agreed not to ask for the death penalty * * *, that affiant should plead guilty to the murder charge herein but not to any specific degree, *which would be fixed at the conclusion of the trial of Max Gilbert,* and would be passed upon the testimony offered in that trial. * * * That because of the severity of the charges herein, and *because this affiant knew in his own mind that it was possible that he might be sentenced to death, and for the purpose of saving his life,* and believing implicitly in the said Mrs. Bates and her representations, he agreed to waive the jury and enter a plea of guilty to the murder charge herein, with the understanding at all times that he would be sentenced to a life sentence thereon." (Italics added.)

At the hearing on these motions defendant Lovelace testified that he and defendant Lyle Cecil Gilbert pleaded guilty because their attorney, Mrs. Bates, told them they "wouldn't get the death sentence" if they pleaded guilty, and that "She had seen the Judge and talked with the Judge, and the Judge had told her he had never sentenced a man to death that hadn't actually fired the fatal shot and killed a man; that in his years on the bench he had never sentenced a man to death that hadn't actually fired the fatal shot, and he couldn't conceive of himself doing so; and inasmuch as Lyle and I hadn't hurt anyone or killed anyone, that we wouldn't get the death penalty. On that understanding we pled [sic] guilty. * * * [S]he told me at least six or seven times * * * [before] the trial started, and numerous times during the trial, that we had nothing to worry about, to just go down there and plead"; and that he had at first objected to entering a plea of guilty, but after Mrs. Bates told him "she had talked with the Judge and the Judge said he wouldn't sentence us to the death penalty" he consented to such a plea.

These two defendants testified both at the Max Gilbert trial and at the subsequent hearing for the purpose of determining the degree of the crime to which they had pleaded guilty. Concerning his testimony given on these occasions defendant Lovelace now testifies that he would never have taken the stand or pleaded guilty if it "wasn't cut and dried I would get a life sentence"; that his attorney stated to him, when he objected to testifying, "you have got nothing to worry about. It is all cut and dried. You are going to get a life sentence. You can't hurt yourself. Go up [to the witness stand], and you might be able to help him [Max Gilbert]"; that at the Max Gilbert trial he falsified his testimony by representing to the court that Max (whose role in the crimes was that of driving the automobile in which the four participants traveled to and from the scene where the crimes took place) did not know "what was going to happen when we got out there," and was not to receive a share in the anticipated proceeds of the robbery, whereas Max actually did know there was to be a "shakedown"; that he took the stand to do the best he could to try to get Max Gilbert off and colored his own testimony as outlined above for the purpose of assisting Max; that all of his testimony concerning his own part in the crimes, including the events leading up to them, was true, but that it was not as full as it would have been had he not been assured in advance that he would not receive the death penalty. He then proceeded to give to the court a more complete picture of his background and upbringing, of the circumstances surrounding his prior convictions, and of the reasons he participated in the robbery during which the murder was committed, including his asserted physical fear of Horgan (whom these defendants describe as the ringleader in the robbery and murder and whose gun fire killed officer Bunch) resulting from threats he claims were made against him by Horgan.

Defendant Lyle Cecil Gilbert testified that during the first week of July, 1942, Mrs. Bates, at a conference at which he and defendant Lovelace, Max Gilbert, and the latter's attorney Mrs. Kellogg were present, stated that she had talked to Judge McKay, "explained the situation to him * * * and he said * * * he realized that neither of us defendants had fired the fatal shot, and that he couldn't conceive of ever sentencing a man to death who was not the actual killer; and that she had his word for it, and * * * that if we were to go down there and plead guilty, that we would be guaranteed a life sentence. * * * She also said * * * 'Now this is no longer a gamble, it is a sure thing,'" and that it was in reliance upon such statements that he agreed to enter a plea of guilty and that he took the witness stand during the Max Gilbert trial. He stated further that—also in reliance upon such statements—in his testimony given at such trial and in order to protect Max, he assumed more of the responsibility for planning and executing the crimes than was actually his; he does not claim, however, that Max participated in the planning or played any role other than that of driver of the automobile in which the four perpetrators of the crimes drove to and from the scene; rather, he now states that the blame which he assertedly falsely assumed at the Max Gilbert trial rightfully belonged to Horgan. No rational reason is apparent as to why he should at any time have assumed responsibility falsely for Horgan's acts.

Mrs. Leola Buck Kellogg, the attorney who represented Max Gilbert at his trial, testified (with his written consent) that at a conference held prior to his trial and prior to the entry of the pleas of guilty by these defendants, at which she and her client, Max Gilbert, and Mrs. Bates and these two defendants were present, Mrs. Bates said, "Max Gilbert, you should change your plea from not guilty to guilty of murder in the first degree, because I have it all fixed with the judge and the District Attorney. I went to see Judge William McKay. * * * I asked him what he would do if the defendants pleaded guilty to murder in the first degree; that thereupon Judge William McKay said to me * * * that he had never sentenced a man to death unless that man had actually fired the shot * * * [Y]ou should all plead guilty to murder in the first degree. There is no question now about its being a gamble; it's a certain thing; it's all fixed"; that on another occasion when the same parties were present Mrs. Bates stated to the three culprits, "You know you're guaranteed now, you're guaranteed life before Judge McKay; there is no gamble about it. I can guarantee you that sentence if you plead guilty to murder in the first degree"; that these two defendants (Lovelace and Lyle Cecil Gilbert) during the conferences above described stated they did not want to plead guilty and that Mrs. Bates then said, "Why, there is nothing to it. I'll guarantee you, you'll get nothing but life if you will plead guilty to murder in the first degree, and the other two charges will be dropped and the death penalty will not be asked."

The mother of defendant Lovelace testified that on July 13, 1942, Mrs. Bates stated to her and to such defendant that "I have talked to the Judge this morning. * * * There is no more gamble. He has promised a life sentence, and it's all fixed * * * and now we have nothing more to worry about. And Jack [defendant Lovelace] pleads guilty to first degree murder"; and that on several occasions between July 13, 1942, and August 5, 1942, Mrs. Bates told her that she "need not worry about * * * defendant Lovelace, that the judge had promised he would not receive a death sentence."

Mrs. Bates, in affidavits filed on behalf of defendants, stated that defendant Lovelace informed her prior to the preliminary hearing "that he had made a complete confession to the police and had even taken them to the scene of the crime"; that she "did not state to John Norman Lovelace in April or May, 1942 or any member of his family that she had made an agreement with the District Attorney's office, the judge, and the sheriff's office whereby defendant would automatically be given a 'life sentence' "; that "at no time did either John Norman Lovelace or Cecil Lyle Gilbert express themselves as desiring a jury trial; that both said at different times and together that their best chance was before a Judge, and that they understood that there was legally no question as to their guilt"; that she "never stated 'Nothing can go wrong, it is already fixed, etc., or that defendant had to plead guilty.' That defendants never even seriously discussed the possibility of anything but a guilty plea with affiant"; that "neither defendant ever requested affiant to enter a Not Guilty plea or to try the case with a jury; that both had had experience in Courts and decided to enter a guilty plea and throw themselves upon the mercy of the Court because they believed that was the best chance for life. That affiant entered said guilty pleas because she believed the Judge would temper justice with mercy and impose life sentences on both defendants. That affiant was just as stunned as *was* defendants at the Judge's sentence"; that early in July, 1942, she discussed with Judge McKay, the trial judge, the charges against defendants and the sentences they might expect to receive from him; that "Judge McKay stated that he saw nothing unethical in the inquiry and that he would have no prejudice for or against a defendant; that of course *he could not commit himself to anything before he heard the evidence;* that he had never sentenced a man to death who did not fire the shot and that Judges were loath to inflict the extreme penalty on those not taking an active part in the crime. *That of course the evidence in this case might lead him to a totally different conclusion.* That affiant did convey to John Norman Lovelace and to members of his family the substance of this conversation and stated to all of them 'Now the Judge has promised nothing but he is not prejudiced and will not automatically inflict a death penalty because the victim was a police officer' " (italics added); that she never requested defendant Lovelace to plead guilty "or stated that he had no chance of getting more than life if he plead[ed] guilty. That she never stated to either defendant that 'all arrangedments had been made and that they would have to plead guilty in order that everything might be carried out according to schedule' "; that she had never used the word *"guaratee"* in discussing their probable sentences with defendants; that she "entered a plea of guilty in this case for both defendants, first, because she believed them to be guilty and the evidence so showed; second, because both defendants stated they believed that they would have a better chance for life with a Judge than with a jury; third, because the District Attorney's office had consented to a plea and stated that they would make no recommendation for the death sentence; fourth, that because of the humanitarian record of Judge McKay, affiant believed that he would not take the lives of these defendants"; that she "never stated [to defendant Lovelace] that anything was already fixed or that 'you have no chance of getting more than life if you plead guilty' * * * That on no occasion did she ever state that 'there was nothing to worry about', either to Mrs. Margaret Lovelace, or to any other person. That she did state to both defendants that Deputy District Attorney Veitch, after long conversations with the Acting Chief of Police, the Acting Sheriff, and the head of the robbery squad, had agreed that the District Attorney's office would remain mute and make no demand for the death penalty. That she did explain on several occasions to both defendants and their relatives that if the case were tried the defendants would be found guilty on all four counts"; that she did state to both defendant Lovelace and his mother that "in her conversation with Judge McKay, he had stated that he had never condemned a man to death who did not fire the shot and that Judges were loathe to inflict the extreme penalty on those not taking an active part in the crime, and that he could not imagine himself doing so; that affiant did believe that Judge McKay would grant to both defendants life sentences"; and that she "always believed, as a result of her conversation with Judge McKay, that he would grant the defendants a life sentence, or she would have tried the case. That she communicated this belief to John Norman Lovelace and Lyle Cecil Gilbert. That had there been any doubt in the mind of affiant, she would have advised both defendants to go to trial."

Arthur L. Veitch, Deputy District Attorney, who was assigned to prosecute these defendants, testified that prior to the entry of defendants' pleas of guilty he was informed by their attorney, Mrs. Bates, that she intended "to plead her defendants guilty"; and that he stated to her that he would in that event "have no statement to make [to the court] as to penalty unless the judge should request affiant to declare himself in that regard," but that if so requested he "would be obliged to state to the court his true opinion" which was that defendants should suffer the death penalty. The record shows that Mrs. Bates conveyed to defendants the substance of the above statements of Deputy District Attorney Veitch, but it shows also that he fully lived up to his declaration that unless requested by the court so to do he would make no recommendation concerning the penalty which defendants should suffer; indeed, when, immediately prior to the pronouncement of the judgments of death the court inquired, "Is there anything you wish to say, Mr. Veitch?" Mr. Veitch replied, "No, I think the discussion should be confined as to whether or not there is any legal cause, at this time. I mean, I don't believe there should be any emotional appeal. We have our plain duty to do."

Judge McKay, before whom both the original proceedings against these defendants and the hearing on the present motions were had and who pronounced both the judgments of death and the modified sentences which are involved herein, also took the stand and in answer to questions propounded by the attorneys for defendants testified that he first became a judge of the superior court on November 12, 1941, after serving as a pro tempore judge the previous month; that prior to this case he had never, as superior court judge, presided at a murder trial; that the only conversation he had with Mrs. Bates out of open court relative to these defendants and prior to the time they were sentenced was on July 10, 1942, at which time Mrs. Bates merely announced her intention to plead defendants guilty; that at no time did he state to her that he never would sentence to death a man who had not fired the fatal shot; that his determination to sentence defendants to death was based to a considerable extent upon the testimony given at the Max Gilbert trial by victims who were present at the time of the crimes and had been assaulted and severely injured by defendants incident thereto. He testified further that the only time Mrs. Bates was present at the Max Gilbert trial and actively engaged in the examination of witnesses was when these two defendants were on the stand, and that at no time did she cross-examine any of the other witnesses. This conduct, it will be remembered, was in substantial conformity with the stipulation which was made and with the ruling of the trial court relating to it.

In addition to the factual matters above set forth it is noted that the trial judge, in making the order herein complained of, relied in part upon certain proceedings disclosed in the record and which are related in a written memorandum filed by him, from which the following statement is taken: "There is a substantial evidence from which the Court must conclude that a bargain or agreement was reached between the People of the State of California and the defendants through their counsel and upon which the defendants relied. This bargain is strongly evidenced by the fact that at the preliminary hearing of this case Deputy District Attorney Veitch announced that he would seek the death penalty for each of the defendants, and Mrs. Bates said to him that she would seek to convince him that since these defendants did not fire the fatal shot life imprisonment would be granted. Thereafter, conferences were held between Mr. Veitch and Mrs. Bates and Mr. Veitch telephoned to the Acting Chief of Police and the Captain in the Sheriff's office, and Mr. Veitch thereafter remained silent at all times on the subject of the death penalty for Lyle Cecil Gilbert and John Norman Lovelace, and kept the bargain as agreed upon. The record in this case also indicates that Deputy District Attorney Veitch, although silent at all times on the subject of the death penalty so far as Lyle Cecil Gilbert and John Norman Lovelace were concerned, nevertheless urged the Court to impose the death penalty upon their co-conspirator Max Gilbert, whom the evidence in the case indicates was the least culpable of those on trial.

"This is further corroborated by the filing of an amended information charging prior convictions of felonies and the rearraignment of the defendants upon such amended information, since, if the death penalty was to be pronounced there was no need to file an amended information charging prior convictions of felonies; this was only for the purpose of enhancing the penalty or giving the prison board further authority for an increased penalty other than the death penalty.

"By reason of these facts and circumstances the defendants were prevented by extrinsic fraud from having their day in court. * * *"

[3] The finding that "the defendants were promised that they would receive a life sentence * * * and that this promise was based upon acts and conduct on the part of *officers of the State* and of defense counsel" does not specify who made the promise. We have examined the entire record in an effort to discover support for such finding and to ascertain whether the promise, if any, was made by a responsible officer or representative of the state. Perhaps the closest approach in the evidence to support for the conclusion that a material promise or representation was actually made by a responsible state officer is the averment in the affidavit of Attorney Bates that the trial judge stated to her before the pleas of guilty were entered "that he had never sentenced a man to death who did not fire the shot and that Judges were loathe to inflict the extreme penalty on those not taking an active part in the crime." The making of this statement was denied by the trial judge in his testimony (it will be remembered that he stated, among other things, that prior to the Max Gilbert trial he had not, as a superior court judge, presided at any murder trial), but even if we assume in support of his orders that before making them his recollection was refreshed and that he (the trial judge) is one of the "officers of the State" referred to in the finding, the statement attributed to him by Attorney Bates still falls short of constituting such a promise or representation as would afford a basis for the claim of extrinsic fraud or denial of due process of law, because, even if we assume that it would otherwise furnish sufficient ground for such claim, it was, according to the affidavit of Attorney Bates, preceded by the qualification that "of course he could not commit himself to anything before he heard the evidence" and was followed by the caution that "of course the evidence in this case might lead him to a totally different conclusion."

The evidence as to the participation of Deputy District Attorney Arthur Veitch in the asserted negotiations is simply to the effect, as hereinbefore related, that he discussed the matter with defense counsel and after conferences with various law enforcement officers stated that he would adduce all available material evidence but would remain mute insofar as recommending the death penalty was concerned unless the trial judge expressly asked for his opinion. The record discloses that with high fidelity to his office and to his personal integrity he lived up to the commitment which he had made. Certainly no act or representation on the part of the district attorney's office shown herein can be said to even savor of intentional fraud or overreaching.

[4] The factual sequence that Mr. Veitch, at the preliminary hearing, had announced that he would seek the death penalty for each of the defendants, that defense counsel stated in reply that she would try to convince him that since these defendants had not fired the fatal shot they should receive life imprisonment rather than death sentences, that Mr. Veitch may have asked for the death penalty as to the defendant who stood trial (Max Gilbert, who was convicted on all four counts of the information), that he remained mute on the question of penalty as to these defendants who pleaded guilty, and that he filed an amended information charging these defendants with prior convictions of felonies, may well have been seized upon by these defendants as a basis for hope and belief that they would receive life imprisonment rather than the death sentence but such facts do not amount to a false or fraudulent promise or representation. Of course the defendants *hoped* that they would escape the supreme penalty; that was the purpose of their pleas. That also, apparently, was the hope and purpose of their counsel. But hope or belief not founded on a false or fraudulent representation or promise does not constitute extrinsic fraud or denial of due process. It is apparent, as above shown, that there was no false or fraudulent representation or promise actually made by any responsible officer of the state to the defendants either for the purpose of tricking them into waiving trial and pleading guilty, or otherwise. There is not a vestige of evidence which would support the conclusion that any person concerned in this case wilfully sought to deprive the defendants of any legal right.

It is pointed out, however, that the evidence, although sharply conflicting, establishes for the purposes of this appeal that defendants' counsel represented to them, among other things (according to the affidavit of defendant Lovelace): that she "had reached an agreement with the district attorney's office * * * and the trial judge * * * whereby the four charges then pending * * * would be reduced to one charge of murder, and * * * [Lovelace] would automatically be given a life sentence"; that defendants "wouldn't get the death sentence if they pleaded guilty"; that the judge had told her that "he had never yet sentenced a man to death since he had been on the bench, which had been thirty-three years, who did not actually fire the fatal shot, and that he could not conceive of any circumstances in which he would do so"; that "we had nothing to worry about, to just go down there and plead"; (according to the testimony of defendant Lyle Cecil Gilbert): that the judge had said "he couldn't conceive of ever sentencing a man to death who was not the actual killer; and that * * * we would be guaranteed a life sentence * * * it is a sure thing'; (according to the testimony of Mrs. Kellogg, attorney for Max Gilbert): "I have it all fixed with the judge and the District Attorney. I went to see Judge William McKay * * * *I asked him what he would do if the defendants pleaded guilty* to murder in the first degree; that thereupon Judge William McKay said to me * * * that he had never sentenced a man to death unless that man had actually fired the shot * * *. There is no question now about its being a gamble; it's a certain thing * * * You're guaranteed life before Judge McKay; * * * I can guarantee you that sentence if you plead guilty." (Italics added.)

It is also to be borne in mind that the defendant Lovelace stated in his affidavit that he "relied implicitly upon these representations and statements of the said Mrs. Bates but at times had doubts and felt that he was cutting his own throat by entering a plea of guilty * * * That because of the severity of the charges herein, and because this affiant knew in his own mind that it was possible that he might be sentenced to death, and for the purpose of saving his life, and believing implicitly in the said Mrs. Bates and her representations, he agreed to waive the jury and enter a plea of guilty to the murder charge herein, with the understanding at all times that he would be sentenced to a life sentence thereon." Concerning the asserted conversation with the judge one Bayard Lovelace, a brother of the defendant Lovelace, testified that Attorney Bates told him, "'Now, he [the judge] can't make a written guarantee, obviously, but,' she said, 'that is as close as he can come,' and she said, 'We can rely on it.'"

[5-7] Defendants have confided to us that they "have not been concerned with technicalities of procedure" and maintain

that these are "proceedings under the Fourteenth Amendment to the Constitution of the United States," and that the trial court "determined that he had been the victim of fraud and concealment" and therefore the judgments of death were obtained without due process of law, were null and void, and could be set aside at any time. The People, with more regard for established processes, classify the defendants' motions as constituting applications for relief in the nature of writs of error coram nobis. We are in accord with this classification. Regardless of defendants' professed unconcern with "technicalities of procedure" the procedural rules of the courts are a part of the due process of law established in this state (see People v. Cowan, 44 Cal.App.2d 155, 162, 112 P.2d 62) and must be observed in the interests of orderly functioning of the administration of justice. Irrespective, however, of the character which may be attributed to the proceeding, it is at once apparent that the order appealed from cannot be sustained. The new judgments are necessarily void unless the original judgments were void, but if the original judgments were void then so also are the new judgments, because such new ones are based on the very same pleas which the trial court held were improperly entered. In other words, if the defendants' pleas are a nullity, as was at least impliedly found by the trial court, then such pleas cannot be the basis for any valid judgment. If such pleas are in fact and in law void, then they should be vacated and both the People and the defendants should be restored to their original positions in all four counts of the information as they stood immediately before the entry of such pleas. If the pleas are not void the original judgments must stand.

[8] The People as well as the defendants have rights in this case. With the record showing the signed conclusion of the trial judge "That the defendants and each of them were promised that they would receive a life sentence if they entered a plea of guilty * * * and that this constituted an agreement and bargain which *estopped* the State of California from imposing sentences of death in this case," certainly the trial judge who had signed that conclusion was not in a position properly to proceed upon those pleas to adjudicate the further rights of either the state or the defendants.

[9, 10] Although from what has already been said it is obvious that the order appealed from must be reversed and the new judgments expunged from the record, it is also apparent that the mere reversal of such order and expungment of the new judgments of life imprisonment will not necessarily determine all issues in the case. Although the motion made by the defendant Lyle Cecil Gilbert asked only for the vacation of the judgment of death, his attack upon the proceedings, like that of his codefendant, actually challenged the validity of his plea of guilty and it is only such challenge which presents a serious problem. The attack upon the proceedings for the determination of the degree of the murder and the fixation of punishment merits little comment. It is apparent from the record and from the trial court's findings of fact that the only "fraud and concealment" practiced upon the court relating to the guilt of the defendants was that of the defendants themselves. Concerning this matter the court's finding (stated as a conclusion) is "That the judgments are based upon perjured testimony *given by the defendants themselves,* acting in reliance upon a promise that they would receive life sentences." (Italics added.) Such finding does not commend itself as a basis for concluding that the defendants were the victims of extrinsic fraud or were denied due process of law. It is a novel thesis which invokes for a party the extraordinary remedy of coram nobis upon the ground that at his trial the court was deceived as to material facts through the deliberately false testimony of the party himself. In People v. Black, 89 Cal.App. 219, 224, 264 P. 343, 345, such an attempt was made and the court declared: "While it is well settled that the writ of error coram nobis may be invoked to correct an error of fact upon a proper showing that the error was occasioned by duress or fraud, the writ cannot be invoked in a case in which the petitioner is a party to the fraud."

[11] Furthermore, the defendants admitted that substantially all of the testimony given by them at the trial of Max Gilbert and material to their own guilt was true. The subject matter of their asserted falsifications is hereinabove mentioned. Perusal of the record of the proceedings had at the fixing of the degree of the crime when the original judgments of death were pronounced, including the evidence then

taken, the argument of counsel for the defense, and the remarks of the trial judge, tends strongly to negative any prejudice to either defendant by reason of their assertedly false testimony. From the record it does not appear that anything material which legitimately could have been done or said in behalf of the defendants in that proceeding was omitted by their counsel. Our opinion on the former appeal discloses that the evidence of claimed mitigating circumstances was then an issue. We held (page 530 of 22 Cal.2d, page 13 of 140 P. 2d): "As to the asserted mitigating circumstances attending the offenses of appellants, including the facts that appellant Gilbert, although armed at the time he was wounded by officer Bunch, did not return the fire, and that Lovelace was physically handicapped, youthful, and acting under the direction of the apparently more hardened and forceful Horgan, it is not under any advocated theory within our province to exercise original discretion in the premises. If we were to assume all that is urged by appellants with respect to our power of review, we could modify the judgments only if it appeared that the discretion of the trial court had been abused *as a matter of law,* (see Cal.Const. art. VI, § 4). Whether we might on original consideration of the facts differ from the trial judge is therefore immaterial. The controlling point is that the evidence is not insufficient as a matter of law to support the conclusions reached by the trial court." It is apparent from the record, and particularly from the remarks of the trial judge included therein, that the mitigating circumstances were considered but were not then deemed sufficient to overcome the conflicting demands of society. The sentence of death, once pronounced, is a solemn judgment which cannot lightly be vacated or modified.

[12-14] Likewise solemn is the procedure which may lead to such a judgment. Exacting as the state may be in ultimately bringing retribution to those who violate its highest laws, it is at least equally solicitous that those who are prosecuted shall be accorded full measure of every legal right. The state will not, through its courts, pronounce judgment on a plea which has been procured by fraud or duress or by any force which operates to preclude the exercise of free will and judgment by the party. Neither will it permit a scheming criminal to trifle with its processes. He may gamble only at his own risk on the result of a plea of guilty when that plea is entered through the exercise of his judgment unvitiated by fraud, duress, or similar motivating influence. If he claims such overreaching he must bear the burden of proof.

[15] "The writ of error coram nobis is not intended to authorize any court to revise and review its opinions; but only to enable it to recall some adjudication made while some fact existed which, if before the court, would have prevented the rendition of the judgment, and which, without any fault or negligence of the party, was not presented to the court. 1 Freeman on Judgments, § 94; 23 Cyc. 884." Nickels v. Florida, 86 Fla. 208, 228, 98 So. 497, 502, 504, 99 So. 121. The crucial question here is whether the pleas of guilty were valid. If facts existed which would vitiate the pleas, and which, without any fault or negligence of the defendants, were not presented to the court, then the defendants are entitled to have their pleas and the judgments vacated.

The findings of fact herein were evidently drawn with the view of modifying the original judgments but were not drawn in respect to all of the factual issues with which the court would have been concerned if a clear cut issue as to the validity of the defendants' pleas had been before it. We are, therefore, unable to determine satisfactorily upon this record that the pleas are either necessarily valid or necessarily invalid.

[16] The record discloses evidence tending to show that the free will and judgment of one or both defendants were overreached by unjustified representations of their counsel seemingly corroborated by acts and statements of the court and deputy district attorney. While it is true that mere advice or assurances by a private attorney will not vitiate a plea entered in reliance thereon (see People v. Miller, 114 Cal. 10, 16, 45 P. 986; In re Hough, 24 Cal.2d 522, 531, 150 P.2d 448; People v. Gottlieb, 25 Cal.App.2d 411, 415, 77 P.2d 489), we are of the view that a contrary rule should prevail if the statements of the attorney amount to an unqualified factual representation (which is untrue) that the state or a responsible officer thereof, such as a judge of competent authority or a district attorney, has entered into a bargain purporting to commit the state to give the defendant a reward, in the form

of immunity or a lesser punishment than he might otherwise receive, in exchange for a plea of guilty, where such representation is apparently substantially corroborated by acts or statements of a responsible state officer, is in good faith relied upon by the defendant, and actually operates to preclude the exercise of free will and judgment on the part of the defendant.

[17] The most critical point is substantial deprivation of the exercise of the free will and judgment of the party through an act participated in by the state. Mere advice and persuasion or the expression of matters of opinion by his own attorney will not suffice to vitiate the plea. Neither will unwarranted or even wilfully false statements of factual matters by his attorney suffice. The private attorney is selected by the party and is his agent. But if the representation of the private attorney presents a purported commitment by a responsible state officer which if actually made would vitiate the plea and if the acts or statements of such state officer, although innocently done or made, apparently corroborate the representation, are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, then the state in its solicitude for fairness will not accept the benefit of a plea so given.

As previously stated the record contains evidence tending to show such a situation. It also contains evidence tending to negative some, if not all, of its elements.

[18] The purposes and functions of the writ of error coram nobis, the situations in which it may properly be granted, and the relief available to defendants incident thereto, have frequently been considered by the appellate courts of this state, and were extensively discussed in People v. Reid, 195 Cal. 249, 232 P. 457, 36 A.L.R. 1435. See, also, People v. Bostic, 167 Cal. 754, 760, 141 P. 380; People v. Mooney, 178 Cal. 525, 528-530, 174 P. 325; People v. Schwarz, 201 Cal. 309, 257 P. 71; People v. Campos, 3 Cal.2d 15, 43 P.2d 274; People v. Superior Court, 4 Cal.2d 136, 149, 47 P.2d 724; People v. Lumbley, 8 Cal.2d 752, 759, 760, 68 P.2d 354; In re Hough, supra, 24 Cal.2d 522, 531, 532, 150 P.2d 448; People v. Perez, 9 Cal.App. 265, 98 P. 870; People v. Blumen, 87 Cal.App. 236, 241, 242, 261 P. 1103; In re Sargen, 135 Cal.App. 402, 406, 407, 27 P.2d 407; People v. Vernon, 9 Cal.App.2d 138, 140, 141, 49 P.2d 326; People v. Lyle, 21 Cal.App.2d 132, 136, 68 P.2d 378; People v. Superior Court, 28 Cal.App.2d 442, 444, 445, 82 P.2d 718; People v. Butterfield, 37 Cal.App.2d 140, 142, 99 P.2d 310; and annotations in 30 A.L.R. 686; 58 A.L.R. 1286. It is our view, notwithstanding a dictum to the contrary in People v. Reid, supra, 195 Cal. at page 260, 232 P. at page 462, 36 A.L.R. 1435, that the fact of affirmance of a judgment on appeal should not, in an otherwise proper case, preclude the granting of relief. See annotation, 145 A.L.R. 818.

[19] Defendants' contention that the People have no right of appeal from the order of the trial court setting aside or modifying its previous judgments of death is without merit. The question was before this court in People v. Lumbley, supra, 8 Cal.2d 752, 761, 68 P.2d 354, and was decided adversely to defendants' position. The effect of the order here appealed from was to modify substantially the judgments originally entered. Such an order, obviously, is one "made after judgment, affecting the substantial rights of the people" and is within the purview of section 1238(5) of the Penal Code. Implications to the contrary in the language used in People v. Superior Court, 4 Cal.2d 136, 151, 47 P.2d 724, are overruled.

For the reasons hereinabove expressed the order appealed from is reversed and the cause is remanded to the trial court with directions to expunge from its records the judgments pronounced on November 3, 1943, whereby the defendants purportedly were sentenced to life imprisonment, and to make such orders as are required by law for the execution of the judgments originally pronounced on August 5, 1942. This judgment of reversal of the order appealed from shall not preclude either defendant, if he be so advised, from applying anew in the superior court for relief in the nature of a writ of error coram nobis, the proceedings, if any, to be in accord with the views hereinabove expressed.

EDMONDS, Justice.

I concur in the judgment of reversal but do not agree with my associates that if the representation of the attorney for the defendant in a criminal prosecution includes a purported commitment by a responsible state officer which, if actually made, would vitiate the plea of guilty, and if the acts or statements of such state officer, although innocently done or made, apparently substantially corroborate the representation, and are in good faith and without negligence relied upon by the defendant, and in truth operate to prevent the exercise of his free will and judgment, the plea may be challenged as having been improperly induced. This rule is an entirely new one and, in my opinion, it will provide the means whereby unjustified attacks may be successfully made upon pleas accepted by courts in good faith and judgments which have become final.

Under the rule now laid down, the plea may be set aside upon the sole ground that although no promise or representation was made by the trial judge or other responsible officer, the act or statement of one or both of them innocently made appear to corroborate the misrepresentation made by the defendant's counsel. It would seem that this novel innovation in the criminal law should require that at least one of the corroborating circumstances should unequivocally justify a conclusion by the accused that an agreement as to the punishment to be imposed had been arranged in his behalf with the state. If, as in the present case, one convicted of a crime may escape judgment and have his plea of guilty set aside merely because there were acts or statements innocently made by an official of the state which might or might not corroborate a representation by counsel, the finality of the judgment in a criminal case will depend largely upon uncertain circumstances which, although innocently occurring, may be claimed to have been relied upon as evidencing the existence of a promise made by the state.

But even if it be assumed that the new rule should be added to the criminal law, the facts of the present case, in my opinion, conclusively show the lack of two essential elements which prevent its application to relieve the defendants. Certainly there is no substantial evidence whatever justifying a finding that either Gilbert or Lovelace in good faith relied upon the asserted representations of their attorney, and there is much evidence directly tending to show that each of the defendants in pleading guilty exercised his free will and independent judgment.

Neither of the defendants was a novice in crime or court procedure. Gilbert had suffered four prior convictions, Lovelace one. Gilbert's sophistication is evidenced in his testimony on the motion, as follows: "And I want that thoroughly understood now, that at no time would I ever consider any plea of any kind whatsoever, in any shape, if I hadn't had a guarantee; and I thought I took all precautions necessary without a signed statement by all parties involved. With the exception of that, I thought I had taken all the necessary precautions. That's why I was willing to even go to trial with a public defender. I didn't want no part of the plea until I actually got a guarantee and, as Mrs. Bates said, 'I have the Judge's word for it that you will get life.'"

The same defendant, in relating a conversation assertedly had with Mrs. Bates relative to the charges of prior convictions, testified: "Also at that time I says, 'I'll admit one prior, but as far as the other priors are concerned I can't admit them.' And she says, 'Why not?' At that time I also told her that, if I remember right, Section 642 to 646 of the Penal Code covered prior convictions. I also told her what these prior convictions were, and that the Penal Code, to my knowledge, stated very definitely that in order for it to be a prior conviction that it must be a separate information filed and that you had served time on each individual charge, to be a prior. I explained to her that instead of these four it actually was one. I says, 'On those conditions I will admit one prior; otherwise I will deny them all.' And she says, 'Well, that's Mr. Veitch's idea of making you serve more time.'"

It does not seem likely that a person who so advised his attorney was misled by her. Furthermore, one of the criticisms now leveled at Mrs. Bates is that, at the trial of Max Gilbert, she did not cross-examine prosecution witnesses but instead advised the defendants not to antagonize them. The fact that the defendants were so greatly interested in the testimony being given at that time clearly shows that neither they nor their counsel then considered that they had any agreement as to the sentences which might be pronounced, and very certainly were not relying upon any commitment made by the district attorney.

Also, according to the rule now promulgated, reliance upon an asserted representation must be without negligence on the part of the defendant. In the present case, upon the hearing for the purpose of taking evidence to fix the degree of the crime to which Gilbert and Lovelace had pleaded guilty, the trial judge read a prepared statement in which he announced his intention to impose a sentence of death upon each of them. Certainly, if either of the defendants had pleaded guilty upon the inducement now stated by them, it is reasonable to suppose that one or both of them, at that time, would have asked permission to change his plea. If the law is to afford relief upon the narrow ground that acts or statements innocently made by the prosecuting officer or the trial judge might reasonably be considered by a defendant as corroboration of representations assertedly made by his counsel, not later than the time of sentence he should be required to disclose the circumstances claimed to have been relied upon by him in pleading guilty.

For these reasons, in my judgment, the order appealed from should be reversed without the qualification that either defendant may apply anew for relief in the nature of a writ of coram nobis.

25 Cal.2d 494

MORELLO v. METZENBAUM et al.

L. A. 18806.

Supreme Court of California.

Dec. 28, 1944.

1. Licenses 🔑18½

The transfer of a landowner's oil royalty interest was a transfer of a "security" within Corporate Securities Act requiring permit from commissioner of corporations for sale of security. Gen.Laws 1937, Act 3814, § 2(a) (7).

See Words and Phrases, Permanent Edition, for all other definitions of "Security".

2. Licenses 🔑19(3)

A transfer of landowner's oil royalty interest as security for payment of landowner's note, though it involved sale of "security" within Corporate Securities Act, was within exemption of the Act, so that no permit from commissioner of corporations was required. Gen.Laws 1937, Act 3814, § 2(a) (7), (c).

3. Licenses 🔑39

A transfer of landowner's oil royalty interest as security for payment of landowner's note, though made without permit from Commissioner of Corporations, was not void under Corporate Securities Act, and, hence, grantee was precluded from recovering balance due on note after application of amount paid by him for such royalty interest at sale on foreclosure of lien created by the transaction. Code Civ. Proc. § 580d; Gen.Laws 1937, Act 3814, § 2(a) (7), (c).

4. Mines and minerals 🔑54½

Where loan was made and note executed three months prior to time maker conveyed an oil royalty interest as security for payment of note under instrument containing power of sale and waiving benefit of statute prohibiting deficiency judgment following sale of property under power of sale, the waiver, not having been made at time of making or renewing of loan, did not render sale of security under the power of sale ineffective. Code Civ.Proc. § 580d; Civ.Code, §§ 2924, 2953.

5. Mines and minerals 🔑54½

Where loan was made and note executed, and three months thereafter maker conveyed an oil royalty interest as security for payment of note under instrument containing power of sale and waiving benefit of statute prohibiting deficiency judgment following sale of property under power of sale, the subsequent transaction did not constitute a "renewal" of the note and, hence, waiver was not exacted at time of making or renewal of note so as to be ineffective. Code Civ.Proc. § 580d; Civ. Code, §§ 2924, 2953.

See Words and Phrases, Permanent Edition, for all other definitions of "Renewal".

6. Mines and minerals 🔑79(1)

The assignee of royalty interest in oil rights under an assignment by landowner has a right in nature of a "profit a prendre", which is real property where it is to endure in perpetuity.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit a Prendre".

7. Mines and minerals 🔑54½

A royalty interest in oil rights under assignment by one landlord was an interest in "real property", within statute prohibiting a judgment for deficiency upon note secured by deed of trust or mortgage upon real property following sale of the property under a power of sale. Code Civ.Proc. § 580d.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Property".

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In Bank.

Appeal from Superior Court, Fresno County; Ernest Klette, Judge.

Action by E. Morello against M. Metzenbaum and another on a note. From a judgment for defendants, the plaintiff appeals.

Affirmed.

Prior opinion, 147 P.2d 955.

F. W. Docker and Matt Goldstein, both of Fresno, for appellant.

Thos. F. Lopez and Lawrence W. Young, both of Fresno, for respondents.

SHENK, Justice.

This is an appeal from a judgment in favor of defendants in an action on a promissory note for $6,000, dated December 15, 1941, and due one day after date.

Defendant M. Metzenbaum purchased a landowner's royalty interest from E. B. Johns, who was the owner of real property in Fresno County under lease to Loren L. Hillman, Inc., for the purpose of drilling for oil. The royalty interest of Metzenbaum was acquired from Johns under the authority of a permit from the Commissioner of Corporations. To enable him to purchase the interest Metzenbaum borrowed $6,000 from plaintiff and executed the note sued on. Defendant Manville was a comaker of the note. The note was not paid when due and, on March 13, 1942, the parties entered into an agreement under the terms of which Metzenbaum executed an instrument in the form of a deed and assignment conveying to the plaintiff 12½ per cent of the oil production from the Johns property. It was the understanding of the parties that 1 per cent of the 12½ per cent was to go to the plaintiff outright, and the balance stand as security for the payment of the note. The deed and assignment recited that it was issued pursuant to a permit from the Commissioner of Corporations. At the time it was executed Metzenbaum also signed an application for a permit to transfer the interest to the plaintiff and escrow instructions were drawn covering the handling of the various documents. By the terms of the agreement under which these instruments were executed plaintiff was authorized to sell the security without advertising and without notice other than a registered letter addressed and mailed to Metzenbaum at least five days prior to sale. The escrow was opened and the instruments deposited. As the note was not paid when due the deed and assignment and the application for a permit were delivered to plaintiff in accordance with the escrow instructions. The attorney for plaintiff sent the required notice to Metzenbaum and thereafter bid in the royalty interest for $2,000, credit for which was endorsed on the note. The deed and assignment was recorded by plaintiff on April 9, 1942. The application for a permit was not used, nor was any other application for a permit made.

The action originally was brought to collect as a deficiency the balance of $4,000 unpaid on the note. Prior to trial, an amended complaint was filed by which plaintiff sought to recover the full amount of the original loan, $6,000, attorneys' fees and costs, on the asserted ground that the agreement of March, 1942, was void and that the interest acquired by plaintiff pursuant to the sale was a nullity, as having been transferred in violation of the Corporate Securities Act. Defendants admitted the due execution of the note, alleged its extension and the transactions of March, 1942, the sale of the royalty interest for $2,000 under the power of sale, and pleaded the bar of section 580d of the Code of Civil Procedure. It was admitted that no permit had been obtained for the transfer of the royalty interest to plaintiff, but it was denied that a permit was necessary.

The trial court found that at the time of the delivery of the deed and assignment to the title company the defendant M. Metzenbaum and his wife, Miriam Metzenbaum, were the sole owners of the property referred to in the deed and assignment; that at the time they purchased the royalty interest from Johns the latter had a permit from the Commissioner of Corporations authorizing him to sell the property to defendant M. Metzenbaum; that at the time the deed and assignment was delivered to the title company by the Metzenbaums the royalty interest as a security was not of their own issue; that they did not make the deed and assignment directly or indirectly for the benefit of Johns or for any person underwriting Johns, or for the direct or indirect promotion of any scheme or enterprise with the intent of violating or evading any provision of the Corporate Securities Act, and that defendants had not violated any provision of that act. Judgment was ordered for the defendants on the theory that the suit was in reality an action for a deficiency on a note secured by a mortgage on real property with power of sale and prohibited by section 580d of the Code of Civil Procedure.

[1] It is settled that the transfer of a landowner's royalty interest is the transfer of a security. People v. Craven, 219 Cal. 522, 27 P.2d 906; Domestic & Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 554, 51 P.2d 73. The first question is whether the mortgage and transfer here involved come within the exception of the Corporate Securities Act, Stats.1917, p. 673, as amended, Stats.1941, p. 2064, Deering's Gen.Laws Act 3814, set forth in section 2, subdivision (c), as follows: "(c) Sales of securities exempted. Except as herein expressly provided [and it is not otherwise provided], the provisions of this act shall not apply to the sale of any security in any of the following transactions: * * * 2. By or for the account of a pledgee or mortgagee selling or offering for sale or delivery in the ordinary course of business, to liquidate a bona fide debt, a security pledged in good faith as security for such debt."

[2] Section 2, subdivision (a) 7, of the act provides that the word "security" shall include any certificate of interest in an oil, gas or mining title or lease. We therefore have a situation in which an interest in real property, which is also a security, has been pledged as collateral security for the payment of a debt, and subsequently sold under a power of sale contained in the agreement by which the pledge was made. None of the parties contends that the transaction was other than a pledge of the royalty interest, save as to the 1 per cent interest acquired by Morello as an outright conveyance, and as to the transfer of that interest no question has been raised. The facts bring the case within the exception of the act above set forth, as the security was placed in escrow to be delivered to the plaintiff only in the event the promissory note in question was not paid. It was a pledge of the security, and no sale took place until the plaintiff sold the property to satisfy the indebtedness. Although the transaction was in form a deed and assignment it was the intention of the parties that title should not pass unless the promissory note was unpaid. These undisputed facts clearly establish that the sale was "by or for the account of a pledgee or mortgagee selling * * * in the ordinary course of business, to liquidate a bona fide debt," and that no permit from the Commissioner of Corporations was required.

[3] It is true that the deed and assignment recited that it was issued pursuant to a permit from the Commissioner of Corporations. An application for such a permit was prepared and signed by Metzenbaums and was in the possession of Morello at the time he recorded the deed and assignment but was never used. Morello was correctly advised by his then counsel that no permit was necessary. It follows that, as the sale of the royalty interest by plaintiff was a valid transaction, the plaintiff could not effectively rescind, cancel or annul the transfer of the interest to him on the ground that no permit was secured from the Commissioner of Corporations.

[4, 5] In answer to defendants' contention that section 580d of the Code of Civil Procedure was a bar to the recovery of any money judgment for the balance admittedly unpaid on the note, the plaintiff asserts that the sale of the security under the power of sale was ineffective by reason of the waiver by defendants of the provisions of section 2924 of the Civil Code, and of section 2953 of the same code which provides: "Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property, whereby the borrower agrees to waive the rights, or privileges conferred upon him by Sections 2924 * * * of the Civil Code * * * shall be void and of no effect. * * *" But the provisions of section 2953 are inapplicable here for the reason that the agreement was not executed at the time or in connection with the making of the loan. This court, in Salter v. Ulrich, 22 Cal.2d 263, page 267, 138 P.2d 7, page 9, 146 A.L.R. 1344, said: "Since necessity often drives debtors to make ruinous concessions when a loan is needed, section 726

should be applied to protect them and to prevent a waiver in advance. This reasoning, however, does not apply after the loan is made, when all rights have been established and there remains only the enforcement of those rights. The situation is analogous to the right of redemption which may not be waived in advance. Civ.Code, § 2889; Bradbury v. Davenport, 114 Cal. 593, 46 P. 1062, 55 Am.St.Rep. 92; Goodenow v. Ewer, 16 Cal. 461, 76 Am. Dec. 540. However, the mortgagor may subsequently deed the property to the mortgagee or may release or sell the right of redemption. Archer v. Salinas City, 93 Cal. 43, 28 P. 839, 16 L.R.A. 145; Watson v. Edwards, 105 Cal. 70, 38 P. 527; Clarke v. Fast, 128 Cal. 422, 61 P. 72; Graves v. Arizona Central Bank, 205 Cal. 715, 272 P. 1063; Bradbury v. Davenport, supra. * * * Although section 2953 was not in effect at the time of the transactions in question, it is entirely consistent with the right of a mortgagor or trustor to make a subsequent waiver, since by its terms it purports to apply only to a waiver agreement, which is exacted in advance as a condition to the making or renewing of any loan secured by a mortgage or deed of trust." This language is particularly applicable in the present case, where the loan was made and the note executed three months prior to the transaction by which the power of sale was provided for. Furthermore, the agreement of March, 1942, did not constitute a renewal of the note as urged by the plaintiff, relying on language in 54 Corpus Juris, at page 380, to the effect that the word "renewal" has been held to be synonymous with the word "extension" when the time of payment of an obligation is extended. Reading further in the text, we find at page 381: "However, while 'renewal' has been construed as equivalent to or synonymous with 'extension,' it has also been distinguished from 'extension,' and it has been held that a renewal, as distinguished from a mere extension, is a separate and distinct contract, the substitution of a new right or obligation for another of the same nature, and that the word contemplates, implies, imports, or requires the execution of a new instrument; * * *." Among the cases cited as supporting the text is Robertson v. Drew, 34 Cal.App. 143, at page 144, 166 P. 838, where the court said: "There appears by the decided cases to be a clear distinction between the meaning of the expressions 'renewing a lease' and 'extending the term' thereof. A covenant providing for the renewal of a lease at the option of the lessee imports the giving of a new lease; but where the option given is for an extension of the term the lessee upon notice, if notice is required * * * is entitled to hold for the additional period." The same interpretation should prevail here, where the note given in December, 1941, continued in existence with the time of payment extended.

[6, 7] Section 580d of the Code of Civil Procedure, invoked by the defendants, in part provides: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property hereafter executed in any case in which the real property has been sold by the mortgagee or trustee under power of sale contained in such a mortgage or deed of trust. * * *"

The assignee of a royalty interest in oil rights under an assignment by the landowner has a right in the nature of a profit a prendre, which is an estate in real property, and is properly described as real property, or real estate, where, as here, it is to endure in perpetuity. Callahan v. Martin, 3 Cal.2d 110, 128, 43 P.2d 788, 101 A.L.R. 871. Such an interest is contemplated by the provisions of said section 580d prohibiting a judgment for a deficiency following the sale of the hypothecated property under a power of sale.

The findings and conclusions of the trial court are supported by the record, and the relief sought by the plaintiff was properly denied.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER JJ., concurred.

25 Cal.2d 561

DELANEY v. LOWERY, County Auditor, et al.

S. F. 17098.

Supreme Court of California.

Dec. 28, 1944.

1. Taxation ⚷63

Lessee interests under leases for production of petroleum products are "real property" for taxation purposes. St.1939, p. 1277, § 104.

See Words and Phrases, Permanent Edition, for all other definitions of "Real Property".

2. Taxation ⚷428

The 1943 amendment to tax statute making lessee interests under leases for production of petroleum products sufficient security for payment of taxes levied thereon as an exception to general rule in regard to possessory interests, necessitated application of secured rates in computing taxes on such lessee interests; secured rates being those fixed by current fiscal year rather than preceding year. St.1939, p. 1307, §§ 2151, 2152; St.1943, pp. 2440, 3078, §§ 2905, 2914, 107.

3. Constitutional law ⚷26

Taxation ⚷25

Generally, Legislature is supreme in field of taxation, and provisions on taxation in State Constitution are a limitation on power of Legislature rather than a grant to it.

4. Taxation ⚷37

Constitutional restrictions on power of Legislature in field of taxation must be strictly construed against the limitation.

5. Constitutional law ⚷48

A strong presumption exists in favor of constitutionality of an act of the Legislature.

6. Constitutional law ⚷20

Where Constitution has a doubtful meaning or is capable of various interpretations, construction placed thereon by Legislature is of persuasive significance.

7. Taxation ⚷63

Lessee interests under leases for production of petroleum products are materially different from, and more than the interest of, a lessee under an ordinary lease for use and occupancy, as regards taxation.

8. Taxation ⚷42(1)

Property may be classified for purpose of taxation as long as classification is reasonable.

9. Taxation ⚷37, 42(1)

The 1943 amendment to tax statute making lessee interests under leases for production of petroleum products sufficient security for payment of taxes levied thereon as an exception to general rule in regard to possessory interests, when construed as necessitating application of secured rates in computing taxes on such lessee interests, is not invalid as contravening constitutional provision relating to levy of taxes upon personal property and possessory interests, or as special legislation for a limited class of possessory interests. St.1943, p. 3078, § 107; Const. art. 1, § 11; art. 4, § 25(10, 33); art. 13, §§ 9(a), 14.

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In Bank.

Proceeding in mandamus by Dee Delaney, a taxpayer, against J. M. Lowery, as County Auditor, etc., and others, to compel respondent auditor to compute taxes on lessee interests according to current 1944–45 rates and respondent tax collector to collect taxes accordingly.

Peremptory writ issued as prayed for in petition.

Hanna & Morton, of Los Angeles, for petitioner.

J. H. O'Connor, Co. Counsel, and A. Curtis Smith, Deputy Co. Counsel, both of Los Angeles, for respondents.

CARTER, Justice.

The assessor of Los Angeles County has entered in that portion of the assessment roll for the fiscal year 1944-1945, designated as the secured roll, the interests of lessees under leases for the production of petroleum products, and the assessment roll has been transmitted by the county board of supervisors to the respondent county auditor to compute the taxes for the current fiscal year. Respondent is engaged in computing the taxes on those interests as though they were unsecured taxes and the interests were listed on the unsecured roll, using the rates on the secured roll for the previous fiscal year, 1943-1944, rather than the rates for the current year, 1944-1945. The secured roll is that part of the assessment roll containing property, the taxes on which are a lien on real property sufficient in the opinion of the assessor to secure the payment of the taxes, and the unsecured roll constitutes the remainder of the assessment roll. Revenue & Taxation Code, § 109. St.1939, p. 1277.

Petitioner, a taxpayer prays for a writ of mandate to compel the respondent auditor to compute the taxes on those lessee interests in oil leases, hereinafter referred to as lessee interests, according to the current 1944-1945 rates and respondent tax collector to collect the taxes accordingly. He alleges in his petition that there are many separate leasehold estates for the production of petroleum products from beneath the surface of the earth which are owned by persons not owning land or other real estate sufficient to secure the payment of taxes on those leasehold estates; that these estates are created by written leases whereby the owner-lessor of land conveys or grants to the lessee the exclusive right to drill for, produce and have the petroleum products under said land for a fixed time or so long as the products may be produced; that all of said lessee interests are taxable property, and the secured tax rates of certain school districts for the current fiscal year of 1944-1945 are higher than the rates for the prior fiscal year 1943-1944, and if the rate being used by respondent is permitted, the county will not obtain as much revenue. In that connection it may be observed that the effect on the amount of taxes of the application of the rate for the preceding year or current year would vary from year to year according to whether the rate for the current year was the same as or more or less than the rate for the preceding year.

Respondents are apparently proceeding under a provision of the Constitution which reads:

"The taxes levied for any current tax year upon personal property and assessments upon possession of, claim to, or right to the possession of land and upon taxable improvements located on land exempt from taxation, which are not a lien upon land sufficient in value to secure their payment, shall be based upon the rates for taxes levied for the preceding tax year upon property of the same kind where the taxes were a lien upon land sufficient in value to secure the payment thereof. Nothing in this section shall be construed to prohibit the equalization each year of the assessment on such property in the manner now or hereafter provided by law." Cal.Const., art. XIII, § 9a.

Petitioner, on the other hand, relies upon a tax statute as amended in 1943. Stats. 1943, ch. 1133, p. 3078. It provides (the portions added by the 1943 amendment appearing in italics) as follows:

"'Possessory interests' means the following:

"(a) Possession of, claim to, or right to the possession of land or improvements, except when coupled with ownership of the land or improvements in the same person.

"(b) Taxable improvements on tax exempt land.

"*Except as provided in this section*, possessory interests shall not be considered as sufficient security for the payment of any taxes. *Leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre, are sufficient security for the payment of taxes levied thereon. Such estates and rights shall not be classified as possessory interests, but shall be placed on the secured roll.*

"*In the event of delinquency in the payment of any installment of taxes on such leasehold estates or rights, they shall be subject to seizure and sale in the same manner as provided for the seizure and sale of possessory interests in Sections 2914 to 2919, inclusive, at any time within one year after the delinquency. Suit may be brought against an assessee of such taxes in the event of delinquency in the payment thereof.*" Revenue and Taxation Code, § 107.

Respondents contend (1) that the Legislature by the 1943 amendment to section 107 did not intend to make and has not made taxes on such interests a lien thereon thus necessitating the application of the secured rates, secured rates being those fixed for the current fiscal year rather than the preceding year; and (2) that if it is given such interpretation it is invalid because in contravention of article XIII, section 9a of the Constitution, supra, and is special legislation for a limited class of possessory interests and also violates other provisions of the Constitution. Cal.Const., art. I, § 11; art. IV, §§ 25(33), 25(10); art. XIII, § 14.

[1, 2] Section 107 is clear and explicit in its wording. In subdivision (a), a possessory interest is defined in precisely the same words as are used in article XIII, section 9a of the Constitution hereinafter referred to as section 9a. It is then provided, with the exception here involved, that such possessory interests shall not be sufficient security for the payment of taxes. The exception is not only that "leasehold estates" of the character here involved *are* sufficient security for taxes thereon, but furthermore, they *may not be classified as possessory interests and must be placed upon the secured roll.* Effect must be given to those words regardless of the results which may flow from the placing of such interests on the secured roll and removing them from the possessory interests class. It seems clear to us, therefore, that in requiring the placing of those interests on the secured roll, the Legislature must have had in mind the other provisions of the tax law which define the term "secured roll" and intended that certain results would flow therefrom. We have seen that the secured roll consists of that portion of the assessment roll containing assessments of property which are liens on real property. Revenue and Taxation Code, § 109. Real property includes possession of, claim to, ownership of, or right to possession of land and all mines and minerals in the land and all rights and privileges appertaining thereto. Revenue and Taxation Code, § 104. That lessee interests may be classified as real property is clear from the definition thereof in the statute which by its very wording embraces rights and privileges appertaining to minerals in land. See Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, 20 L.R.A., N.S., 211. Hence, taxes may be a lien on that character of real property although mere possessory interests are not sufficient security for taxes, and thus should not be carried on the secured roll; however, the character of lessee interests, "leasehold estates," specified in the 1943 amendment to section 107 are declared not to be possessory interests, and are to be placed on the secured roll. Revenue and Taxation Code, § 107. A tax on real property is a lien on the property assessed. Revenue and Taxation Code, § 2187. "Unsecured property" is property the taxes on which are not a lien on real property sufficient in the opinion of the assessor to secure the payment of such taxes. Revenue and Taxation Code, § 134, St.1943, p. 2440. On or before October 1st, the auditor shall deliver the secured roll to the tax collector. Rev.Code, § 2601. Taxes on the secured roll being a lien on real property are due, one-half, on November 1st, and the other half on January 20th, Revenue and Taxation Code, §§ 2605, 2606, St.1941, p. 3112, and the respective installments are delinquent on December 5th and April 20th. Revenue and Taxation Code, §§ 2617, 2618. On the other hand, taxes on unsecured property (which means the same as taxes on property on the unsecured roll (see Stats.1943, ch. 689, p. 2441, § 13), are due on the lien date in March, Revenue and Taxation Code, § 2901, and are delinquent on September 1st. Revenue and Taxation Code, § 2922. By the express provisions of the last paragraph of section 107 the taxes on the interests here involved may be collected by seizure and sale the same as taxes on unsecured property under sections 2914 to 2919 of the Revenue and Taxation Code within one year after delinquency and suit may be brought therefor. Finally, section 2905 of the Revenue and Taxation Code provides:

"In collecting taxes on *unsecured property* the tax rate to be used is the rate for property of the same kind on the secured roll last fixed before the lien date for the taxes to be collected. The taxes on unsecured property shall be computed in dollars and cents, rejecting the fractions of a cent." (Italics added.) The clear implication from that section is that the rate of taxes on secured property or the secured roll is that for the current year which is the general rule rather than the exception. It follows from sections 2151 and 2152 that the general rule is that the current rate is to be applied unless there is an exception. The former section reads:

"The board of supervisors shall fix the rates of county and district taxes and shall levy the State, county, and district taxes as provided by law." And the latter:

"The auditor shall then: (a) Compute and enter in a separate column on the roll the respective sums in dollars and cents, rejecting the fractions of a cent, to be paid as a tax on the property listed. (b) Place in other columns the respective amounts due in installments. (c) Foot each column, showing the totals." We see no reason to suppose that the Legislature did not intend by the use of the terms in section 107 to have the same effect given thereto as are given to those terms where they are used elsewhere including the tax rates to be applied.

Respondents assert, however, that the historical background, including case law, and statutory and constitutional provisions, requires a contrary conclusion; that under case law the theory that a lessee in an oil lease acquires a fixed quantity of the substance of the earth in place has been rejected, and the rule adopted that such interest is one in real property, a profit à prendre, an incorporeal hereditament; that it was in the light of that rule that section 9a of article XIII of the Constitution was amended in 1936 to describe such possessory interests, the section when adopted in 1924 having embraced only personal property, and the 1936 amendment, by adding possessory interests in land, was designed to include the lessee interests here involved. Reference is also made to the argument addressed to the voters when the 1936 amendment was under consideration where it was said:

> "The amendment here proposed will make clearer and extend to its logical conclusion the change intended when section 9a was added to the Constitution in 1924. It will simplify the collection of taxes on these property rights which the law says are *real property but which are not land* and will contribute to the reduction of the cost of government by eliminating some clerical work, not large in amount perhaps but costing something and producing results not at all worth the cost. Before this section was written in 1924, taxes on personal property unconnected with land and on certain *rights connected with land but not the land itself* were collected each year before the tax rate was fixed, at the rate for the preceding year. When the new rate was fixed, if it was higher than the old one, a difference in amount of tax had to be collected; if the new rate was lower, the difference had to be refunded. This made necessary the recomputation of many thousands of items and the seeking or refunding of many very small sums of money: from one cent to a few dollars: an expensive process. This was largely, but not quite completely, remedied in 1924 and certain clerical costs were eliminated; *but oil and mining rights and improvements on leased land or on land exempt from taxation, for which the land cannot be held,* are not covered by the original language of this section and it is still necessary to compute and collect or refund deficiency or excess collections on such rights. The adoption of this amendment will make the first collection final on this class of property, as it now sensibly is on the much larger class known as unsecured personal property and will eliminate entirely the remnant of this annoyance." Italics added.

The purpose of the adoption of section 9a in 1924 authorizing the use of the tax rate for the prior year for unsecured taxes on personal property which was extended to possessory interests in land by the 1936 amendment, was to avoid the necessity of refunds and supplemental assessments arising because such unsecured taxes were collected before the current rate was fixed and were computed tentatively on the rate for the prior year, and to avoid any claim of unconstitutional lack of uniformity in the rate. See 24 Cal.Jur. 279, 280. It is apparent that this purpose is not frustrated by a statutory enactment which provides that lessee interests are sufficient security for the payment of taxes, that such interests be placed on the secured roll and the taxes thereon computed at the current rate. It should be kept in mind that we still have the clear cut language of the Legislature in the 1943 amendment to section 107 which leaves the definition of possessory interests the same as it theretofore existed, and as defined in the Constitution, and then squarely states that the interests here involved are not possessory interests, are sufficient security for the payment of taxes and must be placed on the secured roll. To give effect to those words we must apply the rate provision which is applicable to interests having those characteristics.

It is respondents' position that with the foregoing interpretation placed upon section 107 it is contrary to section 9a, article XIII of the Constitution because of the above-mentioned historical factors. They claim that the phrases in the Constitution "possession of, claim to, or right to the possession of land," the taxes on which are not a "lien upon land" sufficient to secure their payment, inescapably embrace the lessee interests, and therefore the rate must be that for the prior year, striking down the 1943 amendment to section 107. Obviously, all the Legislature did by the 1943 amendment was to interpret and construe phrases used in the Constitution on the subject of taxation. By declaring that lessee interests shall not be classified as possessory interests, it was, by the definition of such interests, given in the forepart of the section (possession of, claim to, or right to the possession of land), declaring that such interests described by the phrase "possession of, or claim etc." do not embrace lessee interests. Those phrases are identical with those used in section 9a of article XIII and must be considered as an interpretation or definition of the scope of the meaning thereof. Hence, we are concerned with the extent of or limitation upon the legislative power in that respect.

[3-6] Generally the Legislature is supreme in the field of taxation, and the provisions on taxation in the state Constitution are a limitation on the power of the Legislature rather than a grant to it. Taylor v. Palmer, 31 Cal. 240, 241, 253; People v. Pacheco, 27 Cal. 175, 176, 209; People ex rel. McCauley v. Brooks, 16 Cal. 11; City of Crescent City v. Moran, 25 Cal.App.2d 133, 136, 77 P.2d 281; Roth Drug, Inc., v. Johnson, 13 Cal.App.2d 720, 57 P.2d 1022. Its power in the field of taxation is limited only by constitutional restrictions. See In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am.St. Rep. 106; Lent v. Tillson, 72 Cal. 404, 14 P. 71; Stockton & V. R. Co. v. City of Stockton, 41 Cal. 147; People v. Pacheco, supra; People v. Seymour, 16 Cal. 332, 76 Am.Dec. 521; Nougues v. Douglass, 7 Cal. 65; Beals v. Amador County, 35 Cal. 624; People v. McCreery, 34 Cal. 432. Those principles are a part of the broader concept that "* * * Our Constitution is not a grant of power but rather a limitation or restriction upon the powers of the Legislature. * * *" Collins v. Riley, 24 Cal.2d 912, 916, 152 P.2d 169, 171. As a result constitutional restrictions on the power of the Legislature must be strictly construed against the limitation. See Central P. R. Co. v. Board of Equalization, 60 Cal. 35, 59-60; and Collins v. Riley, supra. We said in Collins v. Riley, supra, 24 Cal.2d at page 910, 152 P.2d at page 171:

"If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations are to be construed strictly, and are not to be extended to include matters not covered by the language used." That rule is a corollary of the strong presumption of the constitutionality of an act of the Legislature. 5 Cal.Jur. 628, et seq. Those principles indicate the latitude and effect to be given a legislative construction or interpretation of the Constitution. When the Constitution has a doubtful or obscure meaning or is capable of various interpretations, the construction placed thereon by the Legislature is of very persuasive significance. Kaiser v. Hopkins, 6 Cal.2d 537, 58 P.2d 1278; Hammond v. McDonald, 49 Cal.App.2d 671, 122 P.2d 332; 5 Cal.Jur. 604-605. In accordance with that principle and also with section 13 of article XIII of the Constitution that "The Legislature shall pass all laws necessary to carry out the provisions of this article" article XIII dealing with taxation, the Legislature is authorized to define the term "improvements" as used in the constitutional provisions on taxation. See Miller v. County of Kern, 137 Cal. 516, 70 P. 549; Cottle v. Spitzer, 65 Cal. 456, 4 P. 435, 52 Am.Rep. 305.

[7] Clearly the placing of the lessee interests outside the description, "possession of, claim to," etc., and within the phrase "a lien upon land," with the resulting different tax rate, was not unreasonable or arbitrary. The exact nature of the interests of a lessee under an oil lease has been the subject of much controversy in considering tax matters and other issues. Their nature is far from certain or definite. They are obscure to say the least. In a tax case they have been described as extending to the "substance of the land itself" and the object of the lease is to effect, if not technically a sale and conveyance of a specific part of the land, at least a disposition and transfer thereof. Graciosa Oil Co. v. Santa Barbara County, supra [155 Cal. 140, 99 P. 486]. While it may be that the Graciosa case adhered to the oil-in-place theory,—that the rights therein were to a fixed portion of the substance of the earth, which has since been repudiated (see 8 Cal.Jur. Ten-Yr. Supp., Oil & Gas, pp. 606-607, 626-628), it may be said that for taxation purposes the lessee's interest is materially different from, and more than the interest of a lessee under an ordinary lease for use and occupation. Graciosa Oil Co. v. Santa Barbara County, supra. It is true that in the Graciosa case the court stated a lessee's interest "may well be termed a claim to land," still it does not follow that the use of the phrase "claim to land" necessarily must include the lessee's interest as defined in

section 107. It is really more than that. In other fields of the law lessee interests have been described in various ways. "The authorities generally are not harmonious as to the precise nature of an oil and gas lease, some courts viewing it as a mere license and others regarding it as similar to the usual usufructuary lease. These theories have, however, been repudiated in California, and it now seems to be the settled rule in this State that the usual form of lease passes to the lessee a present interest and estate in land in the nature of a profit à prendre in gross. As to whether such an interest constitutes real property appears to depend largely upon the phraseology of the lease. If it runs only for a fixed term of years, the lessee acquires an estate known at common law as a chattel real, which is regarded as a species of personal property; but if it runs for a term of years 'and so long thereafter as oil or gas shall be produced in paying quantities,' apparently it may properly be regarded as passing a qualified or determinable fee in real property. * * * The lease merely grants him certain rights in respect of the property—to enter upon the land, explore it for oil and gas and extract them if he can find them. But within the scope of this grant, the lessee's rights are absolute. The lessor cannot restrict his explorations to any particular stratum, nor tell him how many wells he may drill.

"This right of entry, exploration and extraction necessarily includes a right to possession of such portions of the surface as may be necessary for the operations contemplated by the lease. And the right of possession is sufficient to entitle the lessee to complain of a larceny of oil or gas or to maintain an action to recover possession of the leasehold or to quiet his title thereto." 8 Cal.Jur. Ten-Yr. Supp., Oil & Gas, p. 624. Whatever its precise character may be it cannot be doubted that it is an interest of a peculiar character and need not be necessarily embraced in the phrases "possession of, claim to, etc." to the extent at least that the Legislature may not reasonably declare that it is not included therein.

The clause in section 9a referring to taxes, "which are not a lien upon land sufficient in value to secure their payment," following the mention of the possessory interest, does not so limit the possessory interests to the exclusion of action by the Legislature. That is a descriptive phrase and refers only to those possessory interests which are of such a character that they are not adequate security for the payment of the taxes thereon. It is true that under section 9a as it read after its adoption in 1924, it referred to taxes on property which were not sufficiently secured by a lien on real estate, whereas the 1936 amendment used the term land instead of real estate, but the above analysis of the clause indicates that the word "land" was not to be given a narrow or literal interpretation. There was left to the Legislature a determination of what should be sufficient security as long as the interest was such that it could reasonably fall within the term land. In the long run no one will be injured inasmuch as the current rate or the prior year's rate will either not make any difference in the amount of the tax or may some years be more and others less. We have seen that a lessee's interests as defined in section 107 are more than the interests of an ordinary lessee. It is an estate in land—an interest in real property. The owner-lessor as a part of his ownership of the land has the exclusive right to remove the oil, but does not own the oil in place (8 Cal.Jur. Ten-Yr. Supp., Oil & Gas, p. 606), yet it is in a sense a part of his land. When he transfers that interest, the transferee or lessee must acquire the same interest. The Legislature has concluded that such interest is sufficient security and we are not disposed to override its policy by adopting a restricted definition of the word "land," especially when we are mindful of the rule that section 9a, being a restriction on the power of the Legislature, must be construed if reasonably appropriate to uphold the constitutionality of the legislation. The word land has various meanings both broad and narrow. For illustration it is said in 42 American Jurisprudence Property, section 14:

"The word 'land,' both in England and here, is a word of art. It is nomen generalissimum and includes not only the soil, but everything attached to it, whether attached by the course of nature, as trees, herbage, and water, or by the hand of man, as buildings, fixtures, and fences. While it generally refers to something corporeal, it may include a franchise connected with land. This is the broadest of the two common-law meanings of the term. In its more limited sense the term de-notes the quantity and character of the interest which one may own in the lands. When used to describe the quantity of the estate it is understood to denote a freehold estate at least. When used in this sense it is almost synonymous with estates, which are the subject of separate treatment. Ordinarily, however, the term is used as descriptive of the subject of ownership and not the ownership. Thus, in its broadest sense it will be seen that 'land' in its legal signification embraces much more than the word literally imports, and includes many things besides the soil itself, as waters, grass, stones, buildings, fences, trees, and the like, and in fact all things which have become a part of the soil. The meaning of the word is often restricted by the manner of its use. Thus in a grant of lands, meadows, and pastures, it is held to mean only arable land." Applying the appropriate rules of construction, supra, the broad meaning should be adopted, even though lessee interests were by the cases of this court said to be a profit à prendre, interest in real property, an incorporeal hereditament in 1936 when section 9a was amended. That description of the interests still did not exclude them from the broad term "land."

The argument addressed to the voters when the 1936 amendment to section 9a came before them does not change the foregoing conclusion. The statement that oil and mining rights are not covered by section 9a as it then read was probably true because it referred only to personal property. The chief result to be achieved, as seen from the whole argument was the elimination of administrative difficulties in collecting the taxes rather than that the previous years's rate should be applied. That result has been accomplished as to lessee interests by the 1943 amendment to section 107 of the Revenue and Taxation Code by making the current rate applicable. The only remaining question is the one involving the adequacy of the security which as before mentioned lies within the sound judgment of the Legislature.

[8, 9] In regard to the contention that lack of uniformity and discrimination will exist if lessee interests are taxed at a rate different than possessory interests, such as the lessee's interest under an ordinary lease for use and occupation, it should first be observed that, as indicated by the foregoing discussion, such interests are in a class by themselves and are different from other species of property. The rate fixed is that for the current year, which is the normal situation, and it is primarily a legislative matter to determine whether such interests are not sufficient security for the payment of taxes thereon. Clearly, property may be classified for the purpose of taxation as long as the classification is reasonable, and that is especially true where, as seen, the effect through the years will probably be insignificant. There is a valid distinction between secured and unsecured taxes. Abrams v. San Francisco, 48 Cal.App.2d 1, 119 P.2d 197; Rode v. Siebe, 119 Cal. 518, 51 P. 869, 39 L.R.A. 342. The proper classification is made in permitting the seizure and sale of lessee interests inasmuch as the security may be lost. Mohawk Oil Co. v. Hopkins, 196 Cal. 148, 236 P. 133. It should follow, that where the Legislature determines, as it has by section 107 of the Revenue and Taxation Code, that such interests bear the current tax rates; taxes are payable in installments, and the state retains the benefits which may accrue from the right of seizure and sale to enforce collection of the taxes, we cannot say the classification is arbitrary.

For the foregoing reasons it is ordered that a peremptory writ of mandate issue as prayed for in the petition.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

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25 Cal.2d 947

Coral HOYT, as Executrix, etc., et al., Petitioners, v. S. A. WOODY, as County Auditor, etc., et al., Respondents.

S. F. 17097.

Supreme Court of California.

Dec. 28, 1944.

In Bank.

Proceeding in mandamus to compel a county auditor and county tax collector to ignore provisions of 1943 amendments to Rev. & Tax. Code, § 107.

Peremptory writ denied; alternative writ discharged.

Mack, Werdel & Bianco, of Bakersfield, for petitioners.

Norbert Baumgarten, of Bakersfield, for respondents.

CARTER, Justice.

This cause involves the same controversy as is presented in Delaney v. Lowery, Cal. Sup., 154 P.2d 674. Here, however, the respondents auditor and tax collector of Kern County, are taxing lessee interests under oil leases according to the terms of section 107 of the Revenue and Taxation Code as amended in 1943, Stats.1943, ch. 1133, p. 3078, and the current tax rates for the fiscal year 1944–1945 are higher than those for 1943–1944. Petitioners seek a writ of mandate to compel respondents to ignore the provisions of the 1943 amendment to section 107. For the reasons set forth in Delaney v. Lowery, supra, the petition for a peremptory writ of mandate is denied and the alternative writ is discharged.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

25 Cal.2d 501

GAVINA et al. v. SMITH.

L. A. 18890.

Supreme Court of California.

Dec. 28, 1944.

1. Landlord and tenant 🔑22(2)

Whether exercise of an option to lease creates a lease, or merely an executory contract to make a lease, depends primarily upon the intention of the parties.

2. Landlord and tenant 🔑22(2)

Where parties have agreed in writing upon the essential terms of a lease, there is a binding lease, though a formal instrument is to be prepared and signed later.

3. Mines and minerals 🔑57

Provision of written agreement granting option to lease land for purpose of operating for oil and gas that, upon exercising option, optionee should pay one dollar per acre as rent for first year, disclosed intention of parties to make lease effective upon exercise of option.

4. Mines and minerals 🔑57

Where written agreement granting option to lease land for purpose of operating for oil and gas provided that, on exercising option, optionee should pay rental in advance for one year or deposit it in escrow to be paid to optionors upon receipt of executed oil and gas lease, fact that optionee deposited rental in escrow instead of paying it to optionors did not prevent lease from becoming immediately effective.

5. Mines and minerals 🔑73

Lease for purpose of operating for oil and gas, which provided that if drilling operations were not commenced within one year lessee could extend period of lease for four years, and which reserved to lessors a royalty interest, created a "profit a prendre" and vested in lessee an estate in real property.

See Words and Phrases, Permanent Edition, for all other definitions of "Profit a Prendre".

6. Quieting title 🔑15

Where parties, in written agreement granting option to lease land for purpose of operating for oil and gas, agreed upon material terms of lease and disclosed intention to make lease effective immediately upon exercise of option, owners could not quiet title against the interest in land which vested in optionee upon exercise of option, even though optionee could not obtain specific performance of agreement because of lack of mutuality of remedies.

7. Equity 🔑65(2)

Landowners, whose breach of written contract granting option to lease land for purpose of operating for oil and gas alone prevented lease from being executed, did not come into equity with "clean hands" and hence could not maintain action to quiet title against claims of optionee, even if option agreement was executory and not specifically enforceable. Civ.Code § 3517.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

8. Quieting title 🔑1

An action to quiet title involving equitable issues is governed by equitable principles.

9. Equity 🔑65(2)

One who violates his contract cannot have recourse to equity to support that violation.

In Bank.

Appeal from Superior Court, Kings County; Arthur C. Shepard, Judge Assigned.

Action to quiet title by John F. N. Gavina and others against Lon V. Smith. From a judgment for plaintiffs entered after demurrers to answer were sustained without leave to amend, defendant appeals.

Judgment reversed.

Prior opinion 148 P.2d 890.

Hanna & Morton, of Los Angeles, Borton, Petrini, Conron & Borton, of Bakersfield, J. G. Crichton, of Fresno, and J. M. McRoberts, of Los Angeles, for appellant.

Sidney J. W. Sharp and M. Wingrove, both of Hanford, for respondents.

TRAYNOR, Justice.

In this action to quiet title, defendant Lon V. Smith appeals from a judgment sustaining both special and general demurrers to his second amended answer, without leave to amend. On March 18, 1942, plaintiffs John F. N. Gavina and A. F. Silveria, the owners in fee of 2,209.50 acres of land in Kings County, granted to defendant for $100 the option of leasing the property for the purpose of operating for oil and gas. The option agreement set forth the terms and conditions on which the lease was to be executed. The form of lease was to be the form attached to the option agreement. Plaintiffs were to receive a rental of $1.00 per acre for one year payable in advance. If drilling operations were not commenced within one year from the date of the lease, the lessee could extend the period of the lease for four years by paying $1.00 per acre for each year. Plaintiffs' royalty was to be one-eighth of all oil, gas or other hydrocarbon substances produced. Surface rights were to be retained by plaintiffs for agricultural purposes to an extent that would not interfere with the lessee's operations, and the lessee was to pay for any injury to livestock, trees, crops and improvements caused by oil and gas operations under the lease. Upon the exercise by defendant of the option and the payment in advance to plaintiffs of a rental of $1.00 per acre for one year, plaintiffs agreed to execute and deliver a completed oil and gas lease on the attached form covering the 2,209.50 acres. The agreement provided that the money for the rental could be deposited in escrow with instructions that it be paid to the lessors upon receipt of the executed oil and gas lease. The money paid for the option was to be considered part payment of the rental. The defendant exercised the option and deposited $2,209.50 in escrow as specified. The form of lease attached to the option agreement was completed by the escrow-holder according to instructions and turned over to plaintiffs for their signatures. They failed to sign it or return it for the defendant's signature, which was to be affixed after their own. They did not accept the money tendered, and they offer to return the $100 received for the option.

Plaintiffs contend that upon the exercise of the option defendant had merely an executory contract to make a lease; that although an executed lease would be a good defense to a quiet title suit, an executory contract that is not specifically enforceable is no defense to such a suit; and that the present contract is not specifically enforceable on the ground of lack of mutuality of remedy.

[1-4] Whether the exercise of an option creates a lease or merely an executory contract to make a lease depends primarily upon the intention of the parties. It was the intention of the parties, expressed in the option agreement, to set forth therein and in the attached form of lease all the terms and conditions on which plaintiffs offered to lease the property. By exercising the option, defendant accepted plaintiffs' offer and agreed to lease the property upon those terms and conditions. The requirement of a written lease was fully met, for the option agreement was in writing signed by the plaintiffs, and the option was exercised in writing by defendant. Nothing more was required to make a binding lease, so long as the parties did not intend that more should be done before the lease became effective. Pacific Improvement Co. v. Jones, 164 Cal. 260, 263, 128 P. 404; Levin v. Saroff, 54 Cal.App. 285, 289, 201 P. 961; see Smith v. Bangham, 156 Cal. 359, 362, 104 P. 689, 28 L.R.A.,N.S., 522; Kerr Glass Mfg. Corporation v. Elizabeth Arden Sales Corporation, 61 Cal.App.2d 55, 56, 141 P.2d 938; see Foa, The Relationship of Landlord and Tenant (5th ed.) 73. Plaintiffs' contention that only a contract to make a lease was created by the exercise of the option is based upon the understanding that the form of lease attached to the option agreement was to be completed and signed by the parties after the exercise of the option. Where the parties, however, have agreed

in writing upon the essential terms of the lease, there is a binding lease, even though a formal instrument is to be prepared and signed later. Pacific Improvement Co. v. Jones, supra; Levin v. Saroff, supra. The formal instrument may be more convenient for purposes of recordation and better designed to prevent misunderstanding than the other writings but it is not essential to the existence of the lease. "The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material." Levin v. Saroff, supra, at page 290 of 54 Cal.App., at page 963 of 201 P., see, also, Pacific Improvement Co. v. Jones, supra, 164 Cal. at page 264, 128 P. at page 406. Since the execution of the formal contract would add nothing to what the parties had already agreed upon, there is not reason to hold that they contemplated a waiting period between the exercise of the option and the date the lease was to become effective. It is clear from the provision of the option agreement that upon the exercise of the option defendant should pay $1 per acre as rent for the first year that it was the intention of the parties to make the lease effective upon the exercise of the option. The agreement gave defendant the right to elect whether he was to pay the rent directly to plaintiffs or to deposit it with an abstract company named in the agreement, the latter to turn it over upon the completion of the formal lease. It is immaterial that defendant chose one method of fulfilling his obligation rather than the other because it insured his getting the formal instrument to which he was entitled under his contract with plaintiffs.

[5, 6] It is settled in this state that an oil lease like the one in the present case creates a profit à prendre and vests in the lessee an estate in real property (Callahan v. Martin, 3 Cal.2d 110, 122, 43 P.2d 788, 101 A.L.R. 871; Standard Oil Co. v. John P. Mills Organization, 3 Cal.2d 128, 43 P.2d 797; Dabney-Johnston Oil Corporation v. Walden, 4 Cal.2d 637, 52 P.2d 237; Dabney v. Edwards, 5 Cal.2d 1, 11, 53 P.2d 962, 103 A.L.R. 822; Pimentel v. Hallbaker Co., 32 Cal.App.2d 697, 702, 90 P.2d 588, and that the owner may not quiet his title against such a vested interest. Pimentel v. Hallbaker Co., supra, 32 Cal.App.2d at page 706, 90 P.2d 588; Sandrini v. Branch, 32 Cal.App.2d 707, 710, 90 P.2d 593; Title Ins. etc. Co. v. Miller & Lux Inc., 183 Cal. 71, 87, 190 P. 433; Williams v. Rush, 134 Cal.App. 554, 557, 25 P.2d 888. It is immaterial whether the defendant could get a decree for specific performance if he sought it, for he has a legal interest in the property and legal remedies to enforce it independently of the remedy of specific performance. Callahan v. Martin, supra, 3 Cal.2d at pages 126, 127, 43 P.2d 788, 101 A.L.R. 871; Dabney-Johnston Oil Corp. v. Walden, supra, 4 Cal.2d at page 650, 52 P.2d 237; Julian v. Schwartz, 16 Cal.App.2d 310, 330, 60 P.2d 887; Chandler v. Hart, 161 Cal. 405, 424, 119 P. 516, Ann.Cas. 1913B, 1094; Frisbie v. McClernin, 38 Cal. 568, 571; Guffey v. Smith, 237 U.S. 101, 115, 35 S.Ct. 526, 59 L.Ed. 856.

[7-9] Even if it be assumed that upon the exercise of the option there was only an executory contract to make a lease, plaintiffs would not be entitled to have their title quieted against the claims of defendant under the contract. Plaintiffs could not complain that the lease was not executed when it was their breach of contract alone that prevented it from being executed. Civ.Code, § 3517; Miller v. Dyer, 20 Cal.2d 526, 530, 127 P.2d 901, 141 A.L.R. 1428; McCall Co. v. Wright, 198 N.Y. 143, 91 N.E. 516, 31 A.L.R.,N.S., 1249. An action to quiet title involving equitable issues is governed by equitable principles. Brandt v. Wheaton, 52 Cal. 430, 434; Benson v. Shotwell, 87 Cal. 49, 60, 25 P. 249, 681; Akley v. Bassett, 68 Cal.App. 270, 285, 228 P. 1057; Logan Gas Co. v. Keith, 117 Ohio St. 206, 213, 158 N.E. 184, 58 A.L.R. 600; Oconto Co. v. Bacon, 181 Wis. 538, 195 N.W. 412, 40 A.L.R. 175; King v. Antrim Lumber Co., 70 Okl. 52, 172 P. 958, 4 A.L.R. 21; see 44 Am.Jur., Quieting Title, § 67. In the present case the plaintiffs are not doing equity. Holland v. Hotchkiss, 162 Cal. 366, 375, 123 P. 258, L.R.A.1915C, 492, nor have they come into equity with clean hands, Universal Milk Co. v. Wood, 205 Cal. 751, 272 P. 745. Having wrongfully breached their contract they now seek the aid of equity to quiet their title against any claims arising under the contract. One who violates his contract cannot have re-

course to equity to support that very violation. Shimpones v. Stickney, 219 Cal. 637, 649, 28 P.2d 673; see 10 Cal.Jur. 517; 4 A.L.R. 44, 73.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

25 Cal.2d 582

MATHER v. MATHER et al.

L. A. 18987.

Supreme Court of California.

Dec. 29, 1944.

1. Appeal and error 🔑1207(4)

Where judgment for wife, in husband's action for rescission of a property settlement agreement, was reversed for error in awarding her the entire amount of a claim against an estate instead of one-half thereof, which trial court had found her entitled to, and cause was remanded for entry of judgment responsive to the finding, it was error to enter judgment without reference to disposition of the claim.

2. Courts 🔑98

Where no decisions of the courts of Hawaii bearing upon construction of applicable Hawaiian statute had been cited or disclosed, the Supreme Court of California would place its own interpretation upon language of statute. Rev.Laws Hawaii 1935, § 4645.

3. Husband and wife 🔑30

Under Hawaiian statute providing that a married woman might not contract with her husband and that any deed by either husband or wife to the other should be valid, a fully completed transfer of property, real or personal, under an executed property settlement was valid. Rev.Laws Hawaii 1935, § 4645.

4. Contracts 🔑6

An "executory contract" is one in which some act remains to be done, while an "executed contract" is one where everything is completed at the time of agreement without any outstanding promise calling for fulfillment by the further act of either party.

See Words and Phrases, Permanent Edition, for all other definitions of "Executed Contract" and "Executory Contract".

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In Bank.

Appeal from Superior Court, Los Angeles County; Frank M. Smith, Judge.

Action by A. W. Mather against Anna Inez Mather for rescission of a property settlement agreement. From a judgment, plaintiff appeals.

Reversed with directions.

Marcel E. Cerf, Robinson & Leland and Henry Robinson, all of San Francisco, for appellant.

Don Lake and James R. Jaffray, both of Los Angeles, for respondents.

CURTIS, Justice.

This case has had a confused procedural history and various controversial points arising in connection with its ultimate determination have been under successive review by this court, as will hereinafter appear. The present appeal is from a judgment purportedly entered in accord with the most recent observations of this court in the matter. Mather v. Mather, 22 Cal.2d 713, 140 P.2d 808. The facts are fully stated in the cited opinion and it is but necessary here to make a brief outline of the progressive stages of this prolonged litigation as there recited.

In 1934 the plaintiff commenced this action for rescission of a property settlement agreement made between himself and his former wife, the defendant Anna Inez Mather. The complaint attacks the validity of the agreement as executed upon three grounds: (1) Fraud; (2) misrepresentation; and (3) Hawaiian statutory law whereby a married woman, at the time in question, was not permitted to contract with her husband. Part of the property transferred by the agreement to the defendant Anna Inez Mather was a one-half interest in an approved claim which the plaintiff held against the estate of Louis R. Greenfield. Joined as parties defendant in the action, the administrators of said estate filed an answer in the nature of an interpleader, seeking a release from further liability on said claim by payment of the balance then in their possession—$12,549.60—according to court order. On January 4, 1935, following the successful interposal of a demurrer to the third count of the amended complaint, a formal judgment was entered to the effect that the plaintiff take nothing by his *third* cause of action. The case then proceeded to trial on the first and second counts, and at the conclusion thereof the court made findings against the plaintiff and in favor of the defendant Anna Inez Mather. Among other facts, the court found that the plaintiff assigned and transferred to the defendant Anna Inez Mather a one-half interest in his title to the approved claim against the Greenfield estate. As its conclusions of law the court decreed that the plaintiff should take nothing by reason of his complaint, that the answering defendants should have their costs, and that a temporary injunction theretofore allowed in restraint of payment on the Greenfield estate claim should be dissolved. On March 14, 1935, judgment was entered to the effect that the plaintiff take nothing by his complaint, or the *first* and *second* counts thereof. Upon successive consideration by this court, the entry of the separate 1935 judgments was declared to be but piecemeal disposition of a single and unseverable cause, *partial* and not final judgments. Mather v. Mather, 5 Cal. 2d 617, 55 P.2d 1174; Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100.

Thereafter and on December 12, 1939, a judgment covering all *three* counts was entered, and as part thereof it was adjudged that the balance of the claim against the Greenfield estate should be paid to the defendant Anna Inez Mather. Upon the plaintiff's appeal from said 1939 judgment, the impropriety of its terms was noted by this court as follows (Mather v. Mather, supra, 22 Cal.2d 713, 718, 140 P.2d 808, 810): "To the extent of the [Greenfield estate] provision, this judgment is clearly at variance with the combined rulings of the trial court upon the order sustaining the demurrer to the third count and the findings of fact made upon the first two counts. While * * * the 'judgment' of March 14, 1935, rendered at the conclusion of the trial on counts one and two of plaintiff's complaint, did not contain any express direction that the Greenfield estate pay the money held by it on account of the claim in question and previously deposited in court, it was explicitly found by the court at that time that Anna Inez Mather had but a one-half interest in said claim. In contrast to this plain finding, the judgment here on appeal purports to award her the entire amount of the claim. * * * The judgment, being based upon a finding that Anna Inez Mather was the owner of one-half of the claim against the Greenfield estate, is erroneous in adjudging her to be the owner of the whole of said claim. Such condition of the record precludes affirmance of the judgment as a proper termination of this litigation." Accordingly, the 1939 judgment was reversed for the express purpose of securing to the parties "the entry of a judgment *properly responsive to the prior rulings of the trial court herein*—the findings made at the conclusion of the trial on the first two counts and the order sustaining the demurrer to the third count of the complaint—[which] would simply serve to complete the judgment roll in effectively disposing of *all the issues in controversy* by a single pronouncement of decision as to the *entire case*." (Italics added.) 22 Cal.2d at pages 719, 720, 140 P.2d at page 811.

[1] Despite this plain language as to the scope of a proper judgment in final determination of this case, the defendants Anna Inez Mather and Lessie G. Williams (an interested party under the property settlement agreement) procured on November 1, 1943, the entry of a judgment which, though purporting to be "in accordance with [the] order made on demurrer and [the] findings of fact and conclusions of law" previously filed, nevertheless failed entirely to make any reference to the disposition of the claim against the Greenfield estate. This omission was error and contrary to the express mandate of this court in its reversal of the above mentioned 1939 judgment, with directions that a proper judgment, in response to the finding theretofore made on the issue, should in effect provide for the equal division of said claim between the parties, in pursuance of the terms of their property settlement agreement. Therefore, since the amount held on account of that claim was found to be $12,549.60, each of the parties would be entitled to one-half thereof, and upon the reversal in this case as just recited the trial court had no authority to enter a judgment other than as prescribed in settlement of "all the issues in controversy by a single pronouncement of decision as to the entire case." While there appears in the record a complicated mathematical argument whereby the defendant Anna Inez Mather seeks to show that she is entitled to the *whole amount* of said claim, the point of

division has already been finally decided as stated, and the plaintiff justly feels aggrieved with the terms of a judgment which, through entire disregard of an adjudicated matter, fails to protect his interest. Accordingly, he must prevail on this ground for reversal as here presented. Cowdery v. London, etc., Bank, 139 Cal. 298, 307, 73 P. 196, 96 Am.St.Rep. 115; Rice v. Schmid, 25 Cal. 2d 259, 153 P.2d 313; English v. Olympic Auditorium, Inc., 10 Cal.App.2d 196, 201, 52 P.2d 267; Brodie v. Barnes, 65 Cal.App.2d 1, 3, 149 P.2d 899.

[2] The remaining point to be considered on this appeal is the plaintiff's charge that the trial court erred in sustaining the demurrer to the third count of the complaint as amended. According to the allegations of that count, the property settlement agreement here under attack was made in Hawaii on June 16, 1933, at which time, according to the law then in effect in that jurisdiction, a married woman might not contract with her husband. It is further pleaded that the agreement was fully executed and performed in that territory at the date mentioned, and that the plaintiff thereby "transferred, conveyed, assigned and set over unto the defendant Anna Inez Mather" certain specified property. Relying upon the principle that the lex loci contractus determines the validity or invalidity of such agreement, the plaintiff sought its rescission upon the premise that it represented a transaction contrary to the express stipulation of the Hawaiian law. No decisions of the courts of Hawaii bearing upon the construction of the statute here involved under comparable circumstances have been cited by the parties, nor has independent research disclosed any pertinent authority from that jurisdiction. In such situation this court has placed its own interpretation upon the language of the Hawaiian statute in proof in this case (5 Cal.Jur., § 11, pp. 430, 431) and has concluded that the plaintiff's position may not be maintained because it appears to rest upon a misconception of the scope of the statutory disability.

[3, 4] While it is true that the effective statute specified that "a married woman" might not "*contract* with her husband," it further provided that "any *deed* executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons." (Italics added.) Revised Laws of Hawaii, 1935, § 4645. Upon the basis of such distinction, the word "contract" suggests the making of an agreement in contemplation of the parties' *future* performance of respective obligations assumed under its terms as the type of transaction to which the statutory disability was directed, and that a fully consummated act of transfer between the spouses was not intended to fall within the same category nor be subject to like attack. To illustrate the pertinent point here, the law recognizes, as a matter of classification, two kinds of contracts—executory and executed. The *former* is one in which some act remains to be done, while the *latter* is one where everything is completed at the time of agreement, without any outstanding promise calling for fulfillment by the further act of either party. It has been said that if a transaction is fully executed on both sides, it is not properly described as a contract (Williston on Contracts, Rev.Ed., vol. I, § 14, p. 21), but, as a transfer of title to property, is more closely akin to a conveyance. Page on Contracts, 2d Ed., vol. I, § 53, p. 70. Chief Justice Marshall, speaking for the United States Supreme Court in Fletcher v. Peck, 6 Cranch, U.S., 87, 136-137, 3 L.Ed. 162, used the following language: "An executory contract is one in which a party binds himself to do, or not to do, a particular thing; * * *. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant." Since the cited Hawaiian statute expressly authorized *deeds* executed between the spouses, thus departing from the restraints of the common law as to such conveyances, it would seem also from a comparable legal aspect to validate the fully completed *transfers of property* under the executed property settlement agreement between the parties here concerned, and that whether the transfers covered real or personal property is of no material consequence insofar as the principle of the statutory distinction is pertinent. It therefore appears that the trial court properly held the third count of the plaintiff's amended complaint to be vulnerable to demurrer as failing to state a cause of action upon the basis of the Hawaiian law.

The foregoing discussion disposes of the points of argument presented by the parties on this appeal. Accordingly, the judgment herein is reversed, with directions to the trial court to bring this case to a proper termination by including in its judgment a provision that the sum now held on account of the claim against the Greenfield estate be paid as follows: one-half to the plaintiff, A. W. Mather, and one-half to the defendant Anna Inez Mather.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

25 Cal.2d 486

YBARRA v. SPANGARD et al.

L. A. 19067.

Supreme Court of California.

Dec. 27, 1944.

Rehearing Denied Jan. 25, 1945.

1. Negligence 🔑121(2)

To authorize application of doctrine of "res ipsa loquitur", accident must be of a kind which ordinarily does not occur in absence of some one's negligence, it must be caused by an agency or instrumentality within exclusive control of defendant, and must not have been due to any voluntary action or contribution on part of plaintiff.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Hospitals 🔑8
Physicians and surgeons 🔑18(6)

Doctrine of res ipsa loquitur is applied in a wide variety of situations including cases of medical or dental treatment or hospital care.

3. Negligence 🔑121(2)

The doctrine of res ipsa loquitur which throws upon party charged duty of producing evidence may be invoked when chief evidence of true cause of injury, whether culpable or innocent, is practically accessible to defendant but inaccessible to injured person.

4. Physicians and surgeons 🔑18(6)

Where patient submitted himself to care and custody of doctors and nurses for purpose of having an appendectomy performed, and while under anesthetic received serious injuries to his arm which was not the subject of treatment or within area covered by operation, patient was entitled to aid of doctrine of res ipsa loquitur in action to recover for such injuries, and was not required to show which doctor or nurse was responsible for his injury.

5. Negligence 🔑121(2)

Neither the number nor relationship of defendants alone determines whether doctrine of res ipsa loquitur applies.

6. Physicians and surgeons 🔑15

Where plaintiff entered hospital to have appendectomy performed, it was duty of each of defendant doctors and nurses in whose custody patient was placed, to exercise ordinary care to protect patient from unnecessary harm and liability attached to each defendant for failure in such regard.

7. Physicians and surgeons 🔑16

Assisting physicians and nurses, although employed by hospital or engaged by patient, normally become temporary servants or agents of surgeon in charge while operation is in progress, and liability may be imposed upon surgeon for their negligent acts under doctrine of respondeat superior.

8. Physicians and surgeons 🔑18(6)

Where control at one time or another of one or more of various agencies or instrumentalities which might have harmed patient was in hands of every defendant doctor or nurse or his employees or temporary servants, fact that it might appear at trial that one or more defendants would be found liable and others absolved for injury to plaintiff did not preclude application of doctrine of res ipsa loquitur.

9. Negligence 🔑121(2)

The requirement for application of doctrine of res ipsa loquitur that injury must be caused by agency or instrumentality within exclusive control of defendant is subject to an exception making test one of right of control rather than actual control when purpose of doctrine would be otherwise defeated.

10. Physicians and surgeons 🔑18(6)

Where a plaintiff receives unusual injuries while unconscious and in course of medical treatment, all those defendants who had any control over his body or instrumentalities which might have caused the injuries may properly be called upon under doctrine of res ipsa loquitur to meet inference of negligence by giving an explanation of their conduct.

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In Bank.

Appeal from Superior Court, Los Angeles County; Goodwin J. Knight, Judge.

Action by Joseph Roman Ybarra against Lawrence C. Spangard and others for injuries resulting from allegedly improper treatment by physicians and nurses. From a judgment of nonsuit, plaintiff appeals.

Reversed.

Prior opinion, 146 P.2d 982.

Marion P. Betty and Wycoff Westover, both of Los Angeles, for appellant.

Parker & Stanbury, Raymond G. Stanbury, and Vernon W. Hunt, all of Los Angeles, for respondents.

GIBSON, Chief Justice.

This is an action for damages for personal injuries alleged to have been inflicted on plaintiff by defendants during the course of a surgical operation. The trial court entered judgments of nonsuit as to all defendants and plaintiff appealed.

On October 28, 1939, plaintiff consulted defendant Dr. Tilley, who diagnosed his ailment as appendicitis, and made arrangements for an appendectomy to be performed by defendant Dr. Spangard at a hospital owned and managed by defendant Dr. Swift. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Drs. Tilley and Spangard and wheeled into the operating room by a nurse whom he believed to be defendant Gisler, an employee of Dr. Swift. Defendant Dr. Reser, the anesthetist, also an employee of Dr. Swift, adjusted plaintiff for the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. Reser then administered the anesthetic and plaintiff lost consciousness. When he awoke early the following morning he was in his hospital room attended by defendant Thompson, the special nurse, and another nurse who was not made a defendant.

Plaintiff testified that prior to the operation he had never had any pain in, or injury to, his right arm or shoulder, but that when he awakened he felt a sharp pain about half way between the neck and the point of the right shoulder. He complained to the nurse, and then to Dr. Tilley, who gave him diathermy treatments while he remained in the hospital. The pain did not cease but spread down to the lower part of his arm, and after his release from the hospital the condition grew worse. He was unable to rotate or lift his arm, and developed paralysis and atrophy of the muscles around the shoulder. He received further treatments from Dr. Tilley until March, 1940, and then returned to work, wearing his arm in a splint on the advice of Dr. Spangard.

Plaintiff also consulted Dr. Wilfred Sterling Clark, who had X-ray pictures taken which showed an area of diminished sensation below the shoulder and atrophy and wasting away of the muscles around the shoulder. In the opinion of Dr. Clark, plaintiff's condition was due to trauma or injury by pressure or strain applied between his right shoulder and neck.

Plaintiff was also examined by Dr. Fernando Garduno, who expressed the opinion that plaintiff's injury was a paralysis of traumatic origin, not arising from pathological causes, and not systemic, and that the injury resulted in atrophy, loss of use and restriction of motion of the right arm and shoulder.

Plaintiff's theory is that the foregoing evidence presents a proper case for the application of the doctrine of res ipsa loquitur, and that the inference of negligence arising therefrom makes the granting of a nonsuit improper. Defendants take the position that, assuming that plaintiff's condition was in fact the result of an injury, there is no showing that the act of any particular defendant, nor any particular instrumentality, was the cause thereof. They attack plaintiff's action as an attempt to fix liability "en masse" on various defendants, some of whom were not responsible for the acts of others; and they further point to the failure to show which defendants had control of the instrumentalities that may have been involved. Their main defense may be briefly stated in two propositions: (1) that where there are several defendants, and there is a division of responsibility in the use of an instrumentality causing the injury, and the injury might have resulted from the separate act of either one of two or more persons, the rule of res ipsa loquitur cannot be invoked against any one of them; and (2) that where there are several instrumentalities, and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. We are satisfied, however, that these objections are not well taken in the circumstances of this case.

[1, 2] The doctrine of res ipsa loquitur has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Prosser, Torts, p. 295. It is applied in a wide variety of situations, including cases of medical or dental treatment and hospital care. Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Brown v. Shortlidge, 98 Cal.App. 352, 277 P. 134; Moore v. Steen, 102 Cal.App. 723, 283 P. 833; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; Meyer v. McNutt Hospital, 173 Cal. 156, 159 P. 436; Vergeldt v. Hartzell, 8 Cir., 1 F.2d 633; Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228; Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425; see Shain, Res Ipsa Loquitur, 17 So. Cal.L.Rev. 187, 196.

[3] There is, however, some uncertainty as to the extent to which res ipsa loquitur may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid legal formula, which arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." 9 Wigmore, Evidence, 3d Ed., § 2509, p. 382; see, also, Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425, 432; Ross v. Double Shoals Cotton Mills, 140 N.C. 115, 52 S.E. 121, 1 L.R.A.,N.S., 298; Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 231. In the last-named case, where an unconscious patient in a hospital received injuries from a fall, the court declared that without the doctrine the maxim that for every wrong there is a remedy would be rendered nugatory, "by denying one, patently entitled to damages, satisfaction merely because he is ignorant of facts peculiarly within the knowledge of the party who should, in all justice, pay them."

[4] The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. See Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228. If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of res ipsa loquitur is properly applicable to the case before us.

The condition that the injury must not have been due to the plaintiff's voluntary action is of course fully satisfied under the evidence produced herein; and the same is true of the condition that the accident must be one which ordinarily does not occur unless some one was negligent. We have here no problem of negligence in treatment, but of distinct injury to a healthy part of the body not the subject of treatment, nor within the area covered by the operation. The decisions in this state make it clear that such circumstances raise the inference of negligence and call upon the defendant to explain the unusual result. See Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Brown v. Shortlidge, 98 Cal. App. 352, 277 P. 134.

The argument of defendants is simply that plaintiff has not shown an injury caused by an instrumentality under a defendant's control, because he has not shown which of the several instrumentalities that he came in contact with while in the hospital caused the injury; and he has not shown that any one defendant or his servants had exclusive control over any particular instrumentality. Defendants assert that some of them were not the employees of other defendants, that some did not stand in any permanent relationship from which liability in tort would follow, and that in view of the nature of the injury, the number of defendants and the different functions performed by each, they could not all be liable for the wrong, if any.

[5, 6] We have no doubt that in a modern hospital a patient is quite likely to come under the care of a number of persons in different types of contractual and other relationships with each other. For example, in the present case it appears that Drs. Smith, Spangard and Tilley were physicians or surgeons commonly placed in the legal category of independent contractors; and Dr. Reser, the anesthetist, and defendant Thompson, the special nurse, were employees of Dr. Swift and not of the other doctors. But we do not believe that either the number or relationship of the defendants alone determines whether the doctrine of res ipsa loquitur applies. Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation.

[7] In this connection, it should be noted that while the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon him for their negligent acts under the doctrine of respondeat superior. Thus a surgeon has been held liable for the negligence of an assisting nurse who leaves a sponge or other object inside a patient, and the fact that the duty of seeing that such mistakes do not occur is delegated to others does not absolve the doctor from responsibility for their negligence. See Ales v. Ryan, 8 Cal.2d 82, 64 P.2d 409; Armstrong v. Wallace, 8 Cal.App.2d 429, 47 P.2d 740; Ault v. Hall, 119 Ohio St. 422, 164 N.E. 518, 60 A.L.R. 128; and see, also, Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 233.

[8] It may appear at the trial that, consistent with the principles outlined above, one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of res ipsa loquitur. The control at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.

The other aspect of the case which defendants so strongly emphasize is that plaintiff has not identified the instrumentality any more than he has the particular guilty defendant. Here, again, there is a misconception which, if carried to the extreme for which defendants contend, would unreasonably limit the application of the res ipsa loquitur rule. It should be enough that the plaintiff can show an injury resulting from an external force applied while he lay unconscious in the hospital; this is as clear a case of identification of the instrumentality as the plaintiff may ever be able to make.

[9] An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of res ipsa loquitur would otherwise be defeated. Thus, the test has become one of right of control rather than actual control. See Metz v. Southern Pac. Co., 51 Cal.App.2d 260, 268, 124 P.2d 670. In the bursting bottle cases where the bottler has delivered the instrumentality to a retailer and thus has given up actual control, he will nevertheless be subject to the doctrine where it is shown that no change in the condition of the bottle occurred after it left the bottler's possession, and it can accordingly be said that he was in constructive control. Escola v. Coca Cola Bottling Co., 24 Cal.2d 453, 150 P.2d 436. Moreover, this court departed from the single instrumentality theory in the colliding vehicle cases, where two defendants were involved, each in control of a separate vehicle. See Smith v. O'Donnell, 215 Cal. 714, 12 P.2d 933; Godfrey v. Brown, 220 Cal. 57, 29 P.2d 165, 93 A.L.R. 1092; Carpenter, 10 So.Cal.L.Rev. 170. Finally, it has been suggested that the hospital cases may properly be considered exceptional, and that the doctrine of res ipsa loquitur "should apply with equal force in cases wherein medical and nursing staffs take the place of machinery and may, through carelessness or lack of skill, inflict, or permit the infliction of injury upon a patient who is thereafter in no position to say how he received his injuries." Maki v. Murray Hospital, 91 Mont. 251, 7 P.2d 228, 231; see, also, Whetstine v. Moravec, 228 Iowa 352, 291 N.W. 425, 435, where the court refers to the "instrumentalities" as including "the unconscious body of the plaintiff."

In the face of these examples of liberalization of the tests for res ipsa loquitur, there can be no justification for the rejection of the doctrine in the instant case. As pointed out above, if we accept the contention of defendants herein, there will rarely be any compensation for patients injured while unconscious. A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts. There may be, e.g., preparation for surgery by nurses and internes who are employees of the hospital; administering of an anesthetic by a doctor who may be an employee of the hospital, an employee of the operating surgeon, or an independent contractor; performance of an operation by a surgeon and assistants who may be his employees, employees of the hospital, or independent contractors; and post surgical care by the surgeon, a hospital physician, and nurses. The number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result.

[10] We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of res ipsa loquitur is invoked. We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, CARTER and SCHAUER, JJ., concurred.

Rehearing denied; TRAYNOR, J., dissenting.

25 Cal.2d 535

In re GREEN'S ESTATE.

DICK v. ELLIS et al.

Sac. 5619.

Supreme Court of California.

Dec. 28, 1944.

1. Wills 🔑337

In will contest, where all issues raised were submitted to jury and decided by their verdict in favor of contestant, nothing remained to be done but to enter judgment, and the filing of notice of intention to move for new trial after the verdict and before entry of judgment was not premature. Probate Code, §§ 371, 373; Code Civ.Proc. § 659.

2. Wills 🔑318(3)

The verdict of the jury in a will contest is not merely advisory, but it is mandatory on the trial court to enter judgment pursuant to the verdict. Probate Code, §§ 371, 373.

3. Appeal and error 🔑979(2)
New trial 🔑70

A trial court in considering a motion for new trial is not bound by the rule of conflicting evidence, and, when the motion is granted for insufficiency of evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere. Code Civ.Proc. § 659.

4. New trial 🔑68, 71

A trial court has not abused its discretion in granting a new trial for insufficiency of evidence where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party. Code Civ. Proc. § 659.

5. Wills 🔑337

Granting proponent's motion for new trial for insufficiency of evidence in will contest was not an abuse of discretion. Code Civ.Proc. § 659; Probate Code, § 1240.

6. Wills 🔑337

Granting proponents a new trial in will contest was not an abuse of discretion merely because of trial court's alleged error in excluding evidence offered by contestant. Probate Code, § 1240; Code Civ. Proc. § 629.

7. Courts 🔑202(5)

An order granting a new trial in a probate proceeding is appealable, but order denying motion for new trial is not appealable. Probate Code, § 1240; Code Civ. Proc. § 629.

8. Appeal and error 🔑109, 874(5)

Under statute an appeal will not lie from order denying motion for judgment notwithstanding the verdict where alternative motion for new trial is granted, but, when adverse party appeals from order granting new trial, the order denying motion for judgment notwithstanding verdict may be reviewed on such appeal. Code Civ.Proc. § 629.

9. Wills 🔑384

Where contestant appealed from order granting proponents' motion for new trial in will contest and proponents appealed from order denying their alternative motion for judgment notwithstanding the verdict, appeal from order denying motion for judgment notwithstanding verdict was not necessary, since it was reviewable on contestant's appeal from order granting new trial. Probate Code, § 1240; Code Civ. Proc. § 629

10. Judgment 🔑199(3)

Trial court should grant defendant's motion for judgment notwithstanding verdict only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict for plaintiff. Code Civ. Proc. § 629.

11. Wills 🔑341

In will contest, denying proponents' motion for judgment notwithstanding verdict was not an abuse of discretion, even though trial court was justified in granting proponents' motion for new trial on ground of insufficiency of evidence to support verdict for contestant. Code Civ.Proc. § 629; Probate Code, § 1240.

◆

In Bank.

Appeals from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Proceeding in the matter of the estate of Robert Franklin Green, deceased, wherein Frankie Green Dick contested the will offered for probate by Henry F. Ellis and others. From order granting proponents a new trial after verdict, contestant appeals, and, from order denying their motion for judgment notwithstanding the verdict, proponents appeal.

Order granting new trial affirmed, and appeal from order denying judgment notwithstanding verdict dismissed.

Prior opinion 149 P.2d 58.

J. Oscar Goldstein and Burton J. Goldstein, both of Chico, and Jack J. Miller, of Stockton, for contestant and appellant.

Warren H. Atherton, of Stockton, H. Raymond Hall, of San Francisco, and Gumpert & Mazzera, J. Calvert Snyder, Darrah & Ellis, and Agler B. Ellis, all of Stockton, for proponents and appellants.

CURTIS, Justice.

Robert Franklin Green died on August 31, 1939, leaving surviving him a wife and an only child, a daughter, Frankie Green Dick. He separated from his wife immediately after their marriage and he never lived with her from that time until the day of his death. He had made a property settlement with her whereby she waived all her property rights as his wife. He also left a document which purported to be his last will and testament, in which he left his entire estate to his sister, Mrs. Mary Jane Snyder, and two nieces, Mrs. Frances M. Freeman and Mrs. Carrie C. Erich, daughters of a deceased sister—except for one dollar which he left to his daughter. Ray E. Burson was named executor and filed the purported will of decedent for probate. The daughter, Frankie Green Dick, filed a contest to the probate thereof. The grounds of contest were unsoundness of mind, undue influence, and fraud in procuring the execution of said document. The charge of fraud was abandoned and the contest of the will was tried by a jury on the two grounds of incompetency and undue influence. The jury rendered a verdict in favor of contestant, and proponents moved for judgment notwithstanding the verdict and also filed a motion for a new trial. The court denied the motion for judgment notwithstanding the verdict, but granted the motion for a new trial on the ground that the evidence was insufficient to support the verdict in favor of contestant. Contestant has appealed from the order granting the motion for a new trial, and proponents have appealed from the order denying their motion for judgment notwithstanding the verdict.

The motion for a new trial was made immediately after the rendition of the verdict by the jury and was granted before the entry of any judgment on the jury's verdict.

Contestant first contends that the order granting a new trial should be reversed for the reason that the proceedings for a new trial were prematurely taken and the court was without jurisdiction to grant a new trial.

Section 373 of the Probate Code provides in a will contest case that "The jury must return a special verdict upon the issues submitted to them by the court; and upon the verdict, * * * the court must render judgment, either admitting the will to probate or rejecting it."

Section 659 of the Code of Civil Procedure provides: "The party intending to move for a new trial must, *either before the entry of judgment* or within ten (10) days after receiving written notice of the entry of the judgment, file with the clerk and serve upon the adverse party a notice of his intention to move for a new trial * * *." (Italics added.)

The clerk's transcript shows that the jury rendered its verdict in this action on October 14, 1942. Immediately after the rendition of the verdict and on the same day and during the same session of court, proponents made a motion for entry of judgment in favor of all proponents notwithstanding the verdict of the jury and without waiving the right of making a motion for a new trial if said motion for judgment notwithstanding the verdict should be denied. On stipulation of the parties "the court fixed October 24th, 1942, at 9:30 o'clock a. m. as the time for hearing motion and it is further stipulated that motion for a new trial may be made, grounds stated, and motion for a new trial argued at said time together with the motion for judgment notwithstanding verdict." (Minutes of the Court, October 14, 1942.) Evidently these two motions were either heard on the date fixed by the court or upon some subsequent day, and they were denied on the same date, as each of the appeals herein was taken from the order of court dated November 25, 1942.

Contestant bases her contention that the motion for a new trial was prematurely made, and that the court was without jurisdiction to grant a new trial, on the ground that prior to the granting of said motion no judgment rejecting the will was rendered as provided by section 373 of the Probate Code. Contestant further contends that no judgment could be rendered by the trial court prior to the determination of all issues involved in the proceeding for the probate of the will, including the issue of due execution, which was raised by the petition for the probate of the will, but which was not raised by contestant in her petition and was not submitted for decision to the jury.

In support of this contention contestant relies mainly on the case of Estate of McKenna, 138 Cal. 439, 71 P. 501. The contest in that case was after the probate of the will. The grounds of contest were five in number: (1) Not executed by deceased; (2) not written, dated and signed by deceased (the will was holographic); (3) not the last will of deceased; (4) incompetency; and (5) undue influence.

Only the two last-mentioned grounds, incompetency and undue influence, were submitted to the jury for decision. The jury's verdict was adverse to contestants on each of said grounds. In other words, the jury held that the testatrix was competent and that her will was not the result of undue influence. The other three grounds of contest had not yet been decided when contestants moved for a new trial, and evidently the motion for a new trial was denied before any of these three grounds was passed upon by the court. As noted above, one of these grounds was that the will was not executed by the testatrix, and another was that the will, being an holographic will, was not written, dated and signed by the testatrix. No judgment could be rendered in that case denying the contest until the court or the jury had passed upon the issues, involving these two grounds. The case was in this condition when contestants made their motion for a new trial and thereafter took their appeal from the order denying said motion. On appeal it was held that the proceedings for a new trial were prematurely taken and the motion was rightly denied. In that state of the record the court held (page 440 of 138 Cal., page 502 of 71 P.): "It is clear, therefore, that there has been no decision of the case, and that the proceedings for new trial were prematurely taken, and, on that ground, that the motion [for a new trial] was rightly denied. [citing authorities] The verdict of the jury did not dispose of all the issues raised by the petition of the contestants, and it was therefore the duty of the court to find upon the issues not thus disposed of."

The difference between the facts in that case and those now before us, at least in one respect, is that in the McKenna case all the issues raised by the petition of contestants were not submitted to the jury nor decided by their verdict. For that reason no legal judgment could be rendered before all such issues had been disposed of either by the jury or by the court. Therefore, no valid judgment could be entered by the court pursuant to the jury's verdict. Accordingly, the court on appeal held that "there had been no decision of the case, and the proceedings for new trial were prematurely taken, and on that ground, that the motion was rightly denied."

[1] In the present case all issues raised by contestant, except one which had been abandoned, were submitted to the jury and decided by their verdict. As these issues were decided in favor of contestant, nothing remained to be done but to enter judgment. Prob.Code, § 373; San Joaquin, etc., Irr. Co. v. Stevinson, 30 Cal.App. 405, 158 P. 768; Krug v. John E. Yoakum Co., 27 Cal.App.2d 91, 80 P.2d 492. In the San Joaquin case it was said (page 410 of 30 Cal.App., at page 770 of 158 P.): The only issues of fact involved in the case were those submitted to and found upon by the jury. Nothing remained to be done but enter judgment. The trial was completed upon the coming in of the verdict." In the Krug case, we find this apt statement of the law (page 96 of 27 Cal.App.2d at page 494 of 80 P.2d): "Likewise, the courts hold that the motion for new trial may be made and heard before the entry of judgment. [Cases cited.] The cases cited by the appellant are not controlling here for the simple reason that in every one of them there remained something more for the court to do before judgment could be entered." Furthermore, in Johnson v. Phenix Ins. Co., 152 Cal. 196, page 199, 92 P. 182, page 183, a comparatively recent decision of this court, we find this statement of the law:

"That the motion for new trial attacks the verdict rather than the judgment and that such motion may be made prior to the entry of judgment is no doubt true (Code Civ. Proc., § 659.)"

There is also a difference in the law as it existed at the time the McKenna decision was rendered and as it is now. The McKenna case was decided prior to the amendment of section 659 of the Code of Civil Procedure in 1923, Stats.1923, p. 751, when it was provided, as it now reads, that a notice of intention to move for a new trial might be served and filed *before the entry of judgment* as well as within ten days after receiving written notice of entry of judgment. (The italicized words were added by the amendment.) Under this section of the code, it is held that a notice of intention to move for a new trial filed before the signing and filing of findings of fact and conclusions of law is premature and ineffective for any purpose where findings are required. Root v. Daugherty, 201 Cal. 12, 14, 255 P. 181; Estate of Barker, 207 Cal. 112, 114, 276 P. 992; Reeve v. Jahn, 9 Cal.2d 244, 250, 70 P.2d 610; see Cloud v. State Terminal Co. Ltd., 22 Cal.App.2d 568, 570, 71 P.2d 600; Frye v. Pacific Freight Lines, 27 Cal. App.2d 748, 750, 81 P.2d 1027.

The question has never been raised in any case to which our attention has been called as to the regularity and validity of a notice of intention to move for a new trial filed after the filing of findings of fact and conclusions of law, and before the entry of judgment, since the 1923 amendment of section 659 of the Code of Civil Procedure permitting such procedure. The reason that we find no such case we think is that the language of the section as amended is so clear that no one has doubted its meaning and all have conceded that such procedure is proper in cases tried by the court without a jury. In cases tried by a jury in which a trial by jury is a matter of right, the verdict simply takes the place of findings of fact and conclusions of law in cases tried by the court (Estate of Benton, 131 Cal. 472, 475, 63 P. 775), and the same rule as to the time of filing of such a notice of motion should apply to cases tried by a jury as is followed in cases tried by the court. Applying this rule to the facts in this case, it is apparent that the filing of the notice of intention to move for a new trial after the verdict of the jury was not premature, but on the other hand was timely and legally effective for the purpose intended. As we have seen, the verdict of the jury in the present case disposed of all issues raised by the petition of contestant and was sufficient to support a judgment denying probate of the purported will, had it not been set aside by the court in granting proponents' motion for a new trial.

We conclude therefore, that the notice of intention was not prematurely filed, and that the trial court had jurisdiction to pass upon the motion for a new trial made in pursuance of the notice of intention filed before the entry of judgment but subsequent to the rendition of the verdict of the jury.

[2] Before leaving this subject we think it advisable to pass upon a question raised in this case as to whether the verdict of the jury in a will contest case is only advisory to the trial court and must be adopted by the court to become effective. Section 373 of the Probate Code as quoted above provides that upon the rendition of the verdict by the jury "the court must render judgment, either admitting the will to probate or rejecting it." Section 371 of the Probate Code provides that issues of fact involved in proceedings to contest the probate of a will "must be tried by a jury, unless a jury is waived." In such cases the court is without authority to enter a judgment contrary to the verdict of the jury. See Southern Pacific Land Co. v. Dickerson, 188 Cal. 113, 116, 204 P. 576. In view of the express provision of section 371 of the Probate Code just quoted, it must be held that the verdict of the jury in a will contest proceeding is not merely advisory, but it is mandatory on the trial court to enter judgment pursuant to the jury's verdict. We think the duty of the court to render a judgment in accordance with the verdict of the jury is implied in section 373 of the Probate Code, which provides that the jury must return a verdict upon the issues submitted to them by the court "and *upon the verdict* * * * the court must render judgment." (Italics added.)

[3, 4] It is next contended by contestant that the court erred in granting proponents' motion for a new trial on the ground "that the evidence as a whole was insufficient as a matter of law to support a verdict for respondents." The rules of law applicable to an appeal from an order of the trial court granting a motion for a new trial on the ground of the insufficiency of the evidence are well settled and, as stated in one of our most recent decisions, are as follows: "The state of the record is such that we cannot say that the trial court erred or abused its discretion in granting the plaintiffs' motion for a new trial on the ground of insufficiency of the evidence. The rules of law applicable to an appeal from such an order are well settled. A trial court in considering a motion for new trial is not bound by the rule of conflicting evidence. [Citing cases.] When the motion is granted, as here, for insufficiency of the evidence, it is only in rare cases showing abuse of discretion that an appellate court will interfere because the trial judge must weigh all the evidence and determine the just conclusion to be drawn therefrom. [Citing cases.] It cannot be held that a trial court has abused its discretion where there is a conflict in the evidence or where there is any evidence which would support a judgment in favor of the moving party." Hames v. Rust, 14 Cal.2d 119, 123, 124, 92 P.2d 1010, 1012.

The evidence in this case is voluminous. It consists of almost one thousand typewritten pages. The witnesses who testified at the trial were the contestant, members of her family, and members of the family of the decedent; old friends and acquaintances of the decedent; the doctor who attended him for some years prior to his death; the attorney who drew the will; and the subscribing witnesses to the will. The trial judge in passing upon the motion for a new trial evidently gave the matter before him thorough consideration. His conclusions are embodied in a memorandum opinion of over thirty typewritten pages. In this opinion he carefully and minutely analyzes the evidence on the more important issues in the case and concludes that it is insufficient to sustain the verdict of the jury, which held the testator incompetent to make a will or that the proposed will was executed under the undue influence of any person. The opinion of the trial court under the present rules of court may properly be included in the clerk's transcript on appeal (rule 5a).

[5] We may not agree with the determination reached by the trial judge or with any of his conclusions. That is not the question before us. It is his duty to weigh the evidence and to pass upon any and all conflicts existing therein. His decisions on those questions are final insofar as they relate to the matter then before him. If after such an examination of the evidence he concludes that it is insufficient to support the verdict, his duty is to grant the motion and a reviewing court may not set aside his conclusion unless a showing of abuse of discretion is made out by appellant. No such showing has been made by contestant. We do not consider it necessary to enter into any extended discussion of the evidence in support of this statement. As we have seen, if there is any substantial evidence in the case supporting the trial court's action, then we should not interfere with its order granting said motion. A careful study of the opinion of the trial court convinces us that the evidence in the case, as construed and weighed by it, was insufficient to support the verdict of the jury in favor of contestant. While it is true that contestant's witnesses testified to many facts and circumstances which might justify a conclusion contrary to that reached by the trial court, yet, as we have seen, it is the duty of the trial court to weigh this evidence and to resolve conflicts therein, and its determination is final and binding upon a reviewing court. The contention of contestant that the trial court erred in granting proponents' motion for a new trial cannot be sustained.

[6] Contestant further contends that the order granting a new trial should be reversed for the reason that the order reflects a manifest abuse of discretion. This contention appears to be predicated on certain rulings of the trial court alleged to have been erroneous, which were adverse to contestant. "One of the erroneous rulings," so contestant states in her opening brief, "consisted in the establishing of arbitrary dead-ends restricting proof to a period between October 18, 1930, and December 31, 1937." The trial court also excluded evidence respecting the matter of Henry Ellis having been charged with undue influence over decedent in the execution of a subsequent will, which in a former trial had been declared invalid because the execution had been procured through undue influence on the part of said Henry Ellis. Other instances are cited and relied upon by contestant in support of her present contention where the court, it is

claimed, erroneously excluded evidence offered by contestant, which the latter contended was material and competent.

After the recitation of these rulings of the court and other matters of like character, contestant asserts "From the foregoing errors of the trial court in excluding evidence it follows that if contestant's evidence was meager, the trial court was responsible for the 'paucity of the evidence' and discretion was therefore abused in granting a new trial." No authority is cited in support of this somewhat unusual assertion and we know of none that would support contestant's claim in that respect. Even if the evidence in all these matters had been admitted and was before the court upon the hearing of proponents' motion for a new trial, there is no assurance that such evidence, together with all of the evidence of contestant which was admitted during the trial, would have been sufficient in the opinion of the trial court to overcome the showing made by respondents that the proposed will was not invalid by reason of any of the grounds relied upon by contestant. The contention that the trial court abused its discretion in granting proponents' motion for a new trial cannot be sustained. While an exception to the improper exclusion of evidence may be relied upon by appellant when he seeks to reverse the judgment or set aside the verdict, we are at a loss to understand under what theory it may be held that such an exception can be relied upon where appellant is endeavoring to sustain the judgment or verdict of the jury which has been set aside by the trial court by granting a new trial. The exclusion of competent or relevant evidence might be a good ground for reversing an erroneous judgment, but it should not be considered for the purpose of restoring a judgment after it has been set aside by the trial court on motion for a new trial.

In addition to the appeal of contestant from the order granting a new trial as stated above, proponents have appealed from the order denying their motion for judgment notwithstanding the verdict of the jury in favor of contestant. Contestant contends that such an order is nonappealable and therefore the attempted appeal therefrom should be dismissed.

[7, 8] Although an order granting a new trial in a will contest is not enumerated in section 1240 of the Probate Code, it has become the settled law of this state that such an order is appealable. Estate of Armstrong, 8 Cal.2d 204, 208, 64 P.2d 1093; Estate of O'Dea, 15 Cal.2d 637, 638, 104 P.2d 368.* Section 629 of the Code of Civil Procedure provides for the making of a motion for judgment notwithstanding the verdict in the alternative form, reserving, if that be denied, the right to apply for a new trial. The section further provides that "Where a new trial is granted to the party moving for judgment notwithstanding the verdict, the order denying the motion for judgment notwithstanding the verdict shall not be reviewed on appeal, unless the adverse party appeal from the order granting a new trial, in which case the order denying judgment notwithstanding the verdict may be reviewed on appeal." We understand from the above quoted portion of said section 629 that an appeal will not lie from an order denying a motion for judgment notwithstanding the verdict, but that when the adverse party appeals from the order granting a new trial, the order denying a motion for judgment notwithstanding the verdict may be reviewed on said appeal. Any contrary views expressed in Leplat v. Raley Wiles Auto Sales, 62 Cal.App.2d 628, 145 P.2d 350, are disapproved.

[9] As we have seen in the present case, contestant has appealed from the order granting proponents' motion for a new trial, and proponents have appealed from the order denying their motion for judgment notwithstanding the verdict. As the latter order is reviewable on contestant's appeal from the order granting proponents' motion for a new trial, the latter's appeal from the order denying their motion for judgment notwithstanding the verdict is not necessary nor is it proper under the provisions of section 629 of the Code of Civil Procedure just quoted. The appeal from the order denying the motion for judgment notwithstanding the verdict should be dismissed. However, proponents have lost no rights by such dismissal as the order denying their motion for judgment notwithstanding the verdict is reviewable under

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* In Estate of O'Dea, it was inadvertently stated that an appeal will lie from an order granting *or denying* a motion for a new trial. An appeal no longer lies, and did not at the date of that decision, from an order denying a motion for a new trial.

contestant's appeal from the order granting proponents' motion for a new trial as fully and completely as it would have been had the latter been entitled to a direct appeal from the order adverse to them.

[10, 11] "The right of the trial court to set aside a verdict and enter a contrary judgment is absolutely the same as its right to grant a nonsuit. [citing authorities.] The court should therefore grant such a motion when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff. [Citing authorities.]" Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191; Neel v. Mannings, Inc., 19 Cal.2d 647, 649, 122 P.2d 576; see, also, Hunt v. United Bank & Trust Co., 210 Cal. 108, 117, 291 P. 184. Reviewing the evidence under the rule well established by these cases, it is our opinion that the court did not err in denying proponents' motion for judgment notwithstanding the verdict. As stated before, the trial judge in a lengthy opinion reviewed the evidence, giving it his most careful consideration, and as we read his conclusion as contained in the opinion rendered by him and above referred to, we must conclude that there was no error in his ruling on said motion. It is true the court held that the evidence was insufficient to support the verdict of the jury and that a new trial should be granted, but even though the court might be justified in granting a new trial, it would not be justified in directing a verdict or in granting a motion for judgment notwithstanding the verdict. Hunt v. United Bank & Trust Co., supra, 210 Cal. at page 117, 291 P. 184; Estate of Caspar, 172 Cal. 147, 150, 155 P. 631.

The appeal from the order of court denying the motion for judgment notwithstanding the verdict is dismissed. The order granting a new trial is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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25 Cal.2d 573

PEOPLE v. LIMA.

Cr. 4550.

Supreme Court of California.

Dec. 28, 1944.

1. Criminal law ⚷507(5)

The thief and the receiver of stolen property are not "accomplices" within statute requiring corroboration of an accomplice. Pen. Code, §§ 496, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

2. Criminal law ⚷507(5)

Where thief and receiver of stolen property conspire together for one to steal and deliver property to the other, and pursuant to such plan one does steal and deliver to the other, each is an "accomplice" of the other within statute requiring corroboration of accomplice testimony. Pen. Code, §§ 496, 1111.

3. Criminal law ⚷507(1)

An "accomplice" is one who knowingly, voluntarily, and with common intent with principal offender unites in commission of the crime. Pen. Code, § 1111.

4. Criminal law ⚷507(5), 510

In prosecution for receiving stolen olives with knowledge that they had been stolen, in which prosecution's evidence disclosed existence of conspiracy or agreement whereby prosecution witnesses were to steal and defendant was to purchase the stolen olives, such witnesses were "accomplices" of defendant, and their testimony, unless corroborated, would not support conviction of defendant. Pen. Code, §§ 496, 1111.

5. Criminal law ⚷507(5)

Where same sections of Penal Code provide for punishment of acts perpetrated by parties in execution of pre-arranged plan between thieves and receiver of stolen property to deprive owners of such property, the section making person aiding and abetting commission of any crime a principal therein applied to each of such persons, and all parties to such agreement were "accomplices" whose testimony must be corroborated. Pen. Code, §§ 31, 489, 490, 496, 1111.

6. Criminal law ⇨507(5)

Where there was a pre-arranged plan or conspiracy that certain persons should steal olives and sell them to another and such plan was carried out, the prosecution, though it might have right to elect which of such persons should be prosecuted for theft and which for receiving stolen olives, could not thereby eliminate conspiracy element and resulting accomplice relationship, as respects necessity of corroboration of accomplice testimony. Pen. Code, §§ 31, 489, 490, 496, 1111.

7. Criminal law ⇨511(2)

Evidence corroborative of an accomplice must tend directly and immediately to connect defendant with commission of offense charged.

8. Criminal law ⇨511(1)

In prosecution for receiving stolen olives with knowledge that they had been stolen, admissions of persons who stole the olives were not sufficiently corroborated by other evidence to sustain conviction. Pen. Code, §§ 496, 1111.

9. Receiving stolen goods ⇨8(4)

That defendant's alleged purchases of stolen olives were allegedly made at a late hour of the day and below market price did not establish defendant's guilty knowledge of stolen character of olives, where such circumstances were related solely by accomplices. Pen. Code, §§ 496, 1111.

10. Receiving stolen goods ⇨8(3)

In prosecution for receiving stolen olives as part of pre-arranged plan with thieves, fact that alleged sales were not reflected in defendant's books had no tendency to prove his guilt, where he denied that he had made the purchases and testimony of alleged thieves was uncorroborated. Pen. Code, §§ 496, 1111.

11. Receiving stolen goods ⇨8(3)

Evidence was insufficient to sustain conviction for receiving stolen olives with knowledge that they had been stolen. Pen. Code, § 496.

12. Criminal law ⇨511(1)

Corroborating testimony which merely raises a suspicion of defendant's guilt is not sufficient under statute requiring corroboration of accomplice testimony. Pen. Code, § 1111.

13. Criminal law ⇨369(9)

In prosecution for knowingly receiving stolen olives, evidence that on another occasion defendant had purchased olives from a certain witness not involved in transactions on which prosecution was based was inadmissible. Pen. Code, §§ 496, 1111.

14. Criminal law ⇨370, 372(1)

In prosecution for receiving stolen goods in which defendant admits making purchase for which he is on trial but denies knowledge that property was stolen, evidence of other purchases by him from same thief is admissible as tending to establish knowledge of stolen character of property or to show common scheme or plan. Pen. Code, §§ 496, 1111.

15. Criminal law ⇨338(4)

In prosecution for knowingly receiving stolen olives, testimony of certain witnesses that they had sold stolen olives to defendant's partner was inadmissible, in absence of evidence that defendant had any knowledge of such alleged purchases, and partner denied purchasing olives from such witnesses. Pen.Code, §§ 496, 1111.

16. Criminal law ⇨698(1), 1036(1), 1044

In prosecution for receiving stolen olives, testimony of witnesses as to other transactions in which they had sold stolen olives to defendant's partner could not be held to have been improperly admitted or to be prejudicial where no objection to admission thereof nor motion to strike it out was made. Pen. Code, § 496.

17. Criminal law ⇨786(4)

In prosecution for knowingly receiving stolen olives, it was error to instruct jury that it was their duty to consider whether defendant had been corroborated by other credible evidence, since a defendant need not be corroborated by other evidence and jury is free to accept his testimony as against any other evidence. Pen. Code, §§ 496, 1111.

◆

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Toto Lima was convicted of knowingly buying stolen olives in violation of Penal Code, § 496, and he appeals.

Reversed.

Prior opinion, 146 P.2d 261.

J. Oscar Goldstein, of Chico, Seth Millington, of Gridley, and Raymond D. Williamson, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener and T. G. Negrich, Deputies Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant was convicted on three counts of an indictment charging him with knowingly buying stolen olives in violation of section 496 of the Penal Code. This is an appeal from the judgment and the order denying a new trial.

Defendant operates an olive crushing plant in Butte County where he purchases olives from which he produces olive oil for marketing. It is claimed that on each of the three dates specified in the indictment defendant knowingly purchased olives that had been stolen from nearby orchards by the prosecution witnesses Amos and Larkin. Both of these witnesses admitted theft of the olives but only Amos testified to the subsequent purchases by defendant. Larkin was not present with Amos on any of the three occasions when the purchases assertedly were made. The testimony of Amos and of Larkin is uncertain and contradictory in many respects. Defendant denied ever having purchased the stolen olives and they were never seen at his plant. The employees testified that they had never seen either Amos or Larkin in or about the plant at the time of the purported sales to defendant.

The principal questions presented on this appeal is whether the admitted thieves were accomplices of defendant as alleged receiver of the stolen property so as to require corroboration of their testimony. The determination of this issue turns on the admission of the thieves that the olive thefts and the subsequent sales to defendant were the result of a prior arrangment or understanding among them. Amos testified that the thefts from the D'Amico, Superior and Mitchell orchards, covering the olives involved in the three counts of the indictment, and defendant's subsequent purchase thereof, were all pursuant to an agreement and understanding he had with defendant in the early part of the olive season wherein defendant agreed to buy all the stolen olives the witness and Larkin could bring in.

[1] It is now settled in this state that the thief and the receiver of stolen property are not accomplices. People v. Burness, 53 Cal.App.2d 214, 218, 219, 127 P.2d 623. This is so, because the receiver usually has no part in the theft, directly or indirectly, and the criminal act of knowingly receiving the stolen property occurs independently thereof and at a time subsequent to the completion of the asportation. And conversely, it has been said that, inasmuch as a thief cannot receive from himself, he cannot be an accomplice of the receiver. The thief and the receiver are therefore generally said to be guilty of separate and distinct substantive offenses, and, not being "liable to prosecution for the identical offense", are not accomplices within the meaning of that term as defined in section 1111 of the Penal Code.

[2] There is, however, a well-established exception to this general rule. The rule and the exception are stated in 2 Wharton's Criminal Evidence 1248-1250, § 741, where it is said that "some contrariety of opinion exists as to whether a thief is to be considered as an accomplice of a defendant charged with receiving stolen property, or vice versa, within the rule requiring corroboration of the testimony of an accomplice. In the majority of the jurisdictions which have passed on the question, the tenor of the decisions is to the effect that such persons are not accomplices of each other. For example, in a prosecution for larceny a person who was not present and did not participate in the taking or asportation of the property stolen, or aid or abet therein, but who, subsequent thereto, with guilty knowledge that it was stolen property, aided in the disposition and concealment of the same by transporting it into another county is not an accomplice of the thief. The reason usually advanced for this result, in jurisdictions which hold that the thief and the receiver of stolen goods are not accomplices of each other, is that they are guilty of different crimes, and could not be indicted for the same offense. Following this reason to its logical conclusion then, an exception to this general rule has ensued where the thief and the receiver of stolen property conspire together in a prearranged plan for one to steal and deliver the property to the other, and pursuant to such plan one does steal and deliver to the other; it is held in this case that the receiver is an accomplice of the thief, and the thief is an accomplice of the receiver. * * *" See, also, 45 Am. Jur. 402, § 17.

The following cases have recognized this exception to the rule: White v. State, 23 Okl.Cr. 198, 214 P. 202, 205, 206; Logan v.

State, 23 Okl.Cr. 316, 214 P. 944, 945; Motsenbocker v. State, 29 Okl.Cr. 305, 233 P. 487, 488, 489; Brownell v. State, 33 Okl. Cr. 323, 244 P. 65, 66; Yeargain v. State, 57 Okl.Cr. 136, 45 P.2d 1113, 1116-1118; Grady v. Commonwealth, 237 Ky. 156, 35 S.W.2d 12, 13; Collins v. State, 169 Tenn. 393, 88 S.W.2d 452, 453; Cheeves v. State, 54 Okl.Cr. 133, 15 P.2d 1045; State v. Keays, 97 Mont. 404, 34 P.2d 855, 862; Vogler v. Commonwealth, 255 Ky. 506, 511, 75 S.W.2d 9, 11; Lizar v. State, 74 Okl.Cr. 368, 126 P.2d 552, 558, 559.

Where there has been a conspiracy or prearranged plan between the thief and the receiver, the conspirators have been held to be accomplices even where, as is necessary under our statutory definition of accomplices, § 1111, supra, the test is whether they are liable to prosecution for the identical offense or offenses. It was held in Motsenbocker v. State, 29 Okl.Cr. 305, 233 P. 487, 488, "that ordinarily the thief who steals the property is not an accomplice of the one who receives it from him, knowing it to be stolen; that the thief and the receiver are each independent criminals, guilty of separate and distinct offenses. * * * *that the test by which to determine whether one is an accomplice is to ascertain whether or not he could be indicted for the offense for which the accused is on trial.* We think this test is a good one, resting upon sound reason, and applied to the facts in this case, or in any case where the thief and the receiver of the stolen goods conspire together to steal the property with a prearranged plan for the one who actually commits the theft and makes the asportation to deliver the property to the other at an agreed time and place, the receiver of the stolen goods is an accomplice in the theft, and the thief is likewise an accomplice of the other in the commission of the offense of receiving stolen property. * * * For this reason we say that each is an accomplice of the other." (Italics added.)

[3, 4] In our opinion, reason supports the exception recognized in the cited cases and texts. An accomplice has been defined as one "who knowingly, voluntarily and with common intent with the principal offender unites in the commission of the crime." People v. Shaw, 17 Cal.2d 778, 798, 799, 112 P.2d 241; People v. Wilson, 25 Cal.2d 341, 153 P.2d 720.

Where, as here, the prosecution evidence discloses the existence of a conspiracy or agreement whereby the principal prosecution witnesses were to steal and defendant was to purchase the stolen property, it is both logical and reasonable to hold that they are accomplices in the offense or offenses resulting from execution of such plan. If we were to allow the conspiracy element to be disregarded and the accomplice relationship thereby eliminated, the prosecution could circumvent the rule, requiring corroboration of accomplice witnesses. We conclude, therefore, that Amos and Larkin, the principal prosecution witnesses, by virtue of their admissions, must be held to be accomplices whose testimony, standing uncorroborated, will not support defendant's conviction.

[5, 6] In the recent case of People v. Clapp, 24 Cal.2d 835, 151 P.2d 237, we had before us the question whether a woman submitting to an abortion or soliciting it is an accomplice of the abortionist. The commission of the crime involved the participation of the willing and co-operating woman and the defendant abortionist. We announced the rule that where the commission of a crime as defined in a statute requires participation of two or more persons but prescribes punishment for the acts of certain of the participants only, and another statutory provision prescribes punishment for the acts of others not subject to the first provision, the acts so distinguished are punishable as a separate and distinct crime and the statutory provision specifically defining the separate crime supersedes the general provisions of section 31 of the Penal Code which makes a person who aids and abets in the commission of any crime a principal therein. The present case, however, does not relate to a situation where different statutory provisions separately prescribe punishment for the acts of certain participants in a crime. On the contrary, the same sections of the Penal Code, namely, sections 489, 490 (theft) and section 496 (receiving stolen property), provide for the punishment of the acts perpetrated by each and all of the parties in execution of the conspiracy or prearranged plan to deprive owners of their olives. Section 31 of the Penal Code is therefore applicable to each of them since there is no provision superseding that section. And while, as stated above, the prosecution under the peculiar facts of this case may have had a right to elect which of the group should be prosecuted for theft and which

for receiving stolen property, it could not thereby eliminate the conspiracy element and resulting accomplice relationship.

[7-12] Evidence corroborative of an accomplice must tend directly and immediately to connect the defendant with the commission of the offense. People v. Shaw, 17 Cal.2d 778, 803, 112 P.2d 241; People v. Dail, 22 Cal.2d 642, 655, 140 P.2d 828. The record here does not disclose any evidence other than that of the accomplices tending to connect defendant either with the theft or subsequent receiving of the stolen olives. The circumstances that the purchases assertedly were made at a late hour of the day and for a price below the market price, while relied on by the prosecution as tending to indicate defendant's guilty knowledge of the stolen character of the olives, were related solely by the accomplices and not by other witnesses corroborating them. The fact that the alleged sales were not reflected in defendant's office records or books proves nothing in the face of defendant's denial that he had made the purchases and the failure of the prosecution to prove by any witness other than the accomplices that the olives ever were brought to or seen at defendant's plant. Under the circumstances, the silence of the records and books with respect to the alleged transactions is more consistent with innocence than guilt, and in no way tends to connect defendant with the crimes charged in the indictment. The fact that defendant's plant was operating under a probationary license from the State Department of Agriculture does not connect defendant with the alleged illegal purchases. Nor do we find any corroboration in the testimony of the witness Firestine. While the witness testified he had seen Amos and Larkin loading sacks of olives at the D'Amico orchard and later had seen and talked with Amos at defendant's plant, he further testified that he did not see the olives there and that his conversation with Amos was out of the hearing of the defendant. In view of the witness' appearance at the plant and his conversation with Amos, defendant's inquiry "if there was anything wrong," appears quite natural. There is nothing in these circumstances tending to connect defendant with the alleged purchase of the stolen olives. It is settled that "more is required by way of corroboration than mere suspicion." People v. Shaw, 17 Cal.2d 778, 803, 112 P.2d 241, 255; People v. Kempley, 205 Cal. 441, 456, 271 P. 478; People v. Robbins, 171 Cal. 466, 476, 154 P. 317.

[13, 14] The evidence that defendant on another occasion had purchased olives from the witness McMullen wholly fails to connect defendant with the purchases alleged in the indictment nor does such evidence (denied by defendant) tend to establish that the purchases here involved were, in fact, made. The McMullen boy testified that the olives which he assertedly sold to defendant had been gathered by him in a dead and abandoned orchard. In view of this they were probably not stolen olives, but assuming that they were, the evidence, at the most, discloses a transaction with a different person which was wholly unrelated to the transactions charged in the indictment and was not so inseparately connected that proof of one involved proof of the other. It is settled that if a defendant admits making the purchase for which he is on trial, but denies knowing that the property was stolen, evidence of other purchases by him from the *same* thief is admissible as tending to establish his knowledge of the stolen character of the property or as tending to show common scheme or plan. People v. De Vaughn, 136 Cal.App. 746, 750, 751, 29 P.2d 914; People v. Burness, 53 Cal.App.2d 214, 221, 127 P.2d 623. The De Vaughn case states, however, that evidence showing that a defendant had purchased stolen property from some *other* thief is objectionable when, as here, the transactions are entirely unconnected.

[15-17] We conclude, therefore, in the absence of any evidence corroborative of the accomplices and tending to connect defendant with the three purchases alleged in the indictment, that the judgment and order denying a new trial must be reversed. In view of a possible second trial, it is appropriate that we discuss the testimony of the Thelander and Ruiz boys, also relied on as showing other purchases by defendant. These boys testified that they sold stolen olives to Sam Lima, Sr., defendant's cousin and partner. There is no evidence that defendant had any knowledge of such asserted sales, and Lima, Sr., denied purchasing olives from the Thelander and Ruiz boys. There is no authority for the admission of evidence showing the purchase of stolen property by someone other than the defendant. 45 Am.Jur. 409, § 19. The testimony of Thelander and Ruiz was not ob-

jected to nor was a motion made to strike it out, consequently it may not here be held to have been improperly admitted or prejudicial. But, such evidence having no connection whatever with the defendant should not be offered or admitted in evidence on a second trial. A further error disclosed by the record that should be avoided has to do with an instruction charging the jury, among other things, that "it is your duty, to consider whether he [defendant] has been corroborated by other credible evidence." A defendant need not be "corroborated" by other evidence, and the jury is free, if it be so minded, to accept his testimony as against any other evidence in the case. Because of the state of the record, however, this error likewise is not available to defendant but it should be avoided on a retrial.

In view of our conclusion that there must be a reversal because of the total absence of evidence corroborative of the accomplices, we need not consider any of the other several contentions urged by defendant upon this appeal.

The judgment and order denying a new trial are reversed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

25 Cal.2d 506

PORTER v. GIBSON.

L. A. 18926.

Supreme Court of California.

Dec. 28, 1944.

Rehearing Denied Jan. 25, 1945.

1. Sales 🔑1(1)

The purpose of Uniform Sales Act is to establish, insofar as it is reasonable, uniformity in the laws of the several jurisdictions in respect to matters which are subject of such legislation. Civ.Code, §§ 1721 to 1800.

2. Corporations 🔑94, 116

Since certificates of stock are "choses in action" and are not included within term "goods" as defined in Uniform Sales Act, sales or agreements of sale of corporate stock are not controlled by the act. Civ. Code, §§ 1721 to 1800 and § 1796.

See Words and Phrases, Permanent Edition, for all other definitions of "Chose in Action" and "Goods".

3. Sales 🔑340

One of rights of seller of personalty under a contract for sale of such property, upon buyer's refusal to take property and pay agreed price, is to retain the property for buyer and sue for purchase price.

4. Corporations 🔑121(1)

Where contract for sale of corporate stock authorized seller, on buyer's default, to withdraw stock from escrow and retain, as liquidated damages, any stock paid for, and seller, on buyer's default, withdrew the stocks from escrow and sent them to buyer and upon buyer returning stock notified buyer that she held stock for him, seller did not lose right to sue for purchase price.

5. Corporations 🔑121(1)

Buyer's default in payment of corporate stock pursuant to contract to purchase stock did not free him from terms of contract, and, when stock was delivered to him by seller and demand made for its payment, title passed to him and seller could sue for purchase price.

6. Damages 🔑79(5)

Provision in contract for sale of corporate stock purporting to give seller liquidated damages in case of buyer's failure to comply with agreement was void, where it would be neither impractical nor extremely difficult to fix seller's actual damage for breach of contract. Civ.Code, §§ 1670, 1671.

7. Corporations 🔑121(5)

In seller's action for price due on contract for purchase of corporate stock, under which buyer was relieved of liability if removed from management of corporation by creditors, evidence supported finding that creditors' committee did not remove buyer but retained him while committee temporarily participated in operation of corporation's business.

8. Appeal and error 🔑1071(3)

In seller's action for price due on contract to purchase stock, even though finding that defendant had not returned 170 of the 200 shares delivered to him by plaintiff was contrary to evidence, error in finding would not justify reversal of judgment in favor of plaintiff, in view of pleadings and uncontradicted evidence respecting delivery of stock by plaintiff to defendant.

9. Corporations ⚿118

Where sale of corporate stock to third party to satisfy an unpaid assessment levied by company took place after buyer had defaulted in contract to purchase stock and after seller had delivered stock to buyer and demanded payment, any loss sustained by sale of stock under the assessment proceedings would fall upon buyer, the then owner of stock.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Lucille J. Porter against Clair J. Gibson for purchase price of shares of corporate stock. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Prior opinion 143 P.2d 63.

Welburn Mayock, of Los Angeles, for appellant.

Harry G. Sadicoff, of Los Angeles, for respondent.

CURTIS, Justice.

This action was instituted for the recovery of the purchase price of certain shares of corporate stock, which it is alleged the defendant agreed to purchase from the plaintiff. Judgment was rendered in favor of the plaintiff and the defendant has appealed.

The agreement upon which the action is based was in writing signed by each of the parties thereto, and provided that the plaintiff "agrees to sell" to the defendant, and the defendant "agrees to buy" of the plaintiff, two hundred shares of stock of the Gibson Oil Company, a corporation, for the sum of ten thousand dollars ($10,000) at the rate of fifty dollars ($50) per share, and defendant agrees to pay for said stock at the rate of one hundred and fifty dollars ($150) per month, the first payment to be made at the date of the execution of the contract, July 24, 1939, and subsequent payments of one hundred and fifty dollars ($150) to be made monthly on the fifteenth day of each and every month until the sum of ten thousand dollars ($10,000) shall have been paid. The right was given to defendant to pay a greater amount each month than said sum of one hundred and fifty dollars ($150), and, if he elects, he may "take up the whole amount of the stock at any time upon the payment of the balance due at the said rate of fifty dollars ($50) per share. Buyer shall have the right to delivery to him of the stock paid for each month as it is paid for, but not in lots less than ten (10) shares. Buyer shall be under no further or additional obligation to purchase stock under this agreement should Gibson Oil Company be adjudicated a bankrupt or an assignment for the benefit of creditors be made by it or if Mr. Gibson, party of the second part, is removed from the management of the company through the action of its creditors or bankers."

Plaintiff retained the right to vote said stock until payment therefor shall have been made and the stock transferred to defendant on the corporate records. Various other provisions were contained in the agreement which concerned other matters of interest to the parties, but which are not material to any issue in this action, except paragraph 6 of said agreement, which is as follows: "In order that this agreement may operate to the protection of the parties, it is agreed that buyer and seller will create an escrow at the Bank of America, ——— Branch, and that appropriate instructions and a copy of this agreement shall be entered therein by buyer and seller, pursuant to which said two hundred (200) shares of stock shall be deposited therein by seller, and that said escrow instructions shall provide for the payment to and collection by said escrow holder, for the account of seller, of the purchase price of said shares in cash at the times and in the amounts as herein provided and for the delivery of said purchase price installments to seller as paid and for the delivery of said shares to buyer as paid for, but not in lots less than ten (10) share lots. The buyer is to pay all escrow charges and taxes on said transaction and seller is to receive the full amount of $50.00 per share without any deductions of any nature whatsoever. Time shall be the essence of this agreement and in particular of the payments herein provided to be made. It shall be a condition of said escrow and of this agreement that should buyer fail to make any payment for said shares at the times and in the amounts and manner herein provided, or in the event that buyer should fail to pay any escrow charges, taxes and other sums herein provided to be paid by buyer, then and in either of such events seller may withdraw from said escrow, without any notice to or demand upon buyer, all shares of said stock not paid for and withdrawn and seller may retain any of said shares as to which payment may have been made, as liquidated damages for any such breach of this agreement; and it shall be a further condition of this agreement and of said escrow that in the event of any such default in payment, said escrow holder shall redeliver to seller promptly and without question upon demand, notwithstanding any notice, demand or contention upon the part of the buyer, all of said shares not then withdrawn from said escrow, and that said escrow holder shall not be liable to buyer by reason of any such redelivery, and seller may otherwise dispose of said shares freed of the terms of this agreement."

The escrow provided for in the agreement was opened on August 4, 1939. Defendant made the first payment called for by the agreement and continued to make these payments until March 16, 1940, when payments stopped. Up to the latter date defendant had paid $1,550 and had received thirty shares of stock, and there remained $50 in the possession of the escrow holder for one share of stock not delivered.

Beginning as early as August, 1940, the Gibson Oil Company was having financial difficulties with its creditors. A committee of the creditors was appointed; in September, 1940, a tentative agreement was entered into between the company and its creditors; and in November, 1940, a second agreement in writing was entered into between them. The later agreement is set out in full in the reporter's transcript, but we do not find the prior one in the record. The later agreement seems to be the one under which defendant and the creditors of the company operated its business. It gave to the creditors' committee certain rights over the operation of the business of the company as will be more particularly referred to later in this opinion. It provided, however, that the defendant C. J. Gibson, should be retained "to manage the affairs of the Company, subject to the terms of this and the former agreement and subject to the control of the committee as in this and said former agreement set forth." His salary was fixed at the sum of $250 per month, or "ten (10%) per cent of the Company's net production, whichever is less." There is evidence in the record showing that the net production of the company was $2,500 or thereabouts, each month.

On May 27, 1942—the defendant having failed to make any further payments under his agreement with plaintiff other than those mentioned above—the plaintiff, pursuant to the terms of the agreement, withdrew from escrow the shares of stock theretofore deposited with the escrow holder, and thereupon delivered the same to defendant properly endorsed with a demand for the payment of the sum of $3,700, the accrued installments then due and unpaid. On May 29, 1942, she filed the present action seeking to recover said amount. At the trial of the action on January 14, 1943, plaintiff filed a supplemental complaint covering payments falling due under the agreement between the date of filing of the action and the date of trial. The amount then alleged to be due and unpaid was the sum of $4,750. Judgment was rendered in favor of plaintiff and against defendant for this amount, together with interest. The defendant has appealed from the judgment.

By his answer defendant admitted the execution of the contract, and that he had paid only the sum of $1,550 on the purchase price of the stock. As a special defense he alleged that he was removed from the management of the Gibson Oil Company in September, 1940, and since that date the company had been under the direction, management and control of a creditors' committee, appointed under an agreement between the company and its creditors.

In answer to paragraph III of plaintiff's complaint, in which the plaintiff alleged that she had delivered to the defendant the two hundred shares of stock and had demanded payment of the sum of $3,700, the defendant admitted the delivery to him on March 19, 1940, of thirty shares of said stock, which were fully paid for by him, and also the one hundred seventy additional shares of stock, but that he returned the one hundred seventy shares of stock to plaintiff or her attorney, who now holds possession thereof. Defendant further alleged that in June, 1942, the one hundred seventy shares of stock were sold for failure to pay a delinquent assessment and the penalty thereon, and that by reason of said sale neither plaintiff nor defendant since the sale was the owner of said one hundred seventy shares of stock. The findings of the trial court were that each and all of the allegations of plaintiff's complaint and supplemental complaint were true, and that each and all of the allegations and denials of defendant's answer were untrue, "excepting that it is true that the defendant paid to plaintiff the sum of Fifteen Hundred and Fifty Dollars ($1550.00)."

As stated above, this action was instituted to recover the purchase price of certain personal property (shares of corporate stock) which the plaintiff had agreed to sell and the defendant had agreed to buy at the stipulated price of $10,000. It is the position of defendant that the right to prosecute this action for the recovery of the purchase price of said stock is governed by the provisions of the Uniform Sales Act, Stats.1931, chap. 1070, p. 2234. Sections 1721 to 1800 of the Civil Code, inclusive, were then made to contain the provisions of the Uniform Sales Act. The subject of the act is "Sale of Goods." By said act, section 1796 of the Civil Code, " 'Goods' include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." It will be noted that this definition of "goods" does not specifically mention shares of corporate stock. It is obvious that shares of corporate stock are not money, neither are they emblements, or growing crops, or things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. As chattels personal they are included within the statute unless they are "things in action." Whether shares of corporate stock are "goods" within the meaning of the Uniform Sales Act has never been before the appellate courts of this state, except in the case of Eckart v. Brown, 34 Cal.App.2d 182, 93 P.2d 212. In that case at page 188 of 34 Cal.App.2d, at page 215 of 93 P.2d, the court stated: "It has uniformly been held that the Uniform Sales Act does not include within its provisions a contract for the repurchase of shares of stock. Smith v. Lingelbach, 177 Wis. 170, 187 N.W. 1007, 1008; Goodhue v. State Street Trust Co., 267 Mass. 28, 165 N.E. 701, 704; Millard v. Green, 94 Conn. 597, 110 A. 177, 181, 9 A.L.R. 1610; 1 Uniform Laws Annotated (1931) 15."

[1] It might be well to review the decisions of other jurisdictions insofar as they have given consideration to the question now before us. The purpose of the Uniform Sales Act, as well as other legislation of like character, is to establish, insofar as it is reasonable, uniformity in the laws of the several jurisdictions in respect to the matters which are the subject of such legislation. In carrying out this plan there have been enacted the Uniform Negotiable Instrument Act, the Uniform Sales Act, the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act, the Uniform Stock Certificate Act, and the Uniform Partnership Act, and acts on miscellaneous subjects not necessary to mention here. To make this plan practicable and to carry out its intent and purpose, courts should strive to make their decisions construing the various provisions of these Uniform Acts as nearly uniform as possible, consistent with their understanding of the principles of law applicable to the particular subject before them.

[2] The decisions of courts of last resort of other states that have adopted Uniform Sales Acts are practically unanimous in holding that certificates of stock are choses in action, and are not included in the term "goods" as defined in the Uniform Sales Acts. Millard v. Green, 94 Conn. 597, 609, 110 A. 177, 9 A.L.R. 1610; Goodhue v. State Street Trust Co., 267 Mass. 28, 34, 165 N.E. 701; People's Bank v. Kurtz, 99 Pa. 344, 349, 44 Am.Rep. 112; Guppy v. Moltrup, 281 Pa. 343, 348, 126 A. 766; Smith v. Lingelbach, 177 Wis. 170, 172, 187 N.W. 1007; Henderson v. Plymouth Oil Co., D.C., 13 F.2d 932, 937. The only case to which our attention is called which appears to hold to the contrary is Postel v. Hagist, 251 Ill.App. 454. That case involved the rights of the parties to the proceeds from the sale of shares of corporate stock, which had been sold to a trustee. In discussing the problem then before it, the court stated at page 466 of 251 Ill.App.: "The provisions of the Uniform Sales Act, [Smith-Hurd Stats. c. 121½, § 1 et seq.] Cahill's St. ch. 121a, § 4 et seq., are applicable to the sales of corporate stock. See Illinois-Indiana Fair Ass'n v. Phillips, 328 Ill. 368 [159 N.E. 815, 59 A. L.R. 591]." An examination of the case of Illinois-Indiana Fair Ass'n v. Phillips shows that the only question involved there was the statute of frauds, and that the provisions of section 4 of the Uniform Sales Act of that state expressly provided that certain contracts must be in writing, including a contract to sell or a sale of any goods or *choses in action* of the value of $500. We find nothing in that decision which holds, or even intimates, that certificates of stock are not choses in action, or that they are included in the term "goods."

It is also claimed that there is dictum in the case of Davis Laundry & Cleaning Co. v. Whitmore, 92 Ohio St. 44, 110 N.E. 518, Ann.Cas.1917C, 988, to the effect that shares of stock are not choses in action. (This dictum, says Mr. Williston, is not to be followed as it is incorrect, and the right conclusion was reached in Millard v. Green, 94 Conn. 597, 110 A. 177, 9 A.L.R. 1610, supra.) Williston on Sales, 2d Ed., § 619.

A later decision on this question is Agar v. Orda, 1934, 264 N.Y. 248, 190 N.E. 479, 99 A.L.R. 269. In that case the court refrained from expressly deciding the question as to whether certificates of stock were or were not "goods," but assumed that if (264 N.Y. at page 251, 190 N.E. at page 480) "the Legislature did not intend to include certificates of stock in its definition of 'goods.' * * * yet the fact remains that certificates of stock, like other 'goods,' are freely bought and sold in the market place and pass from hand to hand, and [an] analogy so complete may dictate that the rules governing sales be applied alike to 'goods' and other personal property freely bought and sold and passing from hand to hand." The court proceeded to hold that as the Legislature by the Uniform Sales Act had changed the rule governing the sale of "goods," except choses in action, and had made no change in the rule governing the sale of certificates of stock, it had left to the courts to formulate a rule applicable to cases not covered by the statute—or to be specific, applicable to certificates of stock. Having determined that the power to formulate such a rule had been left to the courts, the New York Court of Appeals, in the interest of uniformity, held that the rule which the Legislature had made applicable to "goods" other than choses in action should apply to the sale of certificates of stock, although the latter were choses in action.

Assuming that the New York Court of Appeals had the power and authority to prescribe a rule for the sale of certificates of stock and make it conform to the rule established by the Legislature for the sale of other classes of personal property, and that this court has the same power, we are not persuaded that we should exercise that power and promulgate a rule applicable to shares of stock which the Legislature in this state neglected to establish in the enactment of the Uniform Sales Act. It must be admitted that the Legislature's failure to include shares of stock within the provisions of that act was intentional, as the act expressly excludes choses in action (shares of stock). If we were to establish a rule governing the sale of shares of stock, it seems that it would be much more consistent for us to act in harmony with the Legislature which left contracts for the sale of shares of stock unaffected by the terms of the Uniform Sales Act. We prefer however, not to exercise the power, if we have it, to formulate any rule upon the subject in view of the action of the Legislature. The law governing contracts for the sale of shares of stock therefore remains unchanged in this state by the enactment of the Uniform Sales Act.

Since certificates of stock as choses in action are expressly excluded from the terms of the Uniform Sales Act, sales or agreements of sale of corporate stock are not in any manner controlled by any of the provisions of that act. The rights of the parties therefore in this action must be determined by the law applicable to sales of shares of stock independent of any provision of the Uniform Sales Act.

[3, 4] By their contract defendant Gibson agreed to buy and plaintiff agreed to sell to him the shares of stock covered by the agreement. Prior to the commencement of this action defendant defaulted in the payments under the contract, and plaintiff delivered to him the two hundred shares of stock properly endorsed and demanded payment of the amount due her under said contract. At the time of trial there was the sum of $4,750 due and unpaid under the contract, and judgment was rendered in favor of plaintiff for said amount.

One of the rights of a vendor of personal property under a contract for the sale of such property, upon the refusal of the vendee to take the property and pay the agreed price, is "Standing on the sale, the vendor may retain the property for the vendee and sue for the purchase price." Cuthill v. Peabody, 19 Cal.App. 304, 308, 125 P. 926, 928. This is just what the plaintiff has done in this case. On default of defendant to make the payments called for under the contract of sale, she withdrew the shares of stock from escrow and sent them to defendant. The latter after retaining the stock for a period of time, returned one hundred seventy shares to plaintiff, who then notified defendant that she held the shares of stock for him and that he could have them at any time "as they are your property." Plaintiff has clearly brought herself within the rule established in Cuthill v. Peabody, supra.

[5] Appellant contends that under the agreement it would be impossible to maintain an action for the purchase price because payment must be made into escrow before delivery of the stock was due or title to it passed; and that if payment under the agreement must precede the passing of title, then under the agreement, when title had passed, payment had already been made and could not be sued for a second time. In other words, the contention amounts to this—title does not pass until the defendant pays into escrow installments on account of the purchase price amounting to $500; then stock in that amount is delivered to him; and at that time, and not before, the property passes to defendant. It may be conceded that as long as the shares of stock remained in escrow the title to all of said stock stood in the seller, and the buyer acquired title only to such portion of said shares as was paid for by him; but when he defaulted in the payment of the stock, the contract provided for the delivery by the escrow holder to the seller of "all of said shares not then withdrawn from said escrow * * * and the seller may otherwise dispose of said shares freed of the terms of this agreement." It will be noted that upon the buyer's default, the seller was entitled to receive from the escrow holder all stock unpaid for and was freed of the terms of the agreement, but nothing is said about the buyer being freed of the terms of the agreement. Upon the buyer's default in the payment of the stock the seller would not be further bound by the agreement of sale, but this default of the buyer did not free him from the terms of the contract. He was still bound to purchase the stock, and when the stock was delivered to him by the seller and demand made for its payment, the title passed to him and the seller could sue for the purchase price. Cuthill v. Peabody, supra.

[6] The further provisions contained in paragraph 6 of the agreement do not show any different intention nor compel a conclusion that the property in the shares of stock would not pass to the buyer upon his default and the delivery to him of the stock and demand made for payment. These provisions simply give to plaintiff certain additional rights in case defendant fails to comply with the terms of the agreement, but they do not in any manner purport to take from her the right to sue for the purchase price of the stock. Plaintiff, in withdrawing the shares of stock from escrow, acted strictly in pursuance of the terms of the agreement. Defendant's claim that by so doing plaintiff "cancelled" the contract is without merit. The provision of said paragraph purporting to give to plaintiff liquidated damages in case of defendant's failure to comply with the terms of the agreement was void, Civ.Code, § 1670, as it would be neither impracticable nor extremely difficult to fix plaintiff's actual damage for defendant's breach of his contract, Civ.Code § 1671, and plaintiff made no attempt to enforce this provision of the contract. Neither did plaintiff attempt to dispose of said shares of stock after their withdrawal by her from escrow otherwise than to tender them to defendant and demand payment of the amounts which defendant had agreed to pay for said stock. We fail to see how any of the terms of paragraph 6 of the agreement indicate or would support a determination that the shares of stock did not pass to defendant upon their delivery to him by plaintiff and demand made for their payment after defendant had defaulted in their payment. That being the case, an action for the purchase price is a proper proceeding against defendant for his failure to comply with his agreement.

[7] One of the conditions of the agreement involved in this action is that "buyer shall be under no further or additional obligation to purchase stock under this agreement * * * if Mr. Gibson, party of the second part, is removed from the management of the company through the action of creditors or bankers." In defendant's answer, as noted above, he alleged that in September, 1940, he was removed from the management of the company through the action of its creditors and bankers, and since that date the company has been under the direction, management and control of a creditors' committee appointed pursuant to an agreement between the company and its creditors.

The evidence shows that an agreement bearing date of November 20, 1940, was entered into between the Gibson Oil Company and a committee of the creditors, whereby the committee of creditors was given certain supervision over the affairs of the company: no expenditures should be made by the company exceeding in amount the sum of $25; all checks issued by the company were to be countersigned by a member of the committee; the members of the committee were to have access at all times to the company's books; no contract was to be entered into by the company without the consent of the committee; and the company agreed to comply with the recommendations of the committee as to the operation of the company. There were many other provisions in the agreement but they were concerned principally with the manner in which the committee would function, and other matters not affecting the operation of the company.

This agreement was executed in the name of the company by Mr. Gibson as president and his secretary as secretary of the company. By paragraph 3 of the agreement, Mr. Gibson was "retained to manage the affairs of the Company, subject to the terms of" the agreement and subject to the control of the committee at a salary of approximately $250 per month. Mr. Gibson personally agreed in writing to all the provisions of this paragraph of the agreement. He continued as manager of the company under the terms of the agreement up to the time of the trial of this action, and there is nothing before us to show that his relations with the company have undergone any change since the trial. The trial court found against defendant on his claim that he was removed from the management of the company, and there is an abundance of evidence to support such finding. In fact there is practically no evidence supporting defendant's claim. It may be true that his powers and duties after the execution of the creditors' agreement were not as broad and extensive as they were before that time. Before the creditors stepped into the affairs of the company, Mr. Gibson was president, manager, and owner of all of its stock. He was the alter ego of the company and could manage the affairs of the company without let or hindrance of any person whatever. But while he was shorn of such of his former powers by the creditors of the company, he still continued to manage its affairs, though under the supervision and direction of the committee. He was never removed from its management.

[8] Defendant further contends that finding III is not supported by the evidence. To properly understand the basis of this contention, it will be necessary to refer to the pleadings respecting the matter in issue upon which said finding was based. In paragraph III of plaintiff's complaint, she alleged that she had delivered to defendant the two hundred shares of stock of the Gibson Oil Company and demanded of defendant the payment of the sum of $3,700. Defendant in his answer expressly *admitted* the receipt of thirty shares of said stock, and impliedly admitted the receipt of all of said stock. He further admitted "that prior to the filing of this action plaintiff caused one hundred seventy (170) shares of stock to be delivered to him but that he returned said shares of stock to plaintiff * * * and that plaintiff * * * is now in possession of said stock." This is the only answer defendant made to the allegation in paragraph III of plaintiff's complaint, that is, that plaintiff delivered to defendant said two hundred shares of stock. It is an admission that said two hundred shares of stock were delivered to defendant, and *an admission*, not an *allegation*, that defendant caused one hundred seventy shares of stock to be returned to plaintiff. Treating it, however, as an allegation, the finding of the court that it was not true is contrary to the evidence, which shows without conflict that defendant did return said shares of stock to plaintiff and that plaintiff's attorney acknowledged their receipt, in which he stated that "The certificates are held by me for your account and you can have them at any time you desire, as they are your property." Defendant now contends that the judgment against him should be reversed upon the ground that the finding under attack was not supported by the evidence. Considering the pleading upon this issue, and the uncontradicted evidence respecting the delivery of said stock by plaintiff to defendant, we would not be justified in reversing the case on account of the error complained of. If it were necessary we might make a finding to conform to the evidence which would support the judgment, but we do not consider the matter of sufficient importance to take such action.

[9] Another claim by defendant in support of his appeal is that the one hundred seventy shares of stock of the Gibson Oil Company was, after the commencement of this action and on June 25, 1942, sold to a third party to satisfy an unpaid assessment levied by the company upon its capital stock. Plaintiff attacks this sale and claims that it was fictitious; that the levy of the assessment was instigated by defendant and the stock was sold in payment

of the same for the purpose of forestalling plaintiff's right to recover under said agreement of sale. This matter was not made an issue by the pleadings and consequently was not made the subject of any finding. While the record discloses persuasive evidence in support of plaintiff's contention that the whole assessment proceeding, including the sale of the stock thereunder, was not bona fide, but was for the ulterior purpose of depriving plaintiff of her rights under the contract with defendant, it is not necessary for us to pass upon that question in view of the fact that said sale under the assessment took place after the default of defendant and after plaintiff had delivered the stock to him and demanded payment of the same. As the title to the stock then passed to defendant, it belonged to him at the time of the sale and any loss sustained by the sale of the stock under said assessment proceedings would fall upon the defendant, the then owner of the stock.

In view of our conclusion upon the matters discussed above, the judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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25 Cal.2d 547

C. I. T. CORPORATION v. PANAC et al.

S. F. 17077.

Supreme Court of California.

Dec. 28, 1944.

1. Bills and notes 🔑373

In action on notes, defense that no contract-negotiable instruments were made or consented to by defendant makers, but that they signed note with understanding, induced by fraud of payee's agent in falsely representing that defendants were signing contract to repair dwelling houses only, was good against plaintiff as holder in due course.

2. Bills and notes 🔑373

As regards defense against bona fide holder, where there is "fraud in the execution" of note, there is no contract, but in case of "fraud in the inducement", that is, where maker voluntarily executes note because of payee's fraudulent representation, there is a contract voidable for fraud.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud in the Execution" and "Fraud in the Inducement".

3. Contracts 🔑93(1)

Though manifestation of assent, not actual assent, creates contract, an unambiguous writing, purporting to be contract, may be void, as where signer, without negligence, assumes it to be paper of different character, whether such mistake relates to its existence as contract or legally operative document of any kind or question whether it is kind of contract or legal document which it purports or is represented to be.

4. Contracts 🔑14

Though neither the will to create legal obligation, nor accurate understanding of meaning of offer and acceptance, is essential to creation of contract, intent to do act amounting to offer or acceptance, or at least negligently allowing appearance of such intent, is essential.

5. Contracts 🔑98

Where fraud induces a person to assent to do something which he would not otherwise do, his act is operative, though voidable, but fraud inducing person to believe that act which he does is something other than it actually is renders it void.

6. Bills and notes 🔑477

In action on note, which defendant was fraudulently induced to sign or indorse in reasonable belief that he was signing something else, plea of non est factum is applicable.

7. Bills and notes 🔑373

A holder in due course of note negligently signed by maker in belief that he was signing something else should be allowed to recover thereon, and maker relying, without investigation of his own, on representations of person at whose request maker signs note, is guilty of such negligence, in absence of extenuating circumstances.

8. Bills and notes 🔑373

A negotiable instrument, which is void because of fraud in inducing maker to sign or indorse it in reasonable belief that he is signing something else or fraud in its execution, is not enforceable by holder in due course, in absence of negligence on maker's part.

9. Bills and notes ⚷373

The rule that maker of negotiable instrument, which is void for fraud inducing him to sign it in reasonable belief that he is signing something else or fraud in its execution, has real defense to action thereon by holder in due course, in absence of negligence on maker's part was not changed by negotiable instruments law. Civ.Code, §§ 3136, 3138.

10. Bills and notes ⚷373

While purchaser of negotiable instrument payable to bearer can enforce it in some cases, even though instrument was originally void because of fraud in inception, under common law or statute, holder thereof in due course cannot recover thereon, where there are no circumstances justifying estoppel or policy of law forbids enforcement of instrument even by such holder. Civ.Code, §§ 3136, 3138.

11. Bills and notes ⚷144

There should be uniformity in negotiable instruments law between states, as well as within a state, and courts should have that in mind as their guiding thought in construing statutory law on subject of such instruments. Civ.Code, § 3266d.

12. Bills and notes ⚷520

In action on spouses' note, of which plaintiff was holder in due course, evidence barred recovery by plaintiff on ground of fraud in execution of note. Civ.Code, §§ 3136, 3138.

13. Bills and notes ⚷520

In action on spouses' note, of which plaintiff was holder in due course, evidence justified finding that defendants were not negligent in signing note with understanding, induced by fraudulent misrepresentations of payee's agent, that defendants were signing only contract to repair dwelling houses.

14. Bills and notes ⚷537(4)

Negligence in signing note is generally question for jury to determine from consideration of all facts and circumstances, but may exist as matter of law where a state of facts is admitted or undisputed.

15. Bills and notes ⚷505

In determining whether maker of note was negligent in signing it, jury may consider his age and mental and physical condition, as well as mercantile usages of trade and commercial intercourse as to negotiable paper.

16. Bills and notes ⚷373

The rule that, where a person possessing ordinary faculties and able to read and write signs negotiable instrument without reading it or a person unable to read makes no effort to inform himself of instrument's character or contents by having it read to him, but trusts entirely to a stranger's representations, bona fide holder of instrument may recover thereon, is inapplicable in case of fraud in inception of note.

17. Bills and notes ⚷373

Illiteracy of party, whose signature to negotiable instrument is obtained by fraudulent representation that instrument is of different character than one which he believes he is signing, is material, when such fraud is pleaded as defense against bona fide purchaser suing on instrument, but maker or acceptor thereof must have been free of negligence and generally must have taken advantage of reasonable means at hand to learn facts.

18. Contracts ⚷100

A person who cannot read is not always negligent in failing to call on another to read instrument to such person before he signs it, but question of his negligence is generally for jury.

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In Bank.

Appeal from Superior Court, Contra Costa County; Harold Jacoby, Judge.

Action by the C. I. T. Corporation against Martin Panac and wife on two notes. Judgment for defendants, and plaintiff appeals.

Affirmed.

Prior opinion, Cal.App., 149 P.2d 901.

Francis W. Collins, of Crockett, for appellant.

Francis P. Healey, of Richmond, and John Jewett Earle, of Oakland, for respondents.

CARTER, Justice.

In this action on two negotiable promissory notes by the plaintiff, a holder in due course, against defendants as makers, the latters' defense of fraud by an agent of the payee in the execution of the notes was sustained by the trial court sitting without a jury.

The court found that defendants are husband and wife; that they are illiterate, being unable to read or write the English language, and William Hart the agent of the payee knew of that fact; that Hart gained the trust and confidence of defendants and secured their signatures to the notes by false representations which induced the defendants to believe that they were signing a contract to repair dwelling houses and nothing else, and that defendants were ignorant of the fact that they were signing notes; that defendants relied upon such false representations and were prevented thereby from seeking independent advice although they requested that they be permitted to obtain it; that defendants were not negligent in signing the notes; and that plaintiff is a holder in due course and had no notice of any infirmities in the notes at the time they were acquired.

[1-3] Turning first to the question of whether or not defendants' defense was real, and hence good against plaintiff as a holder in due course, we are satisfied that the answer must be in the affirmative. The issue is whether a maker of a negotiable instrument may prevail against a holder in due course on a defense that in fact no contract-negotiable instrument was made or consented to by the maker. Where the maker does not consent to execute a negotiable instrument but nevertheless signs it, understanding it to be some other document, is he obligated to a holder in due course? There is a manifest distinction between fraud in the execution—in the fact of whether or not an instrument has been executed at all, and fraud in the inducement, that is, where because of the fraudulent representation of the payee, the maker knowingly and voluntarily executes the note, but it is voidable because of the fraud inducing him to execute it. In the former there is no contract whatever. In the latter there is a contract which is voidable for fraud. This distinction is discussed in Williston on Contracts, Rev.Ed., section 95 A, as follows:

"Though manifestation of assent and not actual assent creates a contract, a writing purporting to be a contract and not ambiguous in its language may be wholly *void.* If without negligence on his part, a signer attaches his signature to a paper assuming it to be a paper of a different character, *the paper is void.* Such a mistake as to the character of the instrument may relate to *its existence as a contract* or legally operative document of any kind, or to whether it is the kind of contract or legal document which it purports or is represented to be. In the former case, it is much easier to establish that there was no mutual assent. Negligence is there much less of a factor, since the average reasonable man would not be expected to exercise that caution which he would if he knew that he was signing what purported to be a legal document; particularly if he intended to become a party thereto. In the latter type of case, such a mistake without negligence will not often occur in the absence of some such fraud, as substituting by sleight-of-hand, for a paper which has been agreed upon, a different one. Nevertheless, the situation is possible without actual fraud, and if it occurs whether induced by fraud, or without it, no contract is formed.

[4] "It is as if the offeror in his sleep said words expressive of an offer, which were accepted. Though neither the will to create a legal obligation, nor accurate understanding of the meaning of an offer and acceptance is essential to the creation of a contract, intent to do the act which amounts to an offer or acceptance, or at least negligently allowing the appearance of such an intent, is essential." (Italics added.)

And section 1488:

[5, 6] "Fraud may induce a person to *assent* to do something which he would not otherwise have done, or it may induce him to believe that the act which he does is something other than it actually is. In the first case the act of the defrauded person is operative though *voidable;* in the second case *the act of the defrauded person is void,* because he does not know he is doing and does not intend to do this act. This distinction most commonly arises in the law of negotiable paper * * * Where a person is fraudulently induced to sign or indorse a bill or note in the reasonable belief that he is signing something else, *he cannot really be said to have made or indorsed the bill or note;* hence the ancient plea of non est factum is applicable.

[7] "If, however, the signer has been negligent, a holder in due course should be allowed to recover and it seems that one who, in the absence of extenuating circumstances, relies without investigation of his own on the representations of the person at

whose request he signs is guilty of negligence." (Italics added.)

See, also, Rest., Contracts, § 475; Cummings v. Ross, 90 Cal. 68, 27 P. 62; McElhaney v. W. E. Moyer & Co., 101 Cal. App. 53, 281 P. 87; Raynale v. Yellow Cab Co., 115 Cal.App. 90, 300 P. 991.

[8] By the overwhelming weight of authority a negotiable instrument which is void under the foregoing circumstances, where there is in fact no contract or there is fraud in the execution, is not enforceable by a holder in due course in the absence of negligence on the part of the maker; that is, the maker has a real defense to an action thereon. M. & J. Finance Corporation v. Rinehardt, 216 N.C. 380, 5 S.E.2d 138; Parker v. Thomas, 192 N.C. 798, 136 S.E. 118; Gate City Nat. Bank v. Bunton, 316 Mo. 1338, 296 S.W. 375; First Nat. Bank v. Hall, 129 Mo.App. 286, 108 S.W. 633; Robertson v. Budzier, 229 Mich. 619, 201 N.W. 949; Harber v. Lincoln, 175 Okl. 221, 51 P.2d 967; First Nat. Bank v. Wade, 27 Okl. 102, 111 P. 205, 35 L.R.A.,N.S., 775; Gross v. Ohio Savings & Trust Co., 116 Ohio St. 230, 156 N.E. 205; De Camp v. Hamma, 29 Ohio St. 467; Yakima Valley Bank v. McAllister, 37 Wash. 566, 79 P. 1119, 1 L.R.A.,N.S., 1075, 107 Am.St.Rep. 823; Thompson v. C. I. T. Corporation, Tex.Civ.App., 157 S.W.2d 961; Security Finance Co. v. Floyd, Tex.Civ.App., 294 S.W. 1113; Foster v. McKinnon, L.R. 40 P. 704; Lewis v. Clay, 67 L.J.Q.B. 224; see 10 C.J.S., Bills & Notes, § 499b; 8 Am.Jur. Bills & Notes, § 589; Green v. Wilkie, 98 Iowa 74, 66 N.W. 1046, 36 L.R.A. 435, 60 Am.St.Rep. 184; Williston on Contracts, Rev.Ed., §§ 95A, 1159, 1488; 12 Va.L.Rev. 324; Britton on Bills & Notes, § 130; Brannon's Negotiable Instruments Law, Bentel, 6th Ed., pp. 623–627; Joyce, Defenses to Commercial Paper, 2d Ed., §§ 81, 82, 96–98, 223; 2 Daniels on Negotiable Instruments, 7th Ed., p. 1075, §§ 991–992; 9 Tulane Law Rev. 78; 6 Ore.L.Rev. 160; 6 Tex. L.Rev. 114; 12 id. 228; 13 Mich.L.Rev. 601; 29 Yale L.J. 797.

[9-10] The rule has been declared by statute in some states. See 8 Am.Jur. Bills & Notes, § 589, ft. n. 5. The rule has not been changed by the uniform negotiable instruments law. M. & J. Finance Corporation v. Rinehardt, supra; Security Finance Co. v. Floyd, supra. Nor by the bills of exchange act in England the wording of which is practically the same as the uniform negotiable instruments law. Lewis v. Clay, supra. The authorities have held the defense to be real under the uniform negotiable instruments law although not expressly discussing the act. See cases cited: 12 Va.L.Rev. 324; 9 Tulane L.Rev. 78. A like construction should be placed upon the negotiable instruments law of this state contained in section 3136 of the Civil Code which provides:

"The title of a person who negotiates an instrument is defective within the meaning of this title when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud." And section 3138, providing:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon." It was not intended by the enactment of the negotiable instruments law that the whole law of contracts was to be abrogated unless clearly indicated. The defense under consideration goes to the existence of any contract. If there is no contract there is no negotiable instrument, which is a simple contract. As stated in Williston on Contracts, Rev.Ed., § 1159:

"The words 'defect of title' in this section (Section 57 of the N.I.L.Civil Code, sec. 3138) even when aided by section 55 (Civil Code sec. 3136) and by the definition of 'holder' do not indicate with perfect clearness that it is only personal or equitable defenses from which the holder is freed, but there was probably no intention to change the law in regard to the matter, and there is no reason to suppose that a change has been effected. Therefore, though in some cases a purchaser of an instrument payable to bearer can enforce it even though by common law or statute the instrument was originally void, yet where the instrument was originally void and there are either no circumstances justifying an estoppel, or though there are, the policy of the law forbids enforcement of the instrument even by a holder in due course, such a holder, according to the better view, cannot recover under the Statute any more than under the previously prevailing law." See to the same effect 12 Va.L.Rev. 324; 2 Daniel on Negotiable Instruments, 7th Ed., §§ 937–

941, 997. And that is conceded to be true by Professor William E. Britton, who takes the position that such a defense should not be available against a holder in due course. 9 Cornell Law Quarterly 138, 156–158.

[11] It is a fundamental principle that there should be uniformity in the negotiable instruments law between states as well as within a state and the courts should have that in mind as their guiding thought in construing the statutory law on the subject. See Civ.Code, § 3266d; Aud v. Magruder, 10 Cal. 282; Utah State National Bank v. Smith, 180 Cal. 1, 179 P. 160; Security Commercial & Savings Bank v. Southern T. & C. Bank, 74 Cal.App. 734, 241 P. 945; Bank of Italy Nat. Trust & Savings Ass'n v. Symmes, 118 Cal.App. 716, 5 P.2d 956; Charles Nelson Co. v. Morton, 106 Cal.App. 144, 288 P. 845; 7 Cal.L.Rev. 263. Therefore the goal of having the law of negotiable instruments certain and uniform will best be advanced by the adoption of a rule followed by the great weight of authority.

The only case in California that has discussed the subject is Bedell v. Herring, 77 Cal. 572, 20 P. 129, 11 Am.St.Rep. 307, decided before the adoption of the negotiable instruments law. It involved an action by a holder in due course against the maker on a promissory note, the maker's defense being that he did not know he was signing a note because of the fraud of the payee. The court affirmed the judgment of the lower court based on the latter's finding that the maker was negligent. After expressly stating that it did not pass upon the question of whether the defense was real or personal, it proceeded nevertheless, to state that it was not a real defense. For the reasons appearing above that dictum is disapproved.

[12] Plaintiff contends that the evidence is not sufficient to support the findings and judgment.

Each of the documents involved in the transaction consisted of a single sheet of paper containing three instruments separated by perforated lines. Each instrument was signed. The first was an application for credit setting forth a general outline of house repair work which was to be done by Home Improvement Company, the payee of the notes. Next were the notes followed by a certificate that the work had been completed. Plaintiff, purchaser of the notes took the entire documents. Home Improvement Company, payee, was a contractor engaged in house repair work. In the first document the application for credit was dated March 15, 1941, and the note, in the principal sum of $628.93, and the certificate of completion, were dated March 19, 1941. Plaintiff purchased the note on the latter date. In the second document the application was dated March 20, 1941, and the note, in the principal sum of $288.50, and the certificate, were dated March 26, 1941. Plaintiff bought the note on the latter date. The notes were payable in installments commencing 60 days after date and were for repair work to be done by the payee, apparently under a contract between the payee and defendants. The work was not done satisfactorily.

Mr. William Hart, an agent of payee, called upon defendants to solicit repair work for Home Improvement Company, being introduced by a Mr. Krajcr, an intimate friend of defendants. Unknown to defendants, Hart had arranged with Krajcr to obtain customers for Home Improvement Company for which he was to receive a commission. After examining defendants' houses where the repair work was to be done (Hart jotted the nature thereof down in a note book), defendants Krajcr and Hart, and two men accompanying the latter returned to defendants' home where Hart prepared the documents, and told defendants to sign them.

"Defendant Mrs. Panac, replied that: 'I sign when work is done,' I said, 'When work is done, I sign. Another things, if you sign, I don't know where to sign.' *I couldn't read it. I read very little.*

"The Court: Do you read English? A. *Little, very little,* because I have my Constitution, that is all. I just learn just a little bit for the Constitution.

"The Court: Do you mean citizenship? A. For citizenship, that's all, and I never know my name * * * imagine how much I could know, and * * *

"The Court: Can you write? A. I can sign my name.

"The Court: Can you write? A. (Cont.) But I don't know how to spell. I can copy but I couldn't spell the things. So anyway, why he * * * Oh, well, he wants to write all this. I say, 'Well I tell you what you do, leave the paper here and I show the lawyer,' and then 'Oh, no,' he said, 'You got to sign. I tell you why, tomorrow I have to send a man here. Don't you want the work done?' I said, 'Yes, sure enough, I want the work done, but I have to see,' and Martin (Mr. Panac) was joking, and I said, 'Martin, don't joke * * * don't joke Martin, he wants me to sign, I don't want to sign.' He says, 'Oh,' he says, 'The reason I want sign is because I got to start the work.' Martin says, *'I trust you, Hart.'* * * * A. Well, after he (Hart) written then Martin, my husband, say 'O.K.' Mr. Hart, he says, 'I kind * * * I have recommended and I see you was in the war,' * * * he tell he was in the war, and I believe it, so he said, *'I trust you.'* He said, 'I going to sign.'

"The Court: Then did your husband sign? A. He sign and he make me sign.

"The Court: And you signed too, all right. A. And before I sign, I say, *'I don't know how to read.'* 'I read it to you,' so he read what got to be done * * * A. Mr. Hart read it.

"The Court: Did he read it over? A. He read it over and he say, everything's on the paper.

"The Court: Did you understand what he was reading? A. Yes, I understand what he reading, says, 'The hardwood floor,' and all the things what he repeat, why I understand that. Then there was a note on the bottom.

"The Court: What color was the paper you signed? A. White paper.

"The Court: You never signed any blue paper? A. Only mine. After.

"The Court: I mean at that time? A. At that time no, no blue paper.

"The Court: All right. A. And before I sign, I say, 'Still, I don't want to sign no paper.' He (Mr. Panac) says, 'Listen, sign Emelia,' he says, 'You see if he do something wrong, you see that leg,' he said, 'crippled.' He said, 'I make another leg a cripple.' Really he did say that, so I feel embarrassed, and so I sign, and I thought he give me this, and I say, 'Give me this paper what I signed.' He said, 'Oh, no, I give you another one,' and *make me sign the other blue paper.* He never leave me that one. * * *

"Did you sign those blue ones to your recollection? A. No, no. I sign the white one, and he give this little piece to me. I asked for the other, and he said, 'Oh, no,' so he take that case, and just spread it out down there and keep it up.

"The Court: All right, *did he read that blue one to you?* A. No.

"The Court: Just read the white one? A. The white one.

"Q. Did that say anything about repairing of the roof on the things he read to you, or do you know? A. Yes, repair the roof.

"Q. That's what he read to you? A. Yes, and the hardwood floor and the ventilation. * * *

"Q. In other words, Mrs. Panac, he read to you the things he had written down in the black book (the note book in which Hart jotted down the repairs to be made)? A. Yes.

"Q. And stated they were in the contract? A. Yes." (Italics added.)

It appears that the white paper was the contract for the repairs and the blue one the document in question. She also testified:

"Q. Well, your testimony, Mrs. Panac in that respect is, that you didn't understand you were signing the promissory notes, or you weren't signing, so far as you knew, any certificates of completion of jobs; you didn't know you were signing any applications for loans; you hadn't contemplated any loans of any sort whatsoever; you signed some big white paper that you thought was a contract for certain work to be done which would be paid for sixty days after completion. A. Yes. * * *

"Q. How well do you read English, Mrs. Panac? A. Well, I couldn't read very good. Oh, I couldn't read it. I don't know how to spell or anything. Just I learned the Constitution by myself. * * *

"The Court: Do you drive an automobile? A. Yes.

"The Court: How can you read the signs? A. Yes, I can read the signs because I learned later for the Constitution.

"The Court: But the signs, what has that got to do with the Constitution? A. Yes, I can read the signs, because it is big, you know.

"The Court: You memorize it, do you mean? A. Yes.

"Q. Do you mean the stop sign? A. Yes, stop sign and signals and everything.

"The Court: Do you read the newspaper at all? A. No, I never take it because I know I couldn't.

"Q. Did you sign these papers that were signed here, or sign anything that night of March 15th, immediately it was presented to you, or did you ask for independent advice before you signed it, or an opportunity to read it? A. Well, I ask him to read it. First I told him I wanted to show my attorney. 'Leave this paper here?' He says, 'Oh,' he says 'I read for you.' I said, 'I couldn't read or write.' He said, 'I'll read it to you.'

"The Court: How many papers did he read to you, 1, 2, 3? A. One.

"The Court: Just one? That is all he ever read to you? A. Yes.

"The Court: Do you know what a promissory note is? A. No, I don't know.

"Q. Did you know you were signing any promissory note? A. No.

"Q. Did you desire to borrow any money at that time from the C. I. T. Corporation or anyone else? A. Not a thing, no, sir.

"The Court: Well, what did you think you were signing? A. Well, sign because he said he couldn't start to work and the reason he said, 'You have to sign it, because he couldn't start to work, he have to send the men to do the work.'"

Defendant Mr. Panac testified:

"Can you read Mr. * * * A. Well, not much, I may read a little but I can't pronounce it well, so afterwards he says, 'Well,' I told him (Hart), I said, 'Read now to me what you got in your contract.' Well, he read it to me. * * * O.K. then when he read that contract to me, he says, 'Now you sign it.' I says, 'Now listen, how can I sign it when I don't know what you are doing?' Oh, he says, If you don't sign. * * * If I don't sign it, he can't start the work. There was nothing mentioned about financing or anything else, and he said I had 60 days time to think this matter over.

"The Court: How many papers did he read to you, one or two? A. One paper he read to me, only one. * * *

"The Court: Is it possible that you signed more than once on each paper? A. Well, I couldn't say 'Yes' or 'No.' I know I signed two papers, not five or six.

"The Court: Do you know what a promissory note is? A. No. * * *

"The Court: Well, I don't care anything about that. Well, did you know you were signing any promissory note? A. No, I didn't know. I know that the job supposed to be done, what I told him to be done, what kind of job, that's all, but the other I didn't know, and I didn't know anything about money because he told me I have sixty days time to think it over where I can get the money but how * * * but he told me not to worry about it. * * *

"The Court: Mr. Panac, can you read this? Just put your glasses on. Can you read this? A. (Reading) 'Notice to be borrow. Do not sign this until the work is satisfactory completed.'

"The Court: Do you know what that means? A. Well, that means. * * * but he didn't read that to me.

"The Court: Well. * * * A. That means I shouldn't pay the money or anything until the work is complete.

"The Court: What does the word 'sign' mean. That is 'sign'? A. Yes, 'sign,' that means sign my name.

"The Court: 'Do not sign?' A. Yes, 'Do not sign until the work is complete.'

"The Court: Well, what does that mean? A. That means I shouldn't sign it, but I wasn't on that * * * I was * * * for not to start the work because * * * for me not to start work until I sign it.

"The Court: Did you see this? A. No, I didn't see it.

"The Court: Didn't see it? A. No. No. No such a thing. If I did see that I could say, 'Well here, it says not to sign until complete work, and you want me to sign it and there is nothing started.' * * *

"Q. Did you impose trust and confidence in Hart because of Krajcr? A. Well, yes, because I asked him. * * * I said, 'How is the job going?' He said, 'Well, he guarantee the job.' 'Then the way Hart told him, he said it going to show up so they have the neighbors, or people whoever been living in there, ask who done this work.' I said, 'Yes, if you do this work all right, you will get the customers to do more business.' He said, 'Oh, he try to do his best,' but afterwards when they didn't start to work for six weeks, * * * for a month or six weeks, then I was disgusted.

"Q. Martin, how did you happen to finally sign anything at all? Did you make some statement to Hart just before you signed everything? Was your wife demurring or refusing to sign? A. Yes, she did.

"Q. How did she happen to sign? A. How happen to sign, because I told myself, 'I want you to sign.' No, he said he can't go ahead with the work unless I sign it, but there was no * * * nothing in my mind, anything about money, because when he told me about sixty days I have time to make up my mind, about the money, and forget it, not to worry about it.

"Q. What did you say to Hart just before you signed the contract, anything at all? A. I asked him, I said, 'Now this work got to be done, what you have.' He said, 'Yes, yes, everything * * * no worry about.' That's why after I sign, I said, 'Well, if you can't start work without the signature, I can't delay and so on with the job. It don't do no good, might just as well start right away.' He said he will, and it was about month or six weeks before.

"Q. Wait a minute. Did you know what you were signing? A. I know *just for the job.*

"Q. You were signing a contract for the job? A. Yes, for the job.

"Q. Were you and your wife hesitating about signing it, for a while there that night? A. Yes.

"Q. What did you finally say to Hart just before you signed it? A. I told him, 'What is this paper?' I asked him, 'What's this for to sign?' He said, 'We can't go ahead with the job.' * * *

"Q. Do you remember any discussion about Hart's bad leg? A. Yes.

"Q. What did you say about that, Anything? A. Yes, I said, 'Now you got bad leg and if you don't come through with what you say, you are going to do good work, and so on, I get the other one.'

"Q. That was before you signed the contract? A. Yes.

"Q. And that was the reason you signed the contract? A. No, not that, but the reason was this: If he don't do the right work the way he promise this and that, and not to worry, I be surprised on how the work is going to be done, I said, 'All right, but listen, you have one bum leg, but if you don't come through with all you promised, you have the other leg bum.' * * *

"Q. By the way, just one other question: What kind of a fellow was Mr. Hart to you, very cordial, very nice? A. Yes.

"Q. Lovely sort of a man? A. Oh, my, if somebody wanted to sell you something, talk like that, you sure buy it.

"The Court: Good salesman? A. You sure buy it.

"Q. You thought he was your best friend I guess? A. Best friend, and he told me all about what he was in the war, this and that. He said, 'You think I'm not going to do for my companion work like that.' He don't want to show up anything like that. I said, 'Now, listen, you got one leg broken, but I going to break the other one if you don't come through.'

"Q. A couple of buddies, war buddies, huh? A. That's what I told him. He says, 'Oh, no, no, no,' nice, nice, nice, and the two men that was with him * * *."

In corroboration of defendants Mr. Krajcr, who was present at the signing of the notes, testified that Mrs. Panac was reluctant to sign, but Hart told her the work could not be commenced unless she did; that Hart read only one paper to defendants; that he did not hear any note read. Mrs. Krajcr testified that Mrs. Panac could not read English very well and she read things for her. Mrs. Panac's daughter testified that Mr. Panac did not read very well and requested her on various occasions to read written instruments for him.

We believe that the evidence is sufficient to support the findings. While there is some conflict in the evidence it is clearly sufficient. From an examination of the record it is apparent that the trial court could have concluded, as it did, that defendants did not have an understanding of the English language. The trial court was in the position to observe the witnesses and we cannot say that it was unreasonable in determining that the defendants were illiterate. Illiteracy is largely a matter of degree and must be considered in the light of the subject matter to be read or understood. The evidence is clear that Hart read the contract for the repair to defendants but not the documents containing the six instruments including the notes. Defendants did not know they were signing promissory notes or certificates that the work had been completed when it had not even been commenced. The evidence does show that defendants knew that they were to have time in which to pay for the repair work, but it is clear that they did not know they were signing a negotiable instrument with results which follow from its negotiation. That defendants would not have signed it if they had known they were signing notes and certificates of completion is a reasonable inference from the foregoing. From the events that occurred and the conduct of defendants it may be inferred that Hart knew of the illiteracy of defendants. Manifestly, he was using "high pressure" selling methods upon persons who would appear to be easy victims. The whole tenor of the transactions shows fraud upon his part.

[13-15] The trial court was also justified in finding that defendants were not negligent. Particular mention may be made of the illiteracy of defendants, the high pressure methods pursued by Hart, the reading of only the contract for repairs and not the notes, the insistence by Hart of an immediate execution, and Hart's brushing aside Mrs. Panac's suggestion that advice and particularly legal advice be first obtained. It is true that there were other persons present when the notes were signed but two of them were presumably friends of Hart. Krajcr was also present but it is clear Hart was using him to perpetrate the fraud through the friendship existing between defendants and him and the commission to be paid to him. The presence of Krajcr and his apparent acquiescence in the transaction served to silence any apprehensions of defendants. Under all of the circumstances we cannot say as a matter of law that defendants were negligent. It has been said with reference to the maker's negligence in cases such as the one at bar:

"It is impossible to state any general rule as to what acts or conduct of defendant will amount to such negligence as will permit a recovery in the cases now under discussion, since, as will be seen from an examination of the authorities, the different courts have taken very widely different views of the subject. As discussed in § 703 of this Title, negligence is generally a question for the determination of the jury, all the facts and circumstances of the case being considered, but, where a state of facts is admitted or not disputed, negligence may exist as a matter of law. The jury may take into consideration, it would seem, the age and mental and physical condition of the person signing, as well as mercantile usages of trade and commercial intercourse as to negotiable paper.

[16] "It has been decided in a number of cases that, where it appeared that defendant who was a person possessing ordinary faculties and able to read and to write signed an instrument without reading it, or being unable to read made no effort to inform himself of its character or contents by having it read to him, trusting entirely to the representations of a stranger, a bona fide holder might recover; but this rule is not universal in its application and would not apply, it seems, to fraud in the inception of the note. The fraud which will relieve a party who is capable of reading must be a fraud which prevents him from reading.

[17, 18] "Persons who are easily defrauded because of age, infirmity, or ignorance are, as would be expected, usually defendants in cases of this character, and whether or not they are negligent depends on the facts and circumstances of each particular case, the ignorance of infirmities of such defendants being taken into consideration. Accordingly, the fact that a party whose signature is obtained by a fraudulent representation that the instrument is of a different character from the one that he believes he is signing is an illiterate person is material when such fraud is pleaded as a defense in an action against a bona fide purchaser. The maker or the acceptor must, however, have been guilty of no negligence and must generally have taken advantage of such reasonable means as lay at his hand. Some cases would seem to establish the rule that one who cannot read is negligent in trusting to the representations of the other party to the transaction as to the contents of an instrument which he signs, where he can easily procure the instrument to be read by third persons who are known to him. However, a person who cannot read is not always negligent in not calling on a third person to read the instrument to him, the question as to his negligence generally being one for the jury, as discussed in § 703 of this Title." 10 C.J.S., Bills & Notes, § 499b, p. 1100.

See, also, 11 C.J.S., Bills & Notes, §§ 702, 703; 8 Am.Jur. Bills & Notes, § 1137; Daniel on Negotiable Instruments, § 996. Bedell v. Herring, supra, is not controlling on the issue of negligence. While some of the factors present in the instant case existed in the Bedell case, not all of them did, and the court was affirming a finding that the maker was negligent on an appeal on the judgment roll alone.

For the foregoing reasons the judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

67 Cal.App.2d 480

BOARD OF LAW LIBRARY TRUSTEES OF LOS ANGELES COUNTY et al. v. LOWERY et al.

Civ. 14503.

District Court of Appeal, Second District, Division 1, California.

Jan. 8, 1945.

1. Municipal corporations 🔑880

The law library which is set up as separate entity for a public purpose with appropriate powers for its conduct as such, whereby law library fund is a separate fund to be used for benefit of law library, is a "public corporation" with a separate entity and interest earned upon deposits of monies in law library fund by county treasurer belongs to the law library and not to county. Gen.Laws 1937, Act 2834a, § 2; St.1941, p. 1742, § 6300 et seq.; p. 1744, § 6342; St.1943, p. 2557, § 6320.

See Words and Phrases, Permanent Edition, for all other definitions of "Public Corporation".

2. Mandamus 🔑100

Mandamus was proper remedy to compel county treasurer to credit interest earned on funds deposited in law library fund to that fund where facts were stipulated. Gen. Laws 1937, Act 2834a, § 2; St. 1941, p. 1742, § 6300 et seq.; p. 1744, § 6342; St.1943, p. 2557, § 6320.

◆

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Mandamus by Board of Law Library Trustees of the County of Los Angeles and others against J. M. Lowery, as auditor of the County of Los Angeles, and another to compel defendants to credit interest earned by the law library fund to that fund. From a judgment for petitioners, defendants appeal.

Affirmed.

J. H. O'Connor, County Counsel, S. V. O. Prichard, Asst. County Counsel, and Gerald G. Kelly, Deputy County Counsel, all of Los Angeles, for appellants.

Paul Vallee, of Los Angeles, for respondents.

DRAPEAU, Justice pro tem.

In this proceeding in mandamus the only question involved is whether interest earned upon deposits of monies in the law library fund by the County Treasurer of Los Angeles County belongs to the county or to the law library.

The county contends that this interest should go into its general fund because the law library is an integral part of the county. Also that the plaintiff may not prevail because of the equities involved in the case, and in any event mandamus is not the proper remedy.

Respondent law library contends that it is a public corporation, separate and distinct from the County of Los Angeles; that the county treasurer is ex-officio treasurer of the law library fund; that the interest on the fund is an accretion thereto and properly belongs to the law library.

The superior court adjudged that the interest should be credited to the law library fund and that a peremptory writ of mandate issue to the auditor of the County of Los Angeles, commanding him to do so. From this judgment the auditor and treasurer of the county have appealed.

The deposit act, Act 2834a, Deering's General Laws, provides for deposit of public funds, the interest thereon to be paid quarterly on average daily balances, and that said interest shall belong to "the county, city and county, city, town, municipality *or other public or municipal corporation represented by the officer making such deposit*, except where the law otherwise directs." Sec. 2. (Emphasis added.)

Law libraries are established pursuant to state law, Div. 3, Ch. 5, Business and Professions Code, St. 1941, p. 1742. This chapter of the code provides for a board of law library trustees in each county of the state. Secs. 6300 to 6307.

Section 6320 provides:

"(Payment to county treasurer: Law Library fund: Withdrawals.) All money collected for the law library in each county, must be paid into the hands of the treasurer of the county, who must keep the same separate and apart in a fund designated the 'law library fund,' to be expended by the board of law library trustees. Money may be drawn from this fund only as in this chapter provided, and only for the purposes herein authorized.

"(Payment where law library and board of trustees in existence.) Whenever a law library and a board of trustees to govern the same, is in existence under the provisions of any law, other than the law superseded by this chapter, in any county, or city and county, in this State, money so collected shall be paid into the hands of those, and in the manner, provided by such law."

Other sections provide that part of the filing fees paid to the county clerk in civil actions shall be credited to the fund; that the boards of supervisors of the counties may augment the fund by appropriations from county funds. Other sections give the board of law library trustees powers to promulgate rules, to purchase books, to pay salaries, to advance funds, and to do all necessary things to carry on the functions of the law library.

Section 6342 provides: "A board of law library trustees may order the drawing and payment, upon properly authenticated vouchers, duly certified by the president and secretary, of money from out of the law library fund, for any liability or expenditure herein authorized, and generally do all that may be necessary to carry into effect the provisions of this chapter."

[1] Thus it appears that the law library is set up as a separate entity for a public purpose with appropriate powers for its conduct as such, and that the law library fund is a separate fund to be used for the benefit of the law library. This being so the rules laid down in Pomona City School District v. Payne, 9 Cal.App.2d 510, 50 P.2d 822, are controlling. There it was held that school funds deposited in the county treasury remain the property of the school district, and interest earned thereon belongs to the district.

This view finds support in several definitions by our California courts of public corporations with a separate entity: The University of California (Estate of Royer, 123 Cal. 614, 56 P. 461, 44 L.R.A. 364); irrigation districts (In re Madera Irr. Dist., 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am.St.Rep. 106); municipal utility districts (Morrison v. Smith Bros., Inc., 211 Cal. 36, 293 P. 53); the metropolitan water district (City of Pasadena v. Chamberlain, 204 Cal. 653, 269 P. 630); the toll bridge authority (California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P.2d 425), and county water districts (Laguna Beach City Water District v. County of Orange, 30 Cal.App.2d 740, 87 P.2d 46).

Therefore, in the present case, it is the duty of the county treasurer to credit interest earned by the law library fund to that fund.

So far as the equities of the case are concerned, it may be observed that the whole matter was submitted on stipulated facts. Within these facts is to be found sufficient evidence to sustain the judgment of the superior court.

[2] And in such a case as this, mandamus is the proper remedy. Long Beach City School District v. Payne, 219 Cal. 598, 28 P.2d 663.

The judgment is affirmed.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 456

HINDS et al. v. WHEADON et al.

Civ. 14310.

District Court of Appeal, Second District, Division 3, California.

Jan. 3, 1945.

Hearing Denied March 1, 1945.

1. Negligence 🔑121(2)

Under doctrine of "res ipsa loquitur," proof that a thing which causes injury is under defendant's management, and that accident is such as in ordinary course of things does not happen if those who have management use proper care, affords reasonable evidence, in absence of explanation by defendant, that accident arose from want of care.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

2. Negligence 🔑121(2)

Under doctrine of res ipsa loquitur, explanation which defendant is required to make is an explanation of his conduct and, to be complete, it must be as broad as inference that accident arose from want of care on his part.

3. Negligence 🔑136(6)

Ordinarily, it is for jury to say whether inference of negligence under res ipsa loquitur doctrine has been successfully met, but, if defendant fails to produce substantial evidence of use of due care, the defense will be held insufficient as a matter of law.

4. Negligence ⚿121(2)

Under doctrine of res ipsa loquitur, all that defendant need do in any case is to produce evidence which equals in evidentiary weight the inference of want of due care on his part which the doctrine creates in favor of plaintiff.

5. Appeal and error ⚿996

Jury's conclusion may not be disturbed on appeal, if evidence upon the issue is such as to allow a difference of opinion among reasonable minds.

6. Negligence ⚿121(2)

The doctrine of res ipsa loquitur is a rule of evidence and not of liability, and it does not impose upon one charged with negligence the duty of exercising a higher degree of care than would me required of him in a case where doctrine was inapplicable.

7. Negligence ⚿134(4)

In action for death of welder caused by explosion of dehydrator tank upon which welder was working, submitted under doctrine of "res ipsa loquitur," proof by defendants that they used ordinary care to keep water in tank at safe level was sufficient to warrant conclusion that they were not negligent, without proof as to cause of lowering of water level.

8. Trial ⚿295(8, 9)

Instruction on preponderance of evidence and instruction on doctrine of res ipsa loquitur, when read together, were consistent and stated law fully and fairly.

◆

Appeal from Superior Court, Los Angeles County; Alfred E. Paonessa, Judge.

Action by Ida Hinds and others against I. M. Wheadon and others to recover for wrongful death of named plaintiff's husband. From a judgment for defendants, the plaintiffs appeal.

Affirmed.

Syril S. Tipton, of Los Angeles, for appellants.

Joseph A. Ball, of Long Beach, for respondents.

SHINN, Justice.

The present action was brought by the widow and minor children of George T. Hinds to recover damages for his death. Decedent was employed by Allied Petroleum Corporation to weld two brackets upon the outside of a cylinder of a steel crude oil dehydrator. Defendants Fisher and Haines were employees of Allied Petroleum. During the welding operation the cylinder exploded and Mr. Hinds was fatally injured. The case was tried before a jury, the verdict was in favor of defendants, and plaintiffs have appealed.

It was alleged in the complaint that defendants undertook and agreed to prepare the cylinder of the dehydrator for the welding operation by removing all gasoline and gasoline fumes and gases by filling the cylinder with water; that they prepared the cylinder and had pumped water into it but that they did so negligently and so as to leave in the cylinder gasoline fumes and vapors, and they negligently failed to keep the cylinder full of water during the welding operation, as a result of which negligent acts the gasoline vapors were exploded. The evidence disclosed that two brackets were being installed to support an inlet pipe at the top of the cylinder. Each bracket had a right and a left plate at top and bottom. The brackets were first tacked on lightly by means of welds. The plates of the upper bracket were approximately 18 inches below the top of the cylinder. No explosion occurred while the final welds were being made on the lower bracket nor while the left plate of the upper bracket was being welded. The cylinder exploded while the final weld was being made to attach the right plate of the upper bracket. It was caused by the vaporizing of the residuum of oil which remained upon the inside walls of the cylinder, the vapor being ignited by the heat from the welding torch applied to the outside wall. This fact was demonstrated by the evidence and the parties are in agreement upon the point. It was also established by the evidence, and it is not questioned in the briefs, that the explosion would not have occurred if the cylinder had contained water at the point of the application of the heat. The cylinder was full of water shortly before the welding started. There was water inside the cylinder at all points where the welding was done except where the right-hand upper plate was being attached some 18 inches below the top. This fact appears from the expert testimony as to the condition of the inner surface of the metal at the points where the welds were made. There was no discoloration of the inner surface at any of the points where welds were made except the one where welding was in progress at the time the explosion occurred. The absence of discoloration was due to the presence of water at the several points and the absorption by the water of the excessive heat. The left upper plate was on the same horizontal level as the right upper plate. Since there was water behind the former and none behind the latter, it is obvious that the water level was lowered in the interval between the making of the two welds to a point more than 18 inches below the top of the cylinder.

Upon the trial the questions of fact were reduced to the single issue whether defendants were negligent in failing to maintain the water at a level at least as high as the point of the highest weld. The question before us is whether defendants or either of them were shown to have been negligent as a matter of law.

The case has been on appeal before. Hinds v. Wheadon, 1942, 19 Cal.2d 458, 121 P.2d 724. In reversing a judgment of nonsuit the court said, at page 462 of 19 Cal.2d, at page 726 of 121 P.2d: "In the present case the absence of water in the dehydrator tank, which resulted in the explosion, is not such an occurrence as happens in the ordinary course of things if those in control of the matter have used the proper amount of care. Under the facts of this case, therefore, we think an inference of negligence on the part of defendants arises which they are required to rebut and which is sufficient to take the case to the jury."

The case was tried and the jury were instructed upon the theory that the doctrine of res ipsa loquitur applied. It was not questioned that it was incumbent upon defendants to supply evidence to meet the inference that they were guilty of negligence in failing to maintain the water at a proper level. The point of disagreement upon the appeal is the following: plaintiffs contend that defendants were required to prove the cause of the lowering of the water level and that it was a cause that was not due to their negligence, while defendants insist that they were not required to prove the cause of the lowering of the water level but only facts from which the jury could determine that they used ordinary care to keep the water at a safe level. Defendants did not prove the cause of the lowering of the water level but they did furnish proof of the precautions which they took to prevent it. This proof, they contend, was sufficient to warrant a conclusion that they were not negligent and to justify the verdict in their favor.

Therefore the question is whether under the doctrine of res ipsa loquitur, as applied to the particular factual situation involved, the defendants can defeat the charge of negligence by proof that they used ordinary care to prevent the accident, if they fail or are unable to prove the exact cause of the accident.

The fluid container consisted of a steel cylinder 10 feet in diameter and 12 feet high, resting upon a concrete foundation. The top of the cylinder was a convex steel dome. The cylinder held 185 barrels of fluid and the dehydrating operation consisted of the separation of oil from water by electric process. The dehydrator was not in operation and no electric currents were present at the time of the explosion. Fluid entered the cylinder through a 2-inch line (which we will call line A) which extended through the wall of the cylinder at a point near the top and above the points where the welding was done. This line extended from the ground level, where the fluid was pumped through a heater into the line. The brackets which were welded onto the cylinder were to serve the purpose of supporting this line and preventing vibration. In line A were three check valves which prevented fluid from flowing out of the cylinder. Another line, B, entered the top of the cylinder. No fluid could run from this line except when the dehydrator was full and under pressure, but under those conditions oil would flow through this upper line to a storage tank, although a small portion of it could be diverted from this outlet line through a ½-inch line, C, on the outside of the cylinder which would carry it to the ground into a waste line leading to a sump. The flow through line C was controlled by a valve close to the ground and which was operated manually. The line was cut off below this valve and the fluid ran through a funnel in the lower end of the line so that it was possible to observe the quality of fluid leaving the cylinder through line B. Lines A, B, and C may be disregarded in our further discussion for the reason that fluid could not have left the cylinder through them by gravity flow. There were other outlets through which it could have passed. Fluid could enter the funnel from the cylinder by means of five small bleeder pipes which emerged from the cylinder at different heights, each controlled by a separate gate valve so that fluid could be run from any of five different levels and could be observed as it entered the funnel. Thus fluid at or above the level of the several outlets could be run into the funnel and on into the sump by opening one or more of the valves. There was an outlet from the bottom of the cylinder, a 4-inch line, D, controlled by a 3-inch gate valve 1½ feet above the ground and constituting a waste line to the sump. This line was used only to run off the waste at the bottom of the cylinder. When the dehydrator was not in operation, fluid could flow out of the cylinder only through this line D, when the 3-inch gate valve was open, or through any one of the five small bleeder lines that was open. Fluid running out from the bottom through line D would not be observed except where it emerged from the line at the sump, but fluid from any of the five bleeder lines could be seen running into the funnel which led to the waste line.

The evidence of the defendants was that Chester Fisher, an employee of Allied Petroleum, under the instructions of the latter's superintendent, pumped clean water into the dehydrator for about two hours in the morning of the day before the accident. He then opened the valve in the ½-inch line C while the pump was in operation and the cylinder was full of water under pressure, and clean water flowed from the line into the funnel. This operation would prove that the dehydrator was full of fluid under pressure and that all of the oil which would leave by that process had been flown out with the water. Some 23 hours later, on the morning of the accident, he again started the pump and clean water immediately flowed from the top of the cylinder and down through line C. If, as testified to, the water began to flow immediately when the pump was started, the operation would prove that the cylinder had remained full of water for 23 hours. Other testimony was that the valve in line D and the five valves in the bleeder lines were all closed before the welder arrived. The testimony was that when he arrived about 10 a.m. he asked whether the dehydrator was ready for him to work on and was told that it was full of water. Fisher then started the pump in the presence of the welder and the superintendent for Allied Petroleum, and clean water immediately ran through line C into the funnel. These facts would show that the cylinder remained full from 8:30 a.m. when Fisher had run the pump, until 10 a.m., when the test was made for the welder. After this operation Mr. Hinds said, "O. K. shut her down"; the pump was shut off and Mr. Hinds went to work. Fisher assisted him for 10 or 15 minutes and then left, but was called back by Mr. Hinds some 35 to 45 minutes later. By that time the two plates of the lower bracket and the left plate of the upper bracket had been completely welded to the cylinder. The upper part of the right plate also had been welded; Fisher held the ladder for the welder as he started to weld down the outside of the right plate, and while he was welding at the right foot of the plate the explosion occurred. Although there remained on the inside wall of the cylinder a residuum of oil which the water would not remove, it is the accepted practice to do welding as the work in question was being done if the cylinder is full of water.

If the testimony of defendants' employees was believed—and in view of the verdict it must have been believed—defendants had placed the dehydrator in a safe condition for the welding; all valves were tight at the time the final test was made just before the welding started and the cylinder had remained full of water for 23 hours immediately prior to 8 a.m. on the day of the accident and from 8:30 until 10 a.m. on the morning of the accident. The water therefore must have escaped through a partially open valve. No fluid was seen running out of any of the five bleeder lines and the only blind one was line C at the bottom, which ran underground to the sump, some 12 feet from the dehydrator. Mr. Fisher testified that he did not touch any of the outlet valves on the day of the accident. The valve in line C, through which fluid could run only when the pump was in operation and the cylinder full, was open. Decedent and Fisher, so far as disclosed, were the only persons around the dehydrator during the welding. If it was believed that one or the other accidentally or intentionally opened a valve and failed to completely close it, there was no evidence pointing to either of them as the one who was guilty of that act. There was the testimony of Fisher that he did not do it. Certainly there was no evidence that either one of them would have had any purpose in opening any one of the six valves through which fluid could be released. Mr. Hinds was using a ladder in his work. In the early part of the work the foot of the ladder rested upon the dirt. When Mr. Fisher was called back to give further assistance, it was to hold the ladder, which was rested upon cement in the later stages of the work. The valve heads in line D and those in the bleeder lines were of the type used on the ordinary garden faucet, although the one in line D was 3 inches in diameter.

[1-4] The doctrine of res ipsa loquitur was adopted in this state in the decision of Judson v. Giant Powder Co. 1895, 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718, 48 Am.St. Rep. 146, as declared in Shearman and Redfield on Negligence, section 60: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Subsequent decisions have not changed the rule. The explanation which the defendant is required to make is an explanation of his conduct and, to be complete, it must be as broad as the inference. It is for the jury to say whether the inference has been successfully met (Ireland v. Marsden, 1930, 108 Cal.App. 632, 291 P. 912; John v. B. B. McGinnis Co., Inc., 1940, 37 Cal.App.2d 176, 99 P.2d 323; Maryland Casualty Co. v. Matson Nav. Co., 1918, 177 Cal. 610, 171 P. 427), although if the defendant fails to produce substantial evidence of the use of due care, as where it appears that precautions that should have been taken were not taken, the defense will be held insufficient as a matter of law. Chutuk v. Southern California Gas Co., 1933, 218 Cal. 395, 23 P.2d 285. All that he need do in any case is to produce evidence which equals in evidentiary weight the inference which the doctrine creates in favor of plaintiff. Ales v. Ryan, 1936, 8 Cal.2d 82, at page 99, 64 P.2d 409.

[5-7] It was clearly the duty of the defendants to remove the loose oil from the cylinder and to have it full of water unmixed with oil. It was also their duty to exercise ordinary care to keep the water level at a point above the highest weld while the work was being done. If the water had been there, the work could have been done in safety; without water an explosion would naturally result because of the oil on the cylinder wall which could not be removed by the flow of water. There was no conflict in the evidence as to the precautions which had been taken by defendants. The jury were justified in believing that at the time the work started the cylinder was in a safe condition. They were also justified in believing that it had been tested for its ability to hold water without leakage and that all outlet valves had been closed. Defendants' duty was to use ordinary care. There was no evidence of any inspection made during the progress of the work to ascertain whether the water was remaining at a safe level. The implied finding of the jury was that such further inspection was not essential to the exercise of ordinary care. This was a reasonable conclusion in view of the testimony as to the tests previously made. Since the question of negligence is one of fact, the conclusion of the jury that a given act or omission did or did not constitute negligence may not be disturbed on appeal, if the evidence upon the issue is such as to allow a difference of opinion among reasonable minds. The res ipsa loquitur doctrine does not abrogate this familiar rule. It does not relieve a plaintiff who charges negligence from the duty of proving it by a preponderance of the evidence. It is a rule of evidence and not of liability and it does not impose upon one charged with negligence the duty of exercising a higher degree of care than would be required of him in a case where the doctrine was inapplicable. There is no rule of law applicable to all cases of simple negligence which requires a defendant to prove the exact cause of an accident in order to meet an inference that it was caused by his negligence. Undoubtedly there are cases where the defendant would have to show the immediate cause of the accident and that it was not due to his negligence, as where it must necessarily have resulted from his own act or omission. This is clearly not such a case. After the jury had accepted as true the testimony of defendants' witnesses, the only logical conclusion as to the cause of the accident would be that some valve had been partially opened, either intentionally or accidentally, during the progress of the work. The implied finding was that this did not happen by reason of any act or omission on the part of defendants, at least any negligent act or omission on their part. This conclusion had direct support in the testimony

of the witness Fisher. There was no evidence whatever that the defendants touched or would have had any reason to touch any of the valves while the work was going on. The jury of course could have refused to believe the testimony of defendants' witnesses as to the making of the tests, but having found that they were made and that the tank was watertight, there was no more reason to believe that the defendants opened a valve, either accidentally or intentionally, than there was to believe that Mr. Hinds had done so. In order to reverse the judgment we would have to hold that the defendants could defeat the charge of negligence only by proving that Mr. Hinds or some third person opened one of the valves. It is obvious that they would be unable to produce such proof. A reversal would mean that the judgment must go against the defendants because of their inability to prove the immediate cause of the accident, even though there was ample evidence to support the finding that they exercised ordinary care to prevent it. Such a holding would be without support in reason or authority.

[8] The jury were instructed that the burden of proof upon the issue of negligence rested upon plaintiffs and were also instructed in the doctrine of res ipsa loquitur. Plaintiffs complain of a part only of the instruction on preponderance of evidence, reading: "If in this case you are unable to determine, by a preponderance of the evidence, whether the defendant was or was not guilty of some negligent act or omission but could only determine that issue by resorting to guess or conjecture, then under such circumstances the plaintiff has not sustained the burden of proof and in such event your verdict must be for the defendant." It is claimed that the quoted portion of the instruction was in conflict with and deprived plaintiffs of the benefit of the res ipsa loquitur rule, in that it required plaintiff to prove a particular negligent act or omission on the part of defendants. The res ipsa loquitur instruction was comprehensive and in all respects correct. The opening sentences were as follows: "From the happening of the accident involved in this case, as established by the evidence, there arises an inference that the proximate cause of the occurrence was some negligent conduct on the part of the defendant. That inference is a form of evidence, and if there is none other tending to overthrow it, or if the inference preponderates over contrary evidence, it warrants a verdict for the plaintiff." The two instructions read together were consistent and stated the law fully and fairly.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

67 Cal.App.2d 440

FISKE et al. v. WILKIE.

Civ. 14269.

District Court of Appeal, Second District,
Division 1, California.
Jan. 2, 1945.

1. Death 🔑31(5)

Damages recoverable in an action for wrongful death are not the product of the community effort or of community accumulation, as respects determination of question who are the "heirs" entitled to maintain the action under statute. Code Civ.Proc. § 377; Probate Code, §§ 108, 201, 221.

2. Death 🔑31(5)

The word "heirs", in wrongful death statute authorizing action to be brought by heirs, is intended to limit the right of recovery to a class of persons who, because of their relationship to deceased, are supposed to be injured by the death. Code Civ.Proc. § 377.

See Words and Phrases, Permanent Edition, for all other definitions of "Heirs".

3. Death 🔑31(5)

Recovery under the wrongful death statute is not limited to persons who would succeed to the money recoverable if it had been in possession of the community at time of wife's death, but recovery may be had by those persons who are capable of inheriting from the deceased person generally. Code Civ.Proc. § 377; Probate Code, §§ 108, 201, 221.

4. Death 🔑31(8)

That husband of deceased survived her by a few months had no effect upon right of her children to recover as "heirs" under wrongful death statute. Probate Code, §§ 108, 201, 221; Code Civ. Proc. § 377.

5. Automobiles 🔑242(2)

Where defendant's automobile left a paved, straight, level, and dry highway, and crashed into a tree 15 feet from the pavement on left side of highway, the doctrine of res ipsa loquitur created a presumption of negligence which constituted a prima facie case for plaintiff seeking to recover for resulting death of occupant.

6. Automobiles 🔑181(2)

That automobile occupants paid for gas and oil used on trip taken for the mutual pleasure of the driver and occupants did not constitute compensation for the ride so as to make injured occupant a passenger rather than a guest.

7. Automobiles 🔑242(2)

The doctrine of res ipsa loquitur, which gives rise to presumption of negligence, does not create an inference of wilful misconduct, within meaning of guest statute.

8. Negligence 🔑11

"Willful misconduct" involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact on the part of the culpable person that danger is likely to result therefrom.

See Words and Phrases, Permanent Edition, for all other definitions of "Willful Misconduct".

9. Automobiles 🔑244(20)

Evidence that automobile, for some unexplained reason, left the paved and level highway and crashed into a tree 15 feet beyond edge of pavement on driver's left, resulting in injuries and death of occupant, was insufficient to establish "willful misconduct" of driver, so as to authorize recovery for death of a guest.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Virginia Fiske and others against Cora Wilkie to recover for the death of plaintiff's mother, who was riding as a passenger in defendant's automobile. From the judgment, plaintiffs appeal.

Affirmed.

Ratzer & Bridge and Collamer A. Bridge, all of Los Angeles, for appellants.

Michael F. Shannon, Thomas A. Wood, and Charles W. Wolfe, all of Los Angeles, for respondent.

WHITE, Justice.

This is an attempted appeal from an order "sustaining the demurrer of defendant to the evidence," an order granting motion for nonsuit, and an appeal from a judgment of the Superior Court of Los Angeles County.

The amended complaint sets out two causes of action and prays for general and special damage occasioned by the death of Mrs. Clara Riis Fiske resulting from injuries received by her: (1) While "riding as a passenger for hire" in an automobile owned by defendant and operated by the latter in a "careless, reckless and negligent manner"; and (2) while "riding as a guest" in said automobile when a "collision of said automobile with said tree was caused by the willful misconduct of the defendant in that she willfully, intentionally, wantonly and recklessly caused the said automobile to crash with said tree."

At the trial, plaintiffs introduced evidence that they are the daughters and only heirs of said Clara Riis Fiske, deceased, and that William C. Fiske, their father and the husband of decedent, died in August, 1941, several months after the death of their mother.

Counsel for defendant then objected to the introduction of any other evidence upon the ground that it was incompetent, irrelevant and immaterial, and in support of such objection stated: "* * * their only right to maintain an action here is pursuant to Section 377 Code of Civil Procedure as the heirs at law of the person alleged to have been wrongfully killed. If the father was alive as of the date of the death the cause of action resided in the father, not in the children, and therefore the only one who would have the right on the father's death to file an action would be the personal representative of the father, if that action survived him. * * * If the wife died without a will, and there is no allegation of a will here, then * * * so far as the right of action is concerned or so far as the community property is concerned, the children take nothing. * * * Section 377 vests this cause of action in either the heir or heirs of the deceased person, or in the personal representative. * * *" The court thereupon said: "At present I am going to overrule the objection. If there is any further question we can look it up at a later period." He then read section 377 into the record and said: "I think I will proceed under that to take the testimony," which he did. When plaintiff rested, defendant moved for a nonsuit in each cause of action. The court took the case under submission. Thereafter, the following Minute Order was made April 19th and entered April 21st: "Cause heretofore heard and submitted on April 14, 1943, it is now ordered: The Demurrer to the evidence is sustained and Defendant's Motion for a nonsuit is granted."

Judgment for defendant, entered May 28, 1943, reads in part as follows:

"* * * upon the commencement of introduction of testimony on the part of the plaintiff, defendant demurred to such evidence and objected to the introduction of any further evidence on the part of plaintiffs when it appeared that the husband of decedent and father of plaintiffs herein died a few months after the death of the wife and mother, ruling upon which demurrer and objection was reserved by the court; * * * all of the foregoing matters were taken under submission by the court and said court on the 19th day of April, 1943, filed its opinion in writing in the above entitled action, sustaining the demurrer of defendant to the evidence of plaintiffs and granting defendant's motion for a nonsuit; wherefore, by reason of the foregoing matters,

"It is ordered, adjudged and decreed that plaintiff take nothing. * * *"

We assume, as did both appellants and respondent in their respective briefs herein, that the trial court meant, by its minute order sustaining the "demurrer to the evidence," which is hereinabove quoted, that the objection to the introduction of further evidence urged by defendant for the reason that plaintiffs were not "heirs" authorized to bring the action under section 377 of the Code of Civil Procedure was sustained.

It then becomes apparent that the trial judge, when determining defendant's motion for nonsuit, considered only that portion of the evidence introduced before the making of said objection. If that objection should not have been sustained, appellants have been erroneously deprived of their right to a trial. The ruling on the objection to the evidence will be reviewed on the appeal from the judgment.

[1-4] Section 377 of the Code of Civil Procedure provides:

"When the death of a person * * * is caused by the wrongful act or neglect of another, his heirs * * * may maintain an action for damages against the person causing the death * * *."

The word "heirs" refers to "those who would be entitled to succeed to the property of such person * * *." Prob. C. § 108. Who is "entitled to succeed" to a particular property depends upon the nature of the property—that is, whether it was separate or community property? Prob. C. §§ 201, 221. The law of this state has long been settled that damages recoverable in an action such as this "are not the product of the community effort or of community accumulations * * *." Redfield v. Oakland C. S. Ry. Co., 110 Cal. 277, 289, 290, 42 P. 822, 825, 1063. As decided in that case, the word "heirs" in section 377 is "intended to limit the right of recovery to a class of persons who, because of their relation to the deceased, are supposed to be injured by her death." Such a claim for damages is not for injuries inflicted upon the decedent, but "for the injury inflicted upon the plaintiffs personally." Redfield v. Oakland, etc., supra, 110 Cal. at page 290, 42 P. at page 825; Blackwell v. American Film Co., 189 Cal. 689, 694, 209 P. 999; Estate of Riccomi, 185 Cal. 458, 460, 197 P. 97, 14 A.L.R. 509. Consequently, recovery is not limited to persons who would succeed to the money so recoverable if it had been in the possession of the community at the time of her death, but such recovery may be had by those persons who are capable of inheriting from the deceased person generally. Redfield v. Oakland etc., supra. A decedent's separate property where there is a surviving spouse and more than one living child "goes one-third to the surviving spouse and the remainder in equal shares" to the children, all of whom are therefore "heirs" of the decedent. Prob. C. §§ 221, 108. The fact that the husband of decedent survived her by a few months has no effect whatever upon the right of her children, the plaintiffs and appellants herein, to recover for the damages inflicted upon them by reason of their mother's death. Taylor v. Western Pacific R. R. Co., 45 Cal. 323, 335-336.

In view of the authorities hereinbefore discussed, the ruling of the court sustaining the objection of defendant to the introduction of evidence by plaintiffs was erroneous.

Respondent urges, however, that, even if error was committed, it could not have been prejudicial to appellants for the reason that all of the evidence offered by them was insufficient to prove either of the causes of action pleaded in the amended complaint and a nonsuit should have been granted in any event.

This is not a case where the trial court has considered the evidence and found in favor of defendant. Here, the trial court erroneously decided the evidence could not be considered. Appellants are entitled to have such evidence heard and weighed by a jury or trial court, if, under any possible view of all the evidence offered by them, they might have recovered.

It, therefore, becomes necessary for us to examine the entire record, considering it in the light most favorable to appellants. Following is a summary of the facts disclosed:

On the morning of April 23, 1941, Clara Riis Fiske (plaintiffs' mother) and five other women left Hermosa Beach in an automobile owned and operated by defendant. They proceeded to Palm Springs and Idyllwild in Riverside County. On their return trip that evening and while said car was being operated by defendant, it crashed into a tree, injuring all the occupants of the car. Two days later, Mrs. Fiske died as a result of the injuries received by her.

Defendant testified that she and Mrs. Fiske and the four other occupants of her automobile were members of South Bay Garden Club, the object and purpose of which was the study and growth of victory gardens, flowers, trees and shrubs; and that on the trip the other ladies picked some specimens of plants and "* * * we generally bring home a few specimens, just when we have our next Garden Club party that we can show what we did on our little trip. I often made these trips." The president of the club had arranged with defendant to permit her (the president) to drive defendant's car on the contemplated trip and then, because of the death of a member, had decided she could not go, so defendant said to the president, "Well, we will just call it off then." Mrs. McKay (one of the other occupants of defendant's car) "got up the crowd" and defendant "didn't know who was going." After defendant had told the president to "call it off," Mrs. McKay came to defendant's house and persuaded her to go and drive her car. When asked if she had "any conversation about the expense and purpose" of the trip, defendant answered: "Nothing particular about this one, but it is understood with the Garden Club when we take these trips, that we are to leave as much gas in the car as when we start out with it." Defendant further testified that gas was put in the car at Banning; that she did not pay for it; and that she does not know who did pay for it; and said: "Well, I imagine they filled it up, I didn't pay no attention, it didn't make no difference to me, because I was to have seven gallons of gas at home."

Deputy Sheriff Kelly, who arrived at the scene of the accident about ten minutes after the crash, testified that he found the "right front just at the axis of the hood and the windshield" of defendant's 1940 Chevrolet sedan against the south side of a eucalyptus tree. Apparently the right front portion of the automobile had been damaged and bark had been knocked off the tree by the impact. Defendant was sitting up near the wrecked car, three women were "laid out on the grass" and two others were jammed in the front seat so that the back thereof had to be pried away to get them out. The tree with which the automobile had collided was approximately two feet in diameter, located at the edge of a private driveway, the first of a row of such trees in front of a house, and about 15 feet south of the southerly edge of the pavement. Skid marks led from the rear wheels of the automobile in a wide, gradual arc to the north side of the pavement and back to a spot about five feet south of the centerline and 150 feet northeast of said car.

The place of the collision was just south of the southerly edge of Center Street, east of its intersection with Bloomfield Avenue. Center Street at that point runs east and west between Norwalk and Artesia, without a turn or curve. There was no obstruction or defect in the pavement, which was level, dry and 22 feet wide, with a four inch solid white line through its center. On each side of the pavement was a four foot graveled strip. The ground sloped a little from the edge of the pavement to the tree with which the automobile collided. The evening was clear, the automobile lights were on, and there was no indication that any other vehicle had been near defendant's automobile at the time of the accident.

Deputy Sheriff Kelly testified that defendant was the only occupant of the car who was able to talk when he arrived there, and that she appeared to be "quite nervous."

Defendant testified that she had been driving in a westerly direction; that there was no other car on the road; that her car was running perfectly; that she was in good health and felt fine; that she did not know what caused the car to go off the road on the left side and collide with the tree.

It is contended by respondent that the evidence, as a matter of law, fails to prove two essentials of appellant's first cause of action, to wit: (1) That any negligence on the part of defendant proximately caused the collision; and (2) that decedent was a passenger and not a guest.

[5] Since it cannot be successfully claimed that an automobile would ordinarily leave a well-paved, straight, level and dry highway under the circumstances shown in the instant case and crash into a tree 15 feet beyond the edge of the pavement on the driver's left, without at least some negligence on the part of the person who was in exclusive control thereof, the doctrine of res ipsa loquitur must be applied. The presumption of negligence arising under that doctrine constitutes a prima facie case in favor of plaintiffs on that point. Judson v. Giant Powder Co., 107 Cal. 549, 40 P. 1020, 29 L.R.A. 718, 48 Am.St.Rep. 146; Brown v. Davis, 84 Cal.App. 180, 257 P. 877; Leitert v. Pickwick Stages, 68 Cal.App. 504, 229 P. 889; Mansfield v. Pickwick Stages, 68 Cal.App. 507, 229 P. 890; Ireland v. Marsden, 108 Cal.App. 632, 291 P. 912; Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53. As was said in the case of Druzanich v. Criley, supra, 19 Cal.2d at pages 444 and 445, 122 P.2d at page 56:

"Under the circumstances here presented, viz., the instrumentality being in the exclusive control of said respondent; the accident being such that in the ordinary course of things it would not have happened if the respondent driver had used proper care; and the injury having occurred without voluntary action on the part of appellant, the res ipsa loquitur doctrine must be held to have been applicable. (Citing authorities.) * * *

"As stated in Ales v. Ryan, 8 Cal.2d 82, 99, 64 P.2d 409, 417: 'The rule is well settled by a multitude of decisions of the appellate courts of this state to the effect that the inference of negligence which is created by the rule res ipsa loquitur is in itself evidence which may not be disregarded by the jury and which in the absence of any other evidence as to negligence, necessitates a verdict in favor of the plaintiff. It is incumbent on the defendant to rebut the prima facie case so created by showing that he used the care required of him under the circumstances. The burden is cast upon the defendant to meet or overcome the prima facie case made against him."

[6] However, the evidence in the record before us is insufficient to support a judgment for plaintiffs on their first cause of action. The law of this state is well settled that the payment for gas and oil used on an automobile trip taken for the mutual pleasure of the driver and an injured occupant does not constitute compensation for the ride; and that, under circumstances such as those present in the instant case, the injured occupant is a guest and not a passenger. McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909. See also Whitechat v. Guyette, 19 Cal.2d 428, 431, 122 P.2d 47; Druzanich v. Criley, supra, and cases therein cited.

In cases having to do with "guest" statutes it is manifest that the various Courts have had distinctly in mind the question of whether the circumstances presented bring the case within the intent and purpose to be accomplished and the evils to be remedied by the enactment of such statute, as well as whether the injured party was within the language of the statutes being considered. Rocha v. Hulen, 6 Cal.App.2d 245, 44 P.2d 478.

As to the second cause of action, respondent urges that there is no proof that the accident resulted from any wilful misconduct on the part of defendant. Indeed, the only evidence tending to prove the cause of the crash consists of the inferences to be drawn from the physical conditions and circumstances surrounding it.

As hereinbefore stated, the law is well settled that negligence must be presumed from unexplained circumstances such as those shown by the evidence in the instant case. The doctrine of res ipsa loquitur is applicable in cases of carriers by automobile for hire who must use the utmost care and diligence for the safe carriage of their passengers. In the case of Brown v. Davis, supra, 84 Cal.App. at page 183, 257 P. at page 878, the court said:

"* * * 'A carrier of persons without reward must use ordinary care and diligence for their safe carriage.' * * * Does this difference in the degree of care required of the two classes of carriers justify a distinction in the application of the doctrine of res ipsa loquitur? * * * The presumption originates from the nature of the act, not from the nature of the relations between the parties. * * * It is not perceived that the probability of injury being the result of negligence is any less in case of a carriage without reward than one for reward. The doctrine has been held applicable in cases in which the injuring party was bound to the exercise of ordinary care only. * * * The doctrine has been applied in cases of injury to invited guests, caused by the operation of automobiles. * * *"

[7, 8] The above quoted decision has often been followed. The inference arising under the doctrine of res ipsa loquitur has been held to be evidence of negligence, and in "guest" cases too numerous to cite, to be evidence of gross negligence, but we know of no case wherein such an inference was held to be evidence of wilful misconduct.

"Willful misconduct depends upon the facts of a particular case, and necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom." Norton v. Puter, 138 Cal.App. 253, 32 P.2d 172, 174; Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510; Olson v. Gay, 135 Cal.App. 726, 27 P.2d 922; Walker v. Bacon, 132 Cal.App. 625, 23 P.2d 520; Howard v. Howard, 132 Cal.App. 124, 22 P.2d 279; Parsons v. Fuller, 8 Cal.2d 463, 66 P.2d 430; Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447.

The case of Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, arose out of injuries to a guest in one of the automobiles involved in an intersection collision. The court reversed an order granting a new trial after judgment for defendant and, at page 424 of 3 Cal.2d, 45 P.2d at page 197, said:

"We have examined the entire record and, in our opinion, those portions thereof most favorable to the plaintiffs will not support a finding of willful misconduct. The phrase 'willful misconduct', as employed in our so-called guest statute, has been variously defined in the many cases that have had occasion to consider the same. We shall not attempt to reconcile the several definitions and applications given to this phrase. It is satisfactorily defined in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, 990, wherein it is declared that '"willful misconduct," within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result.'

"The case of Howard v. Howard, 132 Cal.App. 124, 128, 22 P.2d 279, 281, after defining gross negligence as set forth in Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, and what is meant by willful misconduct as set forth in Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, declares that: '"The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute 'willful misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury."

"'While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while willful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active, and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word "willful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.'

"Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence, for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of willful misconduct. As has been repeatedly declared, '"willful misconduct" means something more than negligence—more, even, than gross negligence.' (Citing authorities.)

"The evidence in the present case is capable of but one construction, viz., that the attempt of the driver of the guest car to cross the intersection in advance of the Peckinpah car, whether he was driving at a normal or an excessive rate of speed, was the result of his conclusion, mistaken though his judgment may have been, that he could safely negotiate said crossing before the arrival of the other car. His conduct under the circumstances constituted, at most, gross negligence. Upon the record now before us, it cannot be said that he proceeded in utter disregard of, or that he was utterly indifferent to, the rights of his guests. While his judgment, under the circumstances confronting him, may have been poor, it does not appear that he was wantonly reckless in exposing his guests to danger, nor did his conduct partake of the nature of a willful, intentional wrong."

[9] In the instant case we fail to find any evidence that the erratic course taken by defendant's automobile when it left the highway and crashed into a tree was the result of any intentional act or omission on her part. She seems to have been just as completely surprized as were her guests, and no better able to explain the cause of the accident. It might be inferred from the evidence that defendant driver fell asleep or otherwise became unconscious or inattentive, which might have been negligence on her part.

Experience has taught that certain kinds of automobile accidents rarely happen without negligence on the part of the driver; that in many, if not most, of such accidents, the driver alone knows just what happened; and, for that reason, if the driver can not or will not explain the cause of the accident, those injured in the accident, in order to enforce their remedy, are entitled to the presumption of the driver's negligence arising under the doctrine of res ipsa loquitur upon proof that the accident occurred while the automobile was under the exclusive control of defendant. On the other hand, experience teaches that most accidents of the kind in the instant case are not the result of the driver's intention to harm guests or even the result of the driver's disregard for the probable or possible consequences of any act, but that they are usually the result of negligence or inadvertence. From a reading of the entire record in the instant case in the light most favorable to plaintiffs, we are unable to find any evidence of wilful misconduct on the part of defendant, or evidence of any facts or circumstances from which wilful misconduct could be inferred. Therefore, it must be held that plaintiffs failed to prove their second cause of action.

Since there is not sufficient evidence in the record to support a judgment for plaintiffs on either of their alleged causes of action, the erroneous ruling hereinbefore discussed was not prejudicial to plaintiffs.

The attempted appeals from the order "sustaining the demurrer of defendant to the evidence" and from the order granting motion for nonsuit are dismissed.

The judgment appealed from is affirmed.

YORK, P. J., and DORAN, J., concur.

PHILLIPS v. CITY OF PASADENA.

Civ. 14566.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1945.

Hearing Granted March 8, 1945.

1. Municipal corporations 🔑741(1)

One failing to file claim with city authorities for damages, caused by city's closing of road leading to claimant's resort, within six months after such occurrence, as required by city charter to authorize suits on such claims, had no right of action against city for such damages.

2. Municipal corporations 🔑741(1)

One failing to file claim with city authorities for damages, caused by city's closing of road leading to claimant's resort, within six months after such occurrence, as required by city charter to authorize suits on such claims, cannot base right to sue city for such damages on assertion that he did not know of permanent closing of road until date within six months before filing of claim.

3. Municipal corporations 🔑741(1)

One suing city for damages, caused by its closing of road leading to plaintiff's resort, cannot avoid fatal effect of failure to file claim with city authorities for such damages within six months after closing of road, as required by city charter, by waiving damages suffered during longer period than six months before filing of claim.

4. Municipal corporations 🔑741(1)

One failing to file claim with city authorities for damages, caused by city's closing of road leading to claimant's resort, within six months after such occurrence, as required by city charter to authorize suits on such claims, cannot recover for damages suffered during last six months before filing of claim on ground that city was guilty of maintaining continuing nuisance.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by J. R. Phillips against the City of Pasadena to recover damages for the closing of a road by which patrons reached plaintiff's resort. Judgment for defendant, and plaintiff appeals.

Affirmed.

Roland Maxwell, of Pasadena, for appellant.

Harold P. Huls, City Atty., and H. Burton Noble, Asst. City Atty., both of Pasadena, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages which he claims to have suffered because of the closing of a road by which patrons reached his resort. He has appealed from a judgment which was entered following the sustaining without leave to amend of the demurrer to his third amended complaint.

According to the allegations of the complaint plaintiff had for more than thirty years owned and operated a resort in the Arroyo Seco Canyon known as Camp Oak Wild, located some distance up the canyon from the city limits of Pasadena. Plaintiff is the owner of the buildings which had been erected on the land in the Los Angeles National Forest leased from the government. The only safe approach to plaintiff's resort by prospective customers is by a road lying partly within the limits of defendant city. At the time of the establishment of plaintiff's resort this road was maintained by the city "over the territory where it traversed that city" and was a public road continually used by plaintiff and his patrons except for brief periods when it was obstructed by heavy rain falls. In March, 1938, defendant closed the road "through the erection of a locked gate" near the intersection of Ventura and Windsor streets in Pasadena. Thereafter plaintiff demanded of defendant that the road be reopened and defendant complied by reopening the road. In March, 1941, the road "was again closed by means of said locked gate" and since that date "defendant has refused to maintain said road within the limits of the city of Pasadena in a safe and traversable condition."

It is further alleged in the complaint that as a direct result of the unlawful obstruction of the road by the erection of the locked gate and its maintenance by defendant "during the period of six months prior to January 16, 1942," plaintiff has been damaged through the loss of patronage of the resort in the sum of $16,000; that the value of the improvements erected by plaintiff has been destroyed to his further damage in the sum of $25,000; that the value of plaintiff's resort business and the good will of the business has been permanently destroyed to plaintiff's further damage in the sum of $10,000. Plaintiff prays for a judgment in the total sum of $51,000 for damages which he claims to have suffered.

Attached to plaintiff's complaint is a copy of the claim which was filed by plaintiff with the officials of the city of Pasadena on January 17, 1942. This claim is for the total sum of $51,000 which is made up of the three sums mentioned in the complaint.

Plaintiff further alleges that because of the fact that after previously closing the road defendant had reopened it, and because of the fact that the barrier erected was a locked gate rather than an obstruction necessarily permanent in character, plaintiff did not become aware of defendant's intention to permanently obstruct the road "by the maintenance of a nuisance in the form of said locked gate until after July 16, 1941."

[1] Plaintiff's action must fail because he did not comply with the requirements of section 12 of Article II of the Charter of the City of Pasadena, which provides in part as follows: "No suit shall be brought upon any claim for money or damages, whether founded on tort or contract, against the City of Pasadena or any department thereof until a demand for the same has been presented as provided herein or in any ordinance herein authorized and rejected in whole or in part. Except in those cases where a shorter period of time is otherwise specified by law, all claims for damages against the city, or any department thereof, must be presented within six months after the occurrence, event or transaction upon which any such claim is founded."

It is to be noted that the charter provision requires that claims must be filed with the city authorities within six months after "the occurrence, event or transaction" upon which the claim is founded. It is alleged by plaintiff that the road was obstructed by the erection of the locked gate in March, 1941. But the claim was not filed until January 17, 1942, more than nine months after the occurrence of which plaintiff complains. Plaintiff attempts to avoid the result of his failure to file the claim within six months by alleging that he did not know that defendant's obstruction of the road was permanent until July 16, 1941, and he follows this allegation with the allegation that he was damaged during the period of six months prior to January 16, 1942. In doing so he presents a variance between his claim filed with the city authorities and the claim on which he bases his prayer for a judgment in the court, for in the claim filed with the city he alleges damages occurring since March, 1941, to be $51,000 and in the present action he alleges that he has suffered damages in the sum of $51,000 for the period of six months immediately prior to the filing of the claim.

[2, 3] Plaintiff's complaint is founded upon the action of defendant in closing the road by the erection and locking of the gate. This unquestionably is the occurrence or event which is involved in the litigation, the date of which was in March of 1941. The charter requires that the claim be filed within six months from that occurrence and not within six months from the time that plaintiff became aware of the occurrence. The purpose of the charter requirement would be defeated if claimants were permitted to base their rights to sue upon an assertion that they did not know of the happening of the event which forms the basis of their claims. It has been held that the principal purpose of the requirement that claims be filed is to provide the city with full information concerning rights asserted against them so that it may settle meritorious claims without litigation. Natural Soda Prod. Co. v. City of Los Angeles, 23 Cal.2d 193, 203, 143 P.2d 12. Nor can plaintiff avoid the effect of his failure to file a claim within six months by waiving any damages which he suffered during a period longer than six months before the claim was actually filed. The purpose of the charter provision may not be frustrated by this simple expedient.

[4] Plaintiff contends that defendant was guilty of maintaining a continuing nuisance and that for this reason he is entitled to recover for damages suffered during the last six months before the claim was filed. There is much discussion in the briefs in

which it is claimed by defendant city that there was in fact no nuisance and that defendant acted properly in closing the gate in the exercise of its police power. We need not discuss defendant's contentions in this regard other than as they may be applicable to the question whether the action falls because of the failure to file the claim within the time required by the charter. This is not an action to abate a nuisance and the rules governing an action of that kind are not applicable here. The action is based upon a claim for damages and plaintiff must comply with the charter requirements for that kind of an action. Plaintiff refers to the case of Natural Soda Prod. Co. supra, where the defendant had opened the gates of its dam intermittently from February 6 to June 30. The water issuing therefrom reached its peak in May and did not entirely disappear until sometime in September. The lake was partially inundated on September 6 and some of the damage was to occur after that date. The claim was filed on December 30, within six months from the time the defendant last opened the gates of its dam. If it be argued that there is a similar sequence of events in the present case the argument must be founded upon the fact that the gate was locked in March, 1938, and again was locked and for the last time in March, 1941. Clearly, under the theory of a sequence of events, the time within which plaintiff could file his claim expired six months from the time the gate was last locked by defendant.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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67 Cal.App.2d 490

In re DEL FOSSE'S ESTATE.

HILDEBRAND et al. v. HUDSON et al.

Civ. 14534.

District Court of Appeal, Second District, Division 3, California.

Jan. 11, 1945.

1. Wills 🔑358

An order of probate court denying a new trial in will contest is not appealable. Code Civ.Proc. § 963; Probate Code, § 1240.

2. Appeal and error 🔑1011(1)

Decision of trial judge based on conflicting evidence cannot be disturbed.

3. Wills 🔑155(1)

To avoid a will on ground of undue influence, there must be showing of some sort of pressure which overpowered the mind and mastered the volition of the testatrix at moment of execution of will.

4. Wills 🔑163(2)

The fact that a confidential relationship existed between testatrix and attorney who prepared will did not create a presumption of undue influence.

5. Wills 🔑163(4)

The fact that testatrix' attorney who prepared will was named executor-trustee was not sufficient to raise presumption of undue influence.

6. Wills 🔑82

The fact that will made no provision for testatrix' aunts did not, of itself, render it an unnatural will, since collateral heirs are not, because of such relationship alone, natural objects of bounty, in the absence of evidence showing that they have peculiar or special claims to testatrix' bounty.

7. Wills 🔑163(1)

Where there was no presumption of undue influence in procuring execution of will, the burden of proving, by preponderance of evidence, charge of undue influence was on contestants.

8. Wills 🔑166(1)

Evidence sustained determination upholding will contested by testatrix' aunts on ground of undue influence.

◆

Appeal from Superior Court, Los Angeles; Thomas C. Gould, Judge.

Proceedings in the matter of the estate of Mary A. Del Fosse, deceased, wherein Kate Hildebrand and another filed a will contest which was answered by James B. Hudson, executor, and George T. Schwemer, principal beneficiary. From an adverse judgment and from an order denying a motion for a new trial, the contestants appeal.

Judgment affirmed, and purported appeal from order denying motion for new trial dismissed.

Samuel A. Miller and Donald Keith, both of Los Angeles, for appellants.

Julius V. Patrosso, Catlin & Catlin, and Frank D. Catlin, all of Los Angeles, for respondents.

DESMOND, Presiding Justice.

[1] On October 13, 1942, the last will and testament of Mary A. Del Fosse was admitted to probate and James B. Hudson, proponent of the will, appointed executor without bond in accordance with its terms. Some months later a contest was filed by two elderly aunts of decedent, her only heirs at law, praying that the probate of the will be set aside. This the court, sitting without a jury, refused to do, and from the judgment denying the petition for revocation and decreeing that the will was in all respects legal and valid this appeal is taken. An appeal is also claimed from the order of the probate court by which a new trial was denied, but such an order is not appealable under the law. Sec. 963, Code Civ.Proc.; Sec. 1240, Prob.Code. The contest was answered by the executor and by George T. Schwemer, principal beneficiary under the will.

Mrs. Del Fosse, aged approximately 75 years, died in the city of Los Angeles on September 19, 1942, leaving an estate appraised at $22,702.70. Her will, executed three days prior to her death, namely, on September 16, 1942, made no provision for contestants and all the beneficiaries named therein were unrelated to decedent. She declared in her will that she was a widow and had no lineal issue, but had taken George T. Schwemer into her home and treated him as her son and "therefore make provision herein for him." After the usual directives concerning the payment of debts, Schwemer was given by the will the decedent's automobile and one of her diamond earrings, several other specific legacies were left to personal friends and the residue of the estate bequeathed to "James B. Hudson, in trust, to hold, manage and distribute as hereinafter provided." He was directed to pay from the principal and income "the sum of Fifty Dollars each month to the said George T. Schwemer, so long as he shall live." The will further provided:

"The purpose of this trust is not to maintain the beneficiary [Schwemer] in idleness but to aid and assist him in developing his talents and ability to the greatest extent. It is my one request that he not be or become addicted to the habitual use of drinking intoxicants, in which event he is to receive nothing hereunder.

"In the event of disability, sickness or injury of the said George T. Schwemer, and the payments from this trust be insufficient, in the judgment of the trustee, to provide him with reasonable support, care and comfort, then the trustee may pay to, apply or expend for his use and benefit so much of the principal as in the discretion of the Trustee may be advisable.

"Upon the death of George T. Schwemer * * * prior to full distribution of the trust estate as herein provided, or upon his failure to become entitled to the benefits hereof by reason of becoming addicted to drink so as to bring discredit to himself, the Trustee shall distribute the trust estate as follows:

"To George Lester Hudson, the adopted son of my good friend and attorney, James B. Hudson, to be distributed as in the judgment of Trustee may appear best."

Two grounds of contest, testamentary incapacity and undue influence allegedly practiced upon decedent by respondent James B. Hudson, were set forth in the petition to revoke probate, but it was upon the latter ground only that contestants relied at the time of trial, the claim of incapacity apparently having been abandoned, no attempt being made to support it by evidence. The allegations in support of the undue influence charge were that decedent was "coerced into signing" the will by the "undue influence" and "false and fraudulent representations" of James B. Hudson "in that * * * Mary A. Del Fosse was confined to a hospital on the 16th day of September, 1942, preparatory to a major surgical operation"; that Hudson had "acted as her attorney and was in a confidential relationship with her and took advantage of her illness and mental weakness in order to have his adopted son named as the chief beneficiary of said will, and further, that said James B. Hudson as a result and by reason of his fiduciary relationship with said Mary A. Del Fosse caused himself to be named as Trustee to determine whether said estate should be used for the beneficiary George T. Schwemer or for his own adopted son"; that decedent "did not know what she was doing or what kind of instrument she was signing, but that said James B. Hudson taking advantage of the relationship of attorney and client between himself and said

Mary A. Del Fosse prepared a document which was signed by said Mary A. Del Fosse without her knowing the terms or contents thereof, and that thereby and not otherwise the said Mary A. Del Fosse was induced to execute the said pretended will."

The only evidence introduced by appellants with reference to the facts surrounding the actual execution of the will was elicited from respondent Hudson under section 2055, Code of Civil Procedure. This evidence was not contradicted. It was to the effect that Hudson had known Mrs. Del Fosse personally for twenty years, had been her banker for ten years, and her attorney for three or four years prior to the execution of the will; that the first time Mrs. Del Fosse discussed the making of her will with him was on Sunday, September 6, 1942, when she called him to her residence; that she told him she contemplated a trip to the hospital and wanted to make a will, and that she wanted "to give it all to 'Timmie,'" a name which she customarily used in referring to Schwemer, but "didn't want him to receive the entire estate at one time"; that a trust was discussed and she said she wanted "Timmie" to receive "possibly a hundred dollars a month"; that he asked her if she wanted the Bank of America to be the trustee and "she said, yes, she thought so"; that he then told her he would outline a proposed form of a will and would return within a few days and discuss it with her; that on the following Wednesday or Thursday, September 9th or 10th, he took a proposed draft of a will to Mrs. Del Fosse and discussed it with her; that this proposed draft named the bank as executor-trustee, allowed "Timmie" a sum of $100 per month and contained specific legacies to Dr. Christensen, her physician, and R. E. Wilson; that this draft was rejected by Mrs. Del Fosse because she desired to add some more specific gifts and wanted him [Hudson] to handle the matter personally; that "she didn't want the bank interested in it at all"; that because Hudson "was personally interested in 'Timmie,'" having known him personally for approximately fifteen years, she wanted him to "act as the trustee and take charge of the estate to see that Timmie was cared for," although Hudson told her he would prefer that she retain the bank as executor-trustee since he could represent the bank as attorney; that at her suggestion, he was to act without bond; that at this meeting Mrs. Del Fosse discussed a provision relating to intoxicating liquors, to the use of which she strongly objected; that she said the "one thing she would not stand for, was his [Schwemer's] drinking; and she wanted a provision in the will that if he became a habitual drunkard or became addicted to liquors, that he was to be denied any beneficial interest under the will." Mrs. Del Fosse at this time stated, according to Hudson, that "she wanted George Hudson, my son" to be "the ultimate beneficiary"; that when Hudson asked her if "she didn't have some relatives," she stated she had "nothing closer than an aunt * * *. That her relatives were well provided for." Mr. Hudson testified that he had never suggested to Mrs. Del Fosse that she make provision in her will for his adopted son.

He testified further that he prepared a second draft of a will but before he had an opportunity to present it decedent called him on the telephone and made another change in the specific legatees; that he next saw Mrs. Del Fosse on Tuesday the following week, September 15th, on the street outside his office, accompanied by John Cosgrove, a legatee under the will; that she told him she was going to the hospital, gave him some specific instructions about business matters, including directions concerning an auto court which she operated, and asked him if the will was ready for her signature; that he told her it was not, that it hadn't been completed with particular reference to the paragraph providing for the ultimate beneficiary of the trust in the event that Schwemer didn't become entitled to it or upon his death before the exhaustion of the trust. Hudson stated that he told Mrs. Del Fosse that he "wasn't satisfied" that she had properly given him "instructions with reference to that; in other words, I had hesitated about putting my son's name in there * * *. She said that 'I think you know me well enough that when I tell you anything, you know I mean it.' I said, 'All right; if that is what you want, that's what I'll do'"; that on the same day, September 15th, between 4 and 5 o'clock in the afternoon, he again saw Mrs. Del Fosse, this time at the Glendale Sanitarium; that after she read the will she decided to make "two more changes * * * she wanted Mrs. Hudson to have a brooch that was in her safe deposit box [subsequently appraised at $30.-00], and * * * John Cosgrove to have $500 in cash"; that these two latter legacies had not appeared in any of the prior drafts; that he told her "it would necessitate redrafting the will * * *. She said that was quite all right; she was there for X-rays for a few days, anyway"; that he told her he would return in the morning with the will.

With reference to the actual execution of the will, Hudson testified that a little after 9 o'clock in the morning of the following day, September 16, he presented the final draft of the will to Mrs. Del Fosse at the hospital. She "sat up in bed, read the will and said it was just what she wanted; * * * I asked her if she was ready to sign it. She said yes. I told her I would step out and see if I could get a couple of nurses to witness it. I went out to the hall, and two nurses came back with me. I asked Mrs. Del Fosse in their presence if she had read the will, or if she had read this instrument and if this was her last will. She said yes. I asked her if she wanted these girls to witness her execution of the instrument and she said she did. She signed the instrument and they signed it all in the presence of we four. They left the room, and she and I had further conversation about other business matters, about Timmie, as I recall. She put the will away in her purse—she had a large purse of some kind—and I left the hospital"; that on the following morning, September 17th, he called upon Mrs. Del Fosse again, this time in response to a telephonic request; that she stated "they had determined that she needed an operation; and she was going to the operating room that morning and she wanted me to arrange for some money" with which to pay the hospital; that he acted pursuant to her instructions; that at this time she turned over the will to him.

[2] An attempt was made by counsel for contestants to impeach the testimony of Hudson concerning the matter of his being named as executor-trustee without bond in place of the bank and the naming of his adopted son as contingent beneficiary. Hudson had testified, as we have indicated, that this change was made after he discussed the first draft of the will with Mrs. Del Fosse on the second visit to her home and that these particular provisions were contained in all the drafts subsequently submitted or discussed with her. Upon being asked to produce these drafts, Hudson testified that since they were not used they had been destroyed. One of appellants' counsel took the witness stand and testified (it being stipulated that his colleague and appellants' other counsel would also so testify) that ten days previously at a meeting held in the offices of respondent's attorney, Hudson stated that the first three drafts contained the name of the bank as trustee and executor and it was not until the final will was drawn that his name, as executor and trustee, and his adopted son's name, as contingent beneficiary, appeared for the first time. It is apparent that the trial judge determined this conflict in the evidence in favor of Hudson's version and under the circumstances we may not question his decision on the point. 27 Cal.Jur. 186; 2 Cal.Jur. 926.

[3] In order to avoid a will on the ground of undue influence there must be an actual showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution. In re Estate of Burns, 1938, 26 Cal.App.2d 741, 749, 80 P.2d 77; In re Estate of Clark, 1915, 170 Cal. 418, 424, 149 P. 828; In re Estate of Carithers, 1909, 156 Cal. 422, 428, 105 P. 127; In re Estate of Gleason, 1913, 164 Cal. 756, 765, 130 P. 872; In re Estate of Lavinburg, 1911, 161 Cal. 536, 543, 119 P. 915. There was no showing of that sort in this case and the evidence indicated that Mrs. Del Fosse was a good business woman active until the time of her death in operating her auto court, a partnership enterprise; that she had named the beneficiaries of her will without the help or suggestion of any of the beneficiaries, the principal beneficiary, Schwemer, being absent and in the armed forces of the United States at the time of the drafting and execution of the will; that she was possessed of all her faculties at the time she signed the will; that at the time of the execution she was not under the influence of any drugs or narcotics; that she read the will and declared that "it was just what she wanted"; that she kept it overnight and had an opportunity, not only to reread it but to change any provisions which she might have found unsatisfactory.

[4-6] Appellants argue that since a confidential relationship existed between Mrs. Del Fosse and Hudson and since "he was active in the preparation of the will" and "stands to gain considerably * * *," the presumption of undue influence arises

and the burden is upon him to rebut that presumption. That a confidential relationship existed between Mrs. Del Fosse and Hudson is not denied, but this fact alone does not create a presumption of undue influence. In re Estate of Burns, supra, 26 Cal.App.2d 741, 749, 80 P.2d 77; In re Estate of Presho, 1925, 196 Cal. 639, 651, 238 P. 944; In re Estate of Arnold, 1940, 16 Cal.2d 573, 581, 107 P.2d 25; In re Estate of Purcell, 1912, 164 Cal. 300, 303, 128 P. 932; In re Estate of Higgins, 1909, 156 Cal. 257, 261, 262, 104 P. 6; 26 Cal. Jur. 652. Nor is the fact that he was named executor-trustee sufficient to raise the presumption. In re Estate of Kilborn, 1912, 162 Cal. 4, 11, 120 P. 762. Nothing in the record indicates that Hudson was active in procuring the will or that he obtained any enrichment thereunder. Mrs. Del Fosse's reasons for establishing the trust were fully explained as were the circumstances surrounding the nominating of Hudson as executor-trustee and the naming of the principal beneficiary and contingent beneficiary. The will is not an unnatural one and the fact that she made no provision therein for her aunts does not, of itself, render it so, for collateral heirs are not, because of such relationship alone, "natural objects of bounty" in the absence of evidence showing that they have peculiar or superior claims to decedent's bounty. See In re Estate of Jacobs, 1938, 24 Cal.App.2d 649, 651, 76 P.2d 128; In re Estate of Nolan, 1938, 25 Cal.App.2d 738, 742, 78 P.2d 456; In re Estate of Easton, 1934, 140 Cal.App. 367, 377, 35 P.2d 614; In re Estate of Finkler, 1935, 3 Cal.2d 584, 597, 46 P.2d 149; 26 Cal.Jur. 695, 696. Mrs. Provost, the only contestant to testify at the trial, did not offer any testimony to establish or show any close or intimate relationship between herself and Mrs. Del Fosse. George Schwemer testified that when he resided with Mrs. Del Fosse during the six or seven years prior to the time when he was inducted in the army he could remember only "one occasion" when Mrs. Provost visited with Mrs. Del Fosse at her home and another when "she came by once in a car." Mrs. Hildebrand, the other contestant, did not take the witness stand and no evidence was offered to show that she ever visited or was on friendly terms with Mrs. Del Fosse or even knew of her existence. It is reasonable to conclude that under the circumstances Mrs. Del Fosse intended to omit her aunts from her will because they "were well provided for."

[7, 8] Since, contrary to the argument of appellants, no presumption of undue influence arose in this case, the burden of proving, by a preponderance of the evidence, the charges made in their pleadings was upon the appellants. The record indicates that they failed to carry that burden.

The judgment is affirmed and the purported appeal from the order denying motion for new trial is dismissed.

SHINN and PARKER WOOD, JJ., concur.

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SCOTT et ux. v. RENZ et al.

Civ. 12742.

District Court of Appeal, First District, Division 1, California.

Jan. 2, 1945.

1. Appeal and error 🔑933(4)

Where plaintiff's motion for new trial was granted without specifying insufficiency of evidence, it was to be assumed that the motion was not granted on that ground. Code Civ.Proc. § 657.

2. Appeal and error 🔑901
Motions 🔑37

On all motions the burden is on moving party in trial court, but, if motion is granted, the burden rests on appellant to show error, and in absence of showing of error, order must be affirmed.

3. Appeal and error 🔑901

On appeal from order granting a new trial the burden is on appellant to show error, even where to do so the appellant must show that no error in law existed that justified the granting of a new trial.

4. Appeal and error 🔑933(1)

On appeal from an order granting a new trial, all presumptions favor the order as against the verdict.

5. Appeal and error ⚷854(6)

Where a motion for new trial is granted on error of law, even if order specifies ground upon which it is granted, appellate court is not limited to a consideration of the ground stated in the order.

6. Appeal and error ⚷854(6)

If there is any ground on which trial court's order granting new trial can be upheld, the order will be sustained irrespective of the particular ground given by the trial court, whether in an opinion or by statement in the order itself.

7. New trial ⚷39

A new trial may be granted on ground that jury was erroneously instructed on matters of law. Code Civ.Proc. § 657.

8. Appeal and error ⚷977(1, 3), 978(1)
New trial ⚷6

The granting or denial of a new trial is matter resting largely in discretion of trial court, and order granting new trial on ground that erroneous instructions were given must not be disturbed unless there appears to be an abuse of discretion.

9. Trial ⚷312(2)

In parents' action for death of three years and eight months old child struck by automobile, where jury returned for further instructions and foreman asked if partial damages could be awarded although jury found defendants not guilty, court's further instruction that before any damages could be awarded jury must be satisfied by preponderance of evidence that defendant driver was guilty of negligence, and that his negligence, if any, was the sole proximate cause of the accident and resulting death was improper, since it could be interpreted to mean that if negligence of deceased child or his eight year old sister contributed to the accident, parents could not recover.

10. Death ⚷24

Parents were not chargeable with contributory negligence simply because they allowed an eight and a three year old child to play in their own yard adjoining their private driveway without immediate parental supervision, in absence of some evidence that automobiles were reasonably expected.

11. Negligence ⚷89(3)
Parent and child ⚷7(9)

Parents are chargeable with ordinary care in the protection of their minor children.

12. Negligence ⚷136(30), 141(11)

Where parents allow their children to play, unattended or not properly supervised, in areas where automobiles or other vehicles reasonably can be expected, it is question of fact as to whether they have exercised reasonable care, and the jury should be so instructed.

13. Death ⚷104(2)

In parents' action for death of three-years and eight months old child struck by automobile on private driveway, evidence disclosing that three adults within house were sitting near a window overlooking yard where children were playing, that house was located in suburban area, and not disclosing that parents had reason to believe automobile was going to use driveway was insufficient to warrant instruction on contributory negligence of parents.

◆

Appeal from Superior Court, Santa Clara County; John D. Foley, Judge.

Death action by Alfred Kenneth Scott and wife against George Renz and others. The jury returned a verdict for defendants. From an order granting a motion for a new trial, defendants appeal.

Affirmed.

Bronson, Bronson & McKinnon, of San Francisco, for appellants.

James S. Byers, of Gilroy, and James F. Boccardo and Edwin H. Williams, both of San Jose, for respondents.

PETERS, Presiding Justice.

[1] This action was brought by plaintiffs to recover damages for the death of their infant child, aged three years and eight months, it being alleged that the death was caused by the negligence of defendants. After a jury verdict for defendants, the plaintiffs moved for a new trial on all of the statutory grounds. The motion was granted without specifying insufficiency of the evidence. It must be assumed, therefore, that the motion was not granted on that ground. § 657, Code Civ.Proc. From the order granting the motion defendants appeal.

[2-4] Appellants vigorously urge that, where a trial court has granted a motion for a new trial on the ground of errors in law, the burden of sustaining the order is upon respondents. Appellants claim to find support for this contention in Phillips v. Wheeler, 55 Cal.App. 236, 156 P.2d 468. (no hearing asked in the Supreme Court), the only authority cited to support this somewhat startling suggestion. In that case neither the appellant nor the respondent discussed in their briefs the only possible grounds justifying the order granting the new trial. In setting aside the submission and ordering that further briefs be filed, the Court, per curiam, stated that, since on the record before it only the grounds that the verdict was against the law and that errors in law occurred at the trial could be properly considered, "it would seem that the duty of pointing out wherein the verdict is against law or that errors were committed during the trial is upon the respondents." The reason assigned for this suggestion was that on the motion for a new trial in the trial court the burden is on the moving party to point out the errors claimed "in which case the record on appeal would presumably be as it was made below and thus the appellate court advised of the particular errors assigned as justifying the granting of the motion and the affirmance of the order." If this language should be construed to mean that the burden in such cases is on the respondent to sustain the order, it is contrary to all the other cases on the subject. On all motions the burden is on the moving party in the trial court, but, if the motion is granted, the burden rests on appellant to show error. In the absence of a showing of error the order must be affirmed. See, generally, cases collected and commented on, 2 Cal.Jur. p. 852, § 499 et seq. Neither the rules nor the statutes provide for any different rule on appeals from orders granting new trials than apply to appeals generally. It is not the function of an appellate court to legislate by providing that a different rule should apply to such appeals. The rule is and should be that the burden is on the appellant to show error, even where to do so the appellant must prove a negative—i. e., that no error in law existed that justified the granting of a new trial. As was said by the Supreme Court in the recent case of Mazzotta v. Los Angeles R. Corp., 153 P.2d 338, 340: "Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict," citing Abercrombie v. Thomsen, 59 Cal.App.2d 331, 138 P.2d 701, Estate of Wood, 131 Cal.App. 465, 21 P.2d 626, and Weaver v. Shell Oil Co., 129 Cal.App. 232, 18 P.2d 736.

In the present case the minute order granting the new trial does not specify the ground upon which it was granted. The trial judge, however, filed an opinion in which he explained his reasons for granting the motion. In that opinion he stated that he was granting the motion because he believed he had committed error in giving, on his own motion, an instruction when the jury returned to the courtroom and asked for additional information.

[5, 6] Where a motion for a new trial is granted on errors of law, even if the order specifies the ground upon which it is granted, the appellate court is not limited to a consideration of the grounds stated in the order. If there be any grounds upon which the trial court's action can be upheld, the order will be sustained irrespective of the particular ground given by that court, whether in an opinion or by a statement in the order itself. This has been the well settled rule in this state at least since 1892 when Kauffman v. Maier, 94 Cal. 269, 29 P. 481, 18 L.R.A. 124, was decided. For several more recent cases where many cases are referred to, see Gray v. Robinson, 33 Cal.App.2d 177, 91 P.2d 194; Schnittger v. Rose, 139 Cal. 656, 73 P. 449; Pitt v. Southern Pacific Co., 121 Cal.App. 228, 9 P.2d 273.

[7, 8] In the present case the only errors in law alleged to have occurred during the trial are alleged errors in various instructions. Of course, a new trial may be granted upon the ground that the jury was erroneously instructed upon matters of law. Code Civ.Proc. § 657; Mazzotta v. Los Angeles R. Corp., Cal.Sup., 153 P.2d 338. This court has recently set forth the rules applicable to such an appeal in Conroy v. Perez, 148 P.2d 680, 682, as follows: "The rule governing reviewing courts on appeals of this kind may be stated as follows: 'The granting or denial of a new trial is a matter resting so largely in the discretion of a trial court that it will not be disturbed except upon a manifest and unmistakable abuse. It is especially so when such discretion is used in awarding a new trial which does not finally dispose of the matter.' 2 Cal.Jur. 905; Pettigrew v. O'Donnell, 32 Cal.App.2d 502, 90 P.2d

93. And where the subject of erroneous instructions is involved, it is held that a wide discretion should be allowed to the trial court and that the order granting the new trial must not be disturbed unless there appears to be an abuse of discretion. Pope v. Wenisch, 109 Cal.App. 608, 293 P. 622, citing Thompson v. California Const. Co., 148 Cal. 35, 82 P. 367; Associated Fruit Co. v. Marone, 68 Cal.App. 358, 229 P. 868; and 20 Cal.Jur. 140."

The Supreme Court, in the case of Mazzotta v. Los Angeles R. Corp., 153 P.2d 338, 340, had the following to say concerning the discretion conferred upon the trial courts in such cases: "It is well settled that the granting of a motion for a new trial rests so completely within the discretion of the trial judge that an appellate court will not interfere with his action unless a manifest and unmistakable abuse of discretion clearly appears. [Citing 11 cases]. Upon an appeal from an order granting a new trial, all presumptions favor the order as against the verdict [citing 3 cases] and the order will be affirmed if it may be sustained on any ground [citing 4 cases] although the reviewing court might have ruled differently in the first instance. [Citing 3 cases]."

The basic facts are as follows: The plaintiffs are husband and wife. They are the parents of two children, Donna Mae, nearly eight years old at the time of the accident, and Kenneth, three years and eight months old when killed. The Scott family, in July of 1943, lived in Gilroy on Cohansey Road, a side street that runs generally east and west. The Scott house is set back from Cohansey Road about 170 feet. Leading to the house from Cohansey Road is the narrow one-car private driveway of the Scotts. This driveway is nearly 200 feet long and leads to a turn-around in back of the Scott house, and from there to the garage. Running parallel to Cohansey Road, and back about 130 feet from it, is a privet hedge, about 6 feet high and 2-½ feet thick. This hedge runs across the front of the Scott house about 40 feet therefrom. When the hedge approaches the driveway, which runs along the east boundary of the Scott property, it turns at a right angle to the south and runs along the west edge of the driveway for a distance of over 90 feet. This portion of the hedge runs north and south. About 70 feet south from the northerly edge of the hedge there is a three-foot opening leading from the front and side gardens immediately adjacent to the Scott house to the driveway. At its southerly extremity the hedge turns westerly and extends for a short distance in that direction. Because of the hedge, the Scotts have in front and on one side of their house a level garden, partially enclosed on the north and east and south by the hedge. The children customarily played in this area.

The defendants, George Renz and Harriett Renz, are husband and wife. Defendant Donald Renz is their son who was 16 years of age at the time of the accident. He was driving the Renz family car, which is registered in the name of Mrs. Renz, when the Scott child was killed. It was stipulated that at the time of the accident Donald was driving with the consent of his mother, that he was on an errand for his father, and acting within the scope of the errand at the time of the accident, and that Donald's driver's application was verified by both Mr. and Mrs. Renz.

The accident happened about 7:30 p. m. on Friday evening, July 16, 1943. All the witnesses agree that it was a clear summer evening, that the sun was still up, and that visibility was good. For several months prior to the accident Mr. Scott had been employed as a truck driver by Mr. Renz, who was a contractor. Mr. Renz, and his employees, did not customarily work on Saturday. On Friday night, July 16th, Mr. Renz decided that he wanted Mr. Scott to work for him on Saturday, July 17th, if he were free. Mr. Renz had a meeting to attend that Friday night so he sent his son Donald in the family car to call upon Mr. Scott to ascertain if Scott could work the next day. Mrs. Renz decided to accompany her son for the ride. Donald drove the car, a 1938 Buick Sedan, to Cohansey Road. He turned into the Scott driveway at about ten miles per hour and slowed down so that at the time of the accident he was going, according to his testimony, at about three to five miles per hour. Neither Donald nor his mother was familiar with the premises, but they did know that the Scotts had children. Donald drove slowly south on the driveway until he arrived at the hedge. He could not see over or through the hedge. According to his and Mrs. Renz's testimony, just after passing the three-foot opening in the hedge there was a bump on the right-hand side of the car. They testified that Donald stopped within a distance of ten feet. Upon getting out of the car they discovered Kenneth lying in a pool of blood about five feet south of the south edge of the opening in the hedge, and slightly to the west of the center of the driveway.

Donald and his mother testified that as they proceeded on the driveway Donald was looking straight ahead and was not talking. Donald has 20/20 vision. They both testified that they did not see or hear any children in the yard or in the driveway until after they felt the bump. Neither saw the opening in the hedge until after the accident. If this evidence were believed by the jury they would have been justified in finding that defendants were not negligent, and that the accident was unavoidable.

But there was substantial evidence, which, if believed by the jury, would have justified a finding that defendants were negligent, and that such negligence proximately caused the accident. Just prior to the accident Kenneth and his sister Donna, together with their seven-year-old cousin Leonard Taylor, who, with his mother Charlotte Taylor, was visiting the Scotts, were playing in the semi-enclosed yard in front and to the side of the house. They were playing "hide and go seek" and cowboy, using old brooms for "horses." In the house were Mr. and Mrs. Scott and Mrs. Taylor. The latter was sitting by a window overlooking a part of the semi-enclosed yard. A few minutes before the accident the children came into the house and then returned to the yard. The two older children got tired of playing cowboy and started to turn hand springs. Kenneth was "riding" his broom and ran through the entrance in the hedge onto the driveway. Donna followed him to the gate and observed the Renz automobile in the north end of the driveway. She screamed to Kenneth to come back and he circled around in the driveway south of the gate, still "riding" his broom stick, and was hit by the right front fender of the car. There was considerable evidence that the car did not stop for a distance of 60 feet. The body was found with a crushed skull 5 feet south of the gate, lying in a pool of blood just west of the center of the narrow driveway. There was substantial evidence that the children standing in the entrance to the hedge were screaming and yelling prior to the accident. There was evidence that a line of blood about 12 feet long led to the place where the body was found and that the ground was disturbed along this area.

It is quite clear from the record that the issues involved were whether the accident was unavoidable or was caused by the negligence of Donald. A verdict for or against the plaintiffs on either of these issues finds ample support in the record. The trial judge submitted not only these two issues to the jury, but, in compliance with the defendants' answer, instructed on contributory negligence of the parents. After the jury had been out for some time it returned for further instructions. The following then occurred:

"The Foreman: Your Honor, we'd like some more instructions as to regards to whether we have a right to set partial damages if we find the—if we don't find the defendants guilty, say funeral expenses.

"The Court: Will you repeat that again?

"The Foreman: We'd like a little more instructions as to whether we have the right as Jury to award, say funeral expenses in case we didn't find the defendants guilty.

"The Court: Well, the Court will state to you that the law is that before any damages can be awarded to a plaintiff, you must be satisfied by a preponderance of the evidence that the defendant driver was guilty of negligence, and that his negligence, if any, was the sole proximate cause of the accident and the resulting death.

"The Foreman: I think that explains it, your Honor."

The jury returned thereafter with an 11 to 1 verdict for defendants.

After granting the motion for a new trial the judge filed an opinion. He first stated therein that the newly discovered evidence set forth by appellants could, with reasonable diligence, have been produced at the trial. He next held that, in his opinion, it was not error to instruct on contributory negligence of the parents. He then referred to the proceedings above referred to and held that the instruction given by him at that time "was a very vital one and one upon which the jury may very well have based its verdict in favor of the defendants. This instruction was plainly erroneous since by it the jury was told that plaintiffs could not recover unless the jury was satisfied by a preponderance of evidence that the defendants' negligence, if any, was the sole proximate cause of the accident. The effect of the instruction was to place upon plaintiffs the burden of proving that they were not guilty of contributory negligence, and of further proving that there was no other proximate cause of the accident, save and except the negligence of the defendants. An instruction that plaintiffs would be entitled to recover if they proved by a preponderance of the evidence that defendants were negligent and that their negligence, if any, was the sole proximate cause of the accident would be a correct statement of law, even though contributory negligence was an issue. However, the converse thereof would not be a correct statement of the law.

"Substantially the same instruction was given in Ross v. Baldwin, 44 Cal.App.2d 433 [112 P.2d 666]. There the court held that the giving of the instruction was reversible error.

" 'The law does not require that the negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor.' Griffith v. Oak Ridge Oil Co., 190 Cal. 389 [212 P. 913, 914].

"It is impossible to state upon what basis the jury found in favor of defendants—whether it found that defendants were not negligent, or that plaintiffs were guilty of contributory negligence, or that although defendants were negligent their negligence was not the sole proximate cause of the accident.

"I feel that it is the duty of the court, having given an erroneous instruction, on a vital matter, constituting prejudicial error, to grant a motion for a new trial."

[9] There can be no doubt but that the instruction given by the court states an incorrect principle of law. Ross v. Baldwin, 44 Cal.App.2d 433, 112 P.2d 666. This, appellants admit, but they contend that when related to the facts of this case the instruction was correct. They admit that abstractly the defendant's negligence in some cases need only be *"a"* proximate cause of the injury, and that it does not have to be *"the"* proximate cause. Thus the negligence of a defendant may concur with the negligence of one or more other persons or with an act of God, and yet the defendant is liable whether or not these other persons are made parties to the action. But, say the appellants, in the present case the instruction was correct because here the only issues before the jury dealt with the negligence of defendants and the contributory negligence of plaintiffs, and therefore, for defendants' negligence, if any, to justify an award it would have to be "the sole" proximate cause of the accident. Appellants also point out that the foreman of the jury merely asked if the jury found the defendants "not guilty" could partial damages be awarded. Appellants contend that the challenged instruction must conclusively be presumed to have been given as an answer to that question.

Neither of these contentions is sound. Aside from the fact that the challenged instruction can be interpreted to place the burden of proof to disprove contributory negligence on the plaintiffs, it also can be interpreted to mean that if Kenneth's "negligence" contributed to the accident plaintiffs cannot recover. It is true that the trial court, when giving its regular instructions, told the jury that there was no contention that Kenneth was negligent and that "therefore you will not have to consider whether the child was or was not careless or negligent." The court refused to give the more specific instruction on this subject proposed by appellants. But when the court told the jury that they could only find for the plaintiffs if the negligence of the defendants was "the sole" proximate cause of the accident, such instruction may well have confused the jury. The actions of the deceased child obviously contributed to the accident. Although they had been told that they did not have to consider whether the child was negligent, the last instruction may well have been considered to be a qualification of the first instruction. Moreover, there was another actor in this transaction—Donna, the eight-year-old sister of Kenneth. Appellants' counsel asked this witness several questions implying she was careless in not getting her brother off the driveway. The jury may well have interpreted the instruction to mean that if the acts of either Kenneth or Donna contributed to the accident the defendants were not liable. Certainly, the trial court was in a much better position than this court to determine whether the incorrect instruction was prejudicial. What was said in Mazzotta v. Los Angeles R. Corp., Cal.Sup., 153 P.2d 338, 341, is equally applicable here: "But much is committed to the discretion of the trial judge in determining a motion for a new trial which is made upon the ground of asserted error in instructions. * * * She was in a position to determine far more accurately than an appellate court the effect of a particular instruction upon the jury and in view of the conflicting testimony concerning the happening of the accident, her conclusion that Finkelstein was prejudiced by the charge complained of rests upon sound grounds. Certainly there is no showing whatever of any abuse of discretion."

The contention that the foreman merely asked if partial damages could be awarded and that the trial court's answer conclusively must be interpreted so as to limit it to answering that question, needs but little comment. It is obvious that the trial judge did not limit himself to answering the question asked, but went beyond the specific question. The judge who gave the instruction so interpreted his answer, and certainly no one knows better than he what he intended, and what effect the instruction had on the jury.

[10-13] There is another error in law that appears in the record. The defendants pleaded contributory negligence on the part of the parents, and the trial court instructed on this defense. Under the evidence there was no justification for such an instruction. Parents certainly cannot be subject to the charge of contributory negligence simply because they allow an eight and a three-year-old child to play in their own yard adjoining their private driveway without immediate parental supervision, in the absence of some evidence that automobiles were reasonably expected that night. If a jury could find contributory negligence under such circumstances parents would be subjected to an unreasonable duty of care. Of course, parents are chargeable with ordinary care in the protection of their minor children. Healy v. Market Street R. Co., 41 Cal.App.2d 733, 107 P.2d 488; Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A.L.R. 401; Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499. These cases establish the rule to be that where parents allow their children to play, unattended or not properly supervised, in areas where automobiles or other vehicles reasonably can be anticipated, it becomes a question of fact as to whether they have exercised reasonable care, and the jury should be so instructed. But where, under the evidence, no reasonable mind could find that further supervision was required, then, of course, it is error to instruct on contributory negligence. Under the facts disclosed by the present record, as a matter of law contributory negligence of the parents was not an issue. Here there were three adults within the house, one, the aunt of the Scott children, sitting near a window overlooking part of the yard where the children were playing. The house was located in a suburban area. There is no evidence at all that the Scotts had any reason to believe that an automobile was going to use the driveway that night. Their children were playing in their own yard adjoining the driveway. Certainly the parents could allow their children to play there without being subject to the charge that by so doing they were guilty of contributory negligence.

Appellants contend that Springer v. Sodestrom, 54 Cal.App.2d 704, 129 P.2d 499, and Cambou v. Marty, 98 Cal.App. 598, 277 P. 365, establish the rule that in all such cases it is a question of fact as to whether due care has been exercised. These cases establish no such principle. In the Springer case the nurse in charge of the small child allowed it to play along the curb of a busy street. There was evidence, emphasized by the court, that the nurse brought the child out to that place. Obviously, under such circumstances, the question as to whether the nurse exercised reasonable care was one of fact for the jury. In the Cambou case the child was eighteen months old. After the defendant had driven his car to the residence of the plaintiffs, and, after the parents knew the defendant intended to drive out the driveway in a short time, they allowed their eighteen-month-old child to play in the driveway. Obviously, whether the parents there exercised reasonable care was a question of fact for the jury, and the court so held.

Inasmuch as this cause must be retried, it should be mentioned that the facts have been discussed in this opinion only in connection with the assignments of error in law made by the parties to this appeal. Such discussion must not be taken as constituting any expression of opinion by this court as to the merits of this case.

The order is affirmed.

KNIGHT and WARD, JJ., concur.

PHŒNIX MUT. LIFE INS. CO. v. BIRKELUND et al.

Civ. 14436.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1944.

Hearing Granted Feb. 19, 1945.

1. **Insurance** ⚷586, 587

Where, by contract, the right to change the beneficiary in life policy is waived, beneficiary secures a vested interest which may not be defeated by assured attempting to change beneficiary.

2. **Insurance** ⚷586, 587

Where husband's life policy was given to wife under a property settlement, his right to change beneficiary was waived and wife secured a vested interest in policy which could not be defeated by husband's subsequent attempt to name second wife a beneficiary.

3. **Equity** ⚷57

That life policy given to insured's wife under property settlement agreement had not actually been delivered would not defeat wife's right to proceeds of policy in interpleader action as against claims of second wife who was subsequently named beneficiary, since policy would be regarded as having been delivered under the maxim that "equity regards that as done which should have been done". Civ.Code, § 3529.

4. **Estoppel** ⚷110
Pleading ⚷78

One who relies on doctrine of estoppel or laches as a defense must plead facts constituting the estoppel or laches, unless the necessary facts to establish the same appear in the complaint.

5. **Appeal and error** ⚷173(9, 10)

The defenses of estoppel and laches cannot be raised for the first time on appeal.

6. **Estoppel** ⚷72

Where wife failed to obtain actual delivery of husband's life policy given to her under a property settlement agreement, but second wife, subsequently named as beneficiary, did not part with anything of value as result of the policy not having been delivered to first wife, the maxim "where one of two innocent persons must suffer by the act of a third, he by whose negligence it happens must be the sufferer", was not applicable so as to defeat rights of first wife to proceeds of policy.

7. **Equity** ⚷65(1)

Before the "clean hands" maxim may be relied upon, it must be shown that the conduct of one of the parties has affected the equitable relationship of the parties litigant.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

8. **Equity** ⚷65(2)

Where property settlement agreement provided that husband should deliver life policy to wife who should pay premiums thereon, and husband subsequently named second wife as beneficiary, that first wife failed to pay premiums did not make the "clean hands" maxim applicable so as to defeat her right to proceeds as against second wife, who was only entitled to recover premiums paid.

9. **Equity** ⚷66

The maxim "he who seeks equity must do equity" can be invoked only where a party seeking equity is required to do equity to another party litigant

10. **Equity** ⚷66

Where first wife failed to pay premiums on husband's life policy, as required under property settlement agreement giving her the policy, and husband attempted to substitute second wife as beneficiary, the maxim "he who seeks equity must do equity" would not defeat first wife's right to proceeds, in insurer's interpleader action against the two claimants, since any obligation to pay premiums was owed either to the insured or to his estate.

◆

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action in interpleader by Phoenix Mutual Life Insurance Company against Ruth Lillian Birkelund and Hilda Olsen Birkelund to determine conflicting claims to a life policy. From an adverse judgment, Ruth Lillian Birkelund appeals.

Affirmed.

Reynolds & Painter, of Los Angeles, for appellant.

Helgoe & Hart and John K. Ford, all of Los Angeles, for respondent.

McCOMB, Justice.

This is an action in interpleader instituted by the Phoenix Mutual Life Insurance Company to determine conflicting claims to a policy of insurance of James R. Birkelund, deceased. One of the claimants is Hilda Olsen Birkelund, hereinafter referred to as Hilda, the first wife of the deceased, the other claimant is Ruth Lillian Birkelund, hereinafter referred to as Lillian, the second wife of the deceased.

From a judgment decreeing that Hilda was entitled to the proceeds of the life insurance policy in question less $270.20 awarded to Lillian, Lillian appeals.

The essential facts are these:

Hilda and decedent were married in 1916. In 1921, decedent obtained a life insurance policy in the sum of $5000 from the Phoenix Mutual Life Insurance Company. Hilda was named as the beneficiary. No right to change the beneficiary was reserved in the insured.

On April 23, 1930, Hilda and decedent executed and delivered to the insurance company a request for change of beneficiary wherein the right to change the beneficiary was reserved to decedent.

On November 23, 1931, as part of a property settlement agreement, Hilda and her husband entered into an agreement reading in part as follows:

"The defendant agrees to deliver to the said plaintiff herein insurance policies upon his life as follows: Two policies for Five Thousand ($5,000.00) Dollars, each in the Phoenix Mutual Insurance Company, each of which policies is encumbered with a loan of Four Hundred Fifty ($450.00) Dollars, and one policy in the Berkshire Life Insurance Company in the amount of Twelve Hundred ($1200.00) Dollars, which later policy is unencumbered by any loan. The plaintiff herein agreeing to pay the premiums subsequent to the year 1931 on the two policies with the Phoenix Mutual Insurance Company, said payments to be made out of the alimony and support money received from the defendant herein. The defendant herein agrees to carry at all times the premium on the Twelve Hundred ($1200.00) Dollar policy above named, and in addition thereto to pay at all times the interest as it comes due on the Nine Hundred ($900.00) Dollar loan from the Phoenix Mutual Insurance on the two first policies above mentioned."

The policies referred to in the foregoing agreement were never delivered to Hilda nor did she ever pay any premiums thereon, neither did Hilda ever make any attempt to obtain the insurance policies which were to be delivered to her in accordance with the terms of the agreement. On July 5, 1932, decedent and Lillian were married and lived together as man and wife until his death in 1942. Lillian paid premiums on policy No. 387,737 in the sum of $271.20. Shortly after his marriage to Lillian, decedent caused Lillian to be named beneficiary under policy No. 387,737, and in December, 1932, delivered the policy to her saying, "I am presenting you and making you a beneficiary of this policy, this Phoenix policy. It is for the loans you have made me over a period of time, and I want you to keep it in your possession." Prior to the delivery of the policy to her, Lillian had loaned decedent between $2,000.00 and $2,500.00 of her separate estate, and after the delivery of the policy between $6,000 and $7,000 of her separate estate, no part of which was ever repaid to her.

There are five questions necessary for us to determine which will be stated and answered hereunder seriatim:

[1,2] First: *Did Hilda have a vested right in insurance policy No. 387,737?*

This question must be answered in the affirmative and is governed by the rule that if, by contract, the right to change a beneficiary is waived, the beneficiary secures a vested interest which may not be defeated by the insured attempting to change the beneficiary. Mahony v. Crocker, 58 Cal. App.2d 196, 202, 136 P.2d 810, and cases therein cited.)

In the present case the effect of the property settlement agreement, the pertinent portion of which is set forth supra, was to constitute a waiver by decedent of his right to change the beneficiary named in the life insurance policy, therefore his attempt to substitute Lillian in place of Hilda was ineffectual.

[3] There is no merit in the contention that Mahony v. Crocker, supra, and the cases therein cited, are inapplicable because in such cases the life insurance policy had actually been delivered to the party entitled thereto while in the instant case, the policy was not delivered to Hilda.

This is an equitable action, and equity regards that as done which should have been done. (Sec. 3529, Civil Code; Beverly v. Blackwood, 102 Cal. 83, 92, 36 P. 378.) Therefore, since it was decedent's duty to deliver the policy to Hilda, for the purpose of this question it will be considered that the policy was in fact delivered to her.

Sandrosky v. Prudential Insurance Co., 217 Cal. 578, 20 P.2d 325, and Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431, are not here in point. Such cases merely hold that a beneficiary's interest is not a vested right if the insured retains the right to change the beneficiary. In the present case the insured had waived the right to change the beneficiary.

[4, 5] Second: *Did (a) estoppel or (b) laches prevent Hilda from asserting her claim to the proceeds of the insurance policy?*

This question must be answered in the negative. It is the general rule in California that one who relies on the doctrine either of (a) estoppel or of (b) laches as a defense to an action, and who has the opportunity to do so must plead the facts constituting the alleged (a) estoppel or (b) laches unless the necessary facts to constitute estoppel or laches appear in the complaint. (Lucci v. United Co., 220 Cal. 492, 497, 31 P.2d 369; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Peerless Motor Co. v. Sterling Finance Corp., 139 Cal.App. 621, 624, 34 P.2d 738; Newhall v. Hatch, 134 Cal. 269, 273, 66 P. 266, 55 L.R.A. 673; Cooke v. Darnell, 100 Cal.App. 482, 488, 280 P. 383.)

In the instant case Lillian has failed through any pleading in the trial court to raise the defense of estoppel or laches, therefore she may not urge such defenses in this court.

[6] Third: *Was the maxim: "Where one of two innocent persons must suffer by the act of a third, he by whose negligence it happens must be the sufferer," pertinent to the facts of the present action?*

This question must be answered in the negative for the reason that Lillian did not part with any thing of value as a result of the insurance policy not having been delivered to Hilda. Part of the money she advanced to decedent was before he gave her the insurance policy in question, and the money advanced subsequent to the time the policy was handed to her was advanced on the security of a contract which decedent had with Mr. Strakosch. Hence the above maxim is inapplicable to the present case. (Shoudy v. Shoudy, 55 Cal.App. 344, 353, 203 P. 433.)

[7, 8] Fourth: *Was the maxim: "He who comes into equity must come with clean hands," applicable to Hilda because she did not pay any premium upon the insurance policy here in question?*

This question must likewise be answered in the negative. Before this maxim may be relied upon it must be shown that the conduct of one of the parties has affected the equitable relationship of the parties litigant. (Germo Manufacturing Co. v. McClellan, 107 Cal.App. 532, 541, 290 P. 534.)

In the instant case Lillian had no right to compel Hilda to pay the premiums on the insurance policy, and Hilda's failure to do so in no way affected Lillian or her rights. Lillian by the judgment was reimbursed for all sums which she had advanced as insurance premiums. This is all she was entitled to.

[9, 10] Fifth: *Did the maxim: "He who seeks equity must do equity", apply in the instant case?*

This question must also be answered in the negative. Any obligation that Hilda owed to pay the premiums on the life insurance policy was either to decedent or his estate. Neither is a party to the present action. Under the recognized rule that the above maxim can be invoked only where a party seeking equity is required to do equity to another party litigant (Maze v. Gordon, 96 Cal. 61, 30 P. 962), the foregoing maxim is inapplicable to the facts disclosed by the present record.

For the foregoing reasons the judgment is affirmed.

MOORE, P. J., concurs.

25 Cal.2d 784

HOWARD et al. v. SUPERIOR COURT OF SAN MATEO COUNTY et al.

S. F. 17092.

Supreme Court of California.

Dec. 30, 1944.

1. Certiorari ⚷1, 5(1)

Certiorari will issue only when inferior tribunal has exceeded its jurisdiction and there is no appeal nor any plain, speedy and adequate remedy, and the writ cannot be used as a writ of error, regardless whether an appeal is possible. Code Civ.Proc. § 1068.

2. Executors and administrators ⚷216(2)

An order by probate court under statute vacating allowance of fees to attorneys for executors was not appealable, but matter would be reviewed upon appeal from a subsequent order granting or denying attorneys' fees. Code Civ.Proc. § 473; Probate Code, § 1240.

3. Certiorari ⚷5(1)

Certiorari will not lie if effect of order sought to be annulled can be reviewed and nullified on an appeal from final judgment, even though order itself is not appealable. Code Civ.Proc. § 1068.

4. Executors and administrators ⚷216(2)

An order by probate court vacating allowance of fees to attorneys for executors merely reopened matter for further consideration and the opportunity for review on subsequent appeal from order granting or denying attorneys' fees would afford an adequate remedy and, hence, attorneys were not entitled to have order vacating their fees reviewed by certiorari. Code Civ.Proc. §§ 473, 1068; Probate Code, § 1240.

5. Executors and administrators ⚷216(2)

Where there was no question of service of notice, either as to original petition by attorneys for executors for allowance of fees or as to motion to vacate order allowing fees, although it was claimed that notice of original petition was defective, certiorari would not issue to review order vacating allowance of fees, since there was no issue as to whether probate court lacked or was acting in excess of jurisdiction. Code Civ.Proc. §§ 473, 1068; Probate Code, § 1240.

6. Executors and administrators ⚷216(2)

In absence of formal written order, it would be presumed that probate court in granting motion to vacate order allowing fees to attorneys for executors found facts as alleged in motion, and Supreme Court could not decide in certiorari proceeding whether probate court erred in granting relief. Code Civ.Proc. §§ 473, 1068; Probate Code, § 1240.

7. Executors and administrators ⚷216(2)

Claims as to lack of sufficient affidavit of merits, inadequacy of showing of mistake, etc., and insufficiency of proposed objection to allowance of fees to attorneys for executors, did not affect jurisdiction of probate court to act on petition of testatrix' husband to vacate allowance of fees to executors' attorneys, but merely indicated possibility of error in exercise of that jurisdiction, and the error could be reviewed only on appeal. Code Civ.Proc. §§ 473, 1068; Probate Code, § 1240.

8. Executors and administrators ⚷216(2)

Proof that probate court abused its discretion in granting petition of testatrix' husband for an order vacating allowance of fees to attorneys for executors, if established, would not show that court was acting in excess of its jurisdiction, so that order could be reviewed by certiorari. Code Civ.Proc. §§ 473, 1068; Probate Code, § 1240.

9. Certiorari ⚷5(1), 28(2)

If a court sets aside its final order on a ground not authorized by statute, it may be acting in excess of its jurisdiction, so that order is reviewable by certiorari, but if it does so on a ground authorized by statute, the possible insufficiency of evidence to support its action does not go to its jurisdiction but is basis for review on appeal. Code Civ.Proc. § 1068.

CARTER, J., dissenting.

In Bank.

Proceeding by Robert S. Howard and others against the Superior Court of San Mateo County and others, to review an order of the respondent court vacating an allowance of attorneys' fees, wherein a motion was filed for the substitution of Neil S. McCarthy and Joseph J. Bullock as attorneys for Robert S. Howard and Lindsay S. Howard, as executors.

Proceeding dismissed, and motion for substitution of counsel granted.

Herbert W. Clark, Morrison, Hohfeld, Foerster, Shuman & Clark, and Orville R. Vaughn, all of San Francisco, Joseph J. Bullock, of Redwood City, and Neil S. McCarthy, of Los Angeles, for petitioners.

J. H. Sapiro and Henry Robinson, both of San Francisco, for respondents.

GIBSON, Chief Justice.

The attorneys for the executors filed a petition asking for an allowance of $10,000 as ordinary fees and $15,000 as extraordinary fees, but the posted notice and the notice served on counsel for the husband of the testatrix merely referred to a petition for the allowance of $25,000 "on account of their compensation for services rendered," without mentioning whether such compensation was for ordinary or extraordinary services. These notices were given pursuant to an order of court, prepared by the petitioning attorneys, which likewise did not differentiate between the two types of compensation. There was no opposition at the hearing and the probate court granted the fees as prayed.

About two months later, the husband filed a verified "petition" to vacate under section 473 of the Code of Civil Procedure, claiming that when he and his counsel examined the notice served on them they mistakenly believed that the executors' attorneys were seeking merely ordinary fees, that they took no action in reliance on that mistaken belief and that the petition to vacate was filed promptly upon discovering the true facts. With this verified pleading the husband filed his verified objections to the petition for allowance of fees. The probate court issued an order to show cause why the prior order should not be set aside, and subsequently, after a continuance of the hearing, the prior order was vacated. The attorneys for the executors then sought a writ of certiorari on behalf of the executors, the estate, and themselves, to annul the vacating order on the ground that such order was in excess of the court's jurisdiction because the petition to vacate did not show sufficient grounds of inadvertence, surprise, mistake or excusable neglect.

[1, 2] The extraordinary remedies of mandamus, prohibition and certiorari are permitted in some states as a substitute for a writ of error in reviewing interlocutory or intermediate orders and decrees where irreparable injury would result from requiring a party to wait and appeal from a subsequent final order or judgment. See Crick, The Final Judgment Rule, 41 Yale L.J. 539, 553, 557. However, in this state, the writ of certiorari will issue only when an inferior tribunal "has exceeded [its] jurisdiction * * * and there is no appeal, nor * * * any plain, speedy, and adequate remedy." Code Civ. Proc. § 1068; Redlands High School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490; Kupfer v. Brawner, 19 Cal.2d 562, 122 P.2d 268. This writ cannot be used as a writ of error, whether or not an appeal is possible. Cook v. Civil Service Comm., 160 Cal. 589, 117 P. 663; Estate of Paulsen, 179 Cal. 528, 178 P. 143; Estrin v. Superior Court, 14 Cal.2d 670, 96 P.2d 340; Ivory v. Superior Court, 12 Cal.2d 455, 85 P.2d 894. The order under section 473 of the Code of Civil Procedure vacating the allowance of fees, having been made in probate, was not appealable (Prob.Code, § 1240; Lilienkamp v. Superior Court, 14 Cal.2d 293, 93 P.2d 1008; Estate of Grussing, 15 Cal.App.2d 11, 59 P.2d 152) but the matter will be reviewable upon an appeal from a subsequent order granting or denying attorneys' fees. Lilienkamp v. Superior Court, supra.

[3, 4] In Bank of America v. Superior Court, 20 Cal.2d 697, 128 P.2d 357, 361, it was held that an order permitting an amendment to the complaint was not reviewable on certiorari because (1) the court had jurisdiction to make the order, and (2) the order was reviewable on appeal from the final judgment. In that case the petitioners had an adequate remedy by appeal from the final judgment, and we said that "Certiorari will not lie if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment, even though the order itself is not appealable." Of course, the language must be read in relation to the particular facts there involved, and there may be situations in which an appeal from a subsequent order or from the final judgment may not be an adequate remedy, but the facts in this case are within the holding in the Bank of America case. The vacating order does not amount to a final determination but merely reopens the matter for further consideration to the end that there may be a proper decision on the merits after a full examination of the facts, and the opportunity for review on a subsequent appeal affords an adequate remedy. Hence petitioners are not entitled to have the order reviewed herein.

[5] Certiorari likewise will not issue unless there is a lack or an excess of jurisdiction; and in this case the probate court unquestionably had jurisdiction of the res and of the parties. There is no question of the service of notice, either as to the original petition or as to the motion under section 473, although it is claimed that the notice of the original petition was defective and misleading.

[6] The motion to vacate was made on the grounds that the order allowing fees was made without proper notice and that it was taken by reason of mistake, inadvertence, surprise and excusable neglect on the part of the husband and his counsel. In the absence of a formal written order, it will be presumed that the probate court in granting the motion found (1) that the notice of application for an allowance to the executors' attorneys of $25,000 "on account of their compensation for services rendered" was defective, or at least misleading; (2) that the husband and his counsel were in fact misled by the notice and believed that it related solely to ordinary fees; (3) that such belief was the result of mistake, inadvertence, surprise or excusable neglect; and (4) that the husband was entitled to relief from his default. If the showing made warranted such findings, the probate court had jurisdiction to grant relief under section 473, and we cannot decide in this proceeding whether or not there was any error in so doing.

[7] The petitioners' claims as to lack of a sufficient affidavit of merits, inadequacy of the showing of mistake, etc., and insufficiency of the proposed objections to the allowance of fees, do not affect the jurisdiction of the court to act on the petition, but merely indicate the possibility of error in the exercise of that jurisdiction. The motion was made upon statutory grounds and, assuming that the trial court should have decided that the mistaken belief of the husband and his counsel was due to their negligent failure to ascertain the facts with reference thereto, the error can be reviewed only on appeal.

[8] The argument of petitioners that the court abused its discretion and therefore exceeded its jurisdiction is equivalent to saying that in every case in which a court errs in the exercise of discretion under section 473 it is acting in excess of its jurisdiction, for there is no error unless the court abuses its discretion. This argument is obviously unsound.

[9] The petitioners, in claiming that the court acted in excess of its jurisdiction, rely on such cases as Lankton v. Superior Court, 5 Cal.2d 694, 55 P.2d 1170; Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147; and Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449. The decisions in these cases may be clearly distinguished (as pointed out in Shrimpton v. Superior Court, 22 Cal.2d 562, 565, 139 P.2d 889) on the ground that each one involved an order of the trial court which was *not* made in pursuance of any of the prescribed methods of procedure as defined by the Code of Civil Procedure. For instance, in the Lankton case the court's proposed modification of its judgment was in excess of its jurisdiction where such action was not based on any ground specified in section 473, but on the ground that a judicial error had been made, and where the time for a motion for a new trial had elapsed and the modification could not be made pursuant to section 662. Similarly, in the Treat case the findings and judgment were vacated on the ground that there had been a failure to comply with the directory provision of section 634 that a copy of the proposed findings and judgment be served on the opposing party. However, this was not a ground for such vacation, and there was no attempt to base the order on the provisions of sections 473 or 662. Hence it should be clear that the factual situation of these cases is entirely different from a case where the court is asked to act on proper grounds and does so act, and the claimed error is that the court abused its discretion in finding that there was a mistake or excusable neglect, etc., warranting relief under section 473. In other words, if the court sets aside its final order on a ground not authorized or recognized by the statute, it may be acting in excess of its jurisdiction, but if it does so on a ground authorized by the statute, the possible insufficiency of the evidence to support its action does not go to its jurisdiction, but is a basis for review on appeal. So long as there is some showing in support of the trial court's action, the quantum of proof cannot be considered or weighed on certiorari.

Since it cannot be said that the probate court lacked jurisdiction under section 473 to set aside the allowance of fees, and inasmuch as that order may be reviewed on a subsequent appeal it may not be annulled on certiorari.

It appears that the respondent court, in vacating the order allowing fees, relied in part upon an asserted stipulation that such order might be set aside and the matters of fees re-examined. The petitioning attorneys deny that any such stipulation was intended. It is unnecessary for us to determine the effect of the statements of counsel understood by the court to constitute such stipulation, since we have decided that the order may not be reviewed in this proceeding.

The motion for the substitution of Neil S. McCarthy and Joseph J. Bullock as attorneys for Robert S. Howard and Lindsay S. Howard as executors is granted without prejudice to rights of the petitioning attorneys in connection with the presentation of their claims for fees.

The proceeding in certiorari is dismissed.

SHENK, CURTIS, TRAYNOR, and SCHAUER, JJ., concurred.

EDMONDS, J., did not participate therein.

CARTER, Justice.

I dissent. In this case it is undisputed that counsel for the executors filed a petition in the estate proceedings for the allowance of attorney's fees; that notice of the hearing on that petition was given in all respects as required by law; that thereafter the matter was heard legally and properly; no opposition was offered to the petition for the order fixing the fees. After the order allowing the fees was made the court vacated the order purporting to act pursuant to section 473 of the Code of Civil Procedure. There was no basis whatsoever for its action. The *sole* excuse offered by one of the heirs for failing to oppose the petition for fees and for relief under section 473 was that he failed to take cognizance of the petition and notice. There was no fraud, trickery, deceit or mistake. There was nothing but pure and simple neglect to oppose the petition. There is no excuse for that neglect. A court is authorized to vacate an order or judgment only when it is taken against a party because of "his mistake, inadvertence, surprise or excusable neglect." (Code Civ.Proc. § 473.) Hence, the case falls squarely within the rule that a court has no power to make an order affecting an order or judgment theretofore made unless there is a ground therefore fixed by statute or some rule of law. There must have existed one of the conditions mentioned in section 473 before the court had *authority* to act. It necessarily follows that the court acted in excess of its jurisdiction and that being true the order of vacation should be annulled on certiorari.

Although the majority opinion seeks to distinguish the numerous authorities which hold that an order vacating a former order will be annulled on certiorari where there existed no grounds for its action, the case is closely analogous to Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147, where the trial court purported to set aside its findings upon a motion for a new trial where there were no ascertainable grounds for doing so. This court annulled the order on *certiorari* on the ground that the court *exceeded its jurisdiction.* The court stated at page 638 of 7 Cal.2d, at page 148 of 62 P.2d:

"Petitioner argues that the trial court in granting said motion to vacate and set aside the findings and judgment in said actions acted without and in *excess of its jurisdiction* and, therefore, the minute order just quoted is void and *may be vacated and annulled on certiorari. There is no question that if the trial court had not the power to vacate and set aside its original findings and judgment, the order purporting to do so may be annulled on certiorari.* Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001, 1005; see, also, Lankton v. Superior Court, 5 Cal.2d 694, 55 P.2d 1170. In Stanton v. Superior Court, supra, the court said: *'To require review to be by appeal of every unauthorized order or judgment attacking the proceedings by which the regular judgment was given and made would seriously embarrass, if not destroy, the efficiency of our whole legal system.'*

"The sole question, therefore, presented is whether or not the minute order complained of, as made and entered, was beyond the power of the trial court to make. * * * And *nowhere in the statutes is the failure of a party to serve the opposite party with a copy of the proposed findings of fact and conclusions of law specified as a ground for setting aside or vacating a judgment.*

"There are two possible sources of authority for making the order upon which the trial court could have relied. One such source is the express statutory authority conferred upon the court by the provisions of section 662 of the Code of Civil Procedure, which is to be exercised in conjunction with, and as a part of, the court's duty to rule upon a motion for a new trial. * * * The other source of authority, which might have been relied upon by the trial court as a basis for the order of annulment, is the inherent power of the court, independent of statutory provisions, to correct mistakes in its proceedings and to annul within a reasonable time orders and judgments prematurely, inadvertently, or improvidently made by the court. * * *

"It follows that if the trial court had in fact proceeded under the power conferred by said section 662 of the Code of Civil Procedure in the making of the order complained of, the making of such order would have been within the power of the court, and such order could not be successfully attacked. * * * Or if the order granting the motion to set aside and vacate the original findings of fact and conclusions of law and judgment had been based upon the fact that said findings of fact and conclusions of law and judgment had been signed prematurely or improvidently, or under the mistaken belief of the trial judge that they had been served on the opposite party, said order would have been within the power of the trial court to make and would be sustained as a proper and valid order."

In Whitley v. Superior Court, 18 Cal.2d 75, 113 P.2d 449, this court held that the trial court acted in excess of its jurisdiction in granting a new trial on insufficiency of the evidence where it failed to specify that as the ground. It was said at page 82 of 18 Cal.2d, at page 453 of 113 P.2d: "Finally, as an objection to a determination of the validity of these nunc pro tunc orders, respondent urges the point that a writ of review is not a proper proceeding in this case, *as petitioner has her remedy by appeal.* Respondent here calls attention to the general rule that certiorari may not be used as a substitute for appeal. 4 Cal.Jur. 1052. But *it is likewise well recognized that an order which is not provided for in our procedure is not an appealable order within the meaning of section 1068, Code of Civil Procedure, and an application for a writ of review is the proper remedy.* Treat v. Superior Court, 7 Cal.2d 636, 62 P.2d 147; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001; Diamond v. Superior Court, 189 Cal. 732, 210 P. 36; Quevedo v. Superior Court, 131 Cal.App. 698, 21 P.2d 998; Holquin v. Allison, 97 Cal.App. 126, 274 P. 1037. When a statute prescribes a definite procedure and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction and certiorari will lie to correct such excess. Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109." See to the same effect Estate of Paulsen, 35 Cal.App. 654, 170 P. 855; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001; Diamond v. Superior Court, 189 Cal. 732, 210 P. 36; Bottoms v. Superior Court, 82 Cal.App. 764, 256 P. 422; Younger v. Superior Court, 136 Cal. 682, 69 P. 485; Security-First Nat. Bank v. Superior Court, 1 Cal. 2d 749, 37 P.2d 69; Fortenbury v. Superior Court, 16 Cal.2d 405, 106 P.2d 411; Hill v. Superior Court, 16 Cal.2d 527, 106 P.2d 876; Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 132 A.L.R. 715; Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 90 P.2d 75; Evans v. Superior Court, 14 Cal.2d 563, 96 P. 2d 107.

The majority opinion also concludes that certiorari is not an available remedy because there is an appeal. It arrives at that conclusion by reasoning that although there is no appeal from the order vacating the order allowing fees, the matter is now set at large and an appeal will lie from the ultimate order denying fees if one is made. *That reasoning is wholly contrary to the cases above cited on the subject of jurisdiction.* Not only is no effort made to distinguish them with reference to the non-existence of a right to appeal as a prerequisite to certiorari, but they are not even mentioned. For illustration in both the Whitley and Treat cases there can be no doubt that even if there was no ground to grant a new trial there would be an appeal from the judgment entered after the new trial was had. Yet that problem is discussed and disposed of in the above quotation from the Whitley case, decided by this court on May 28, 1941. The cases furnish many illustrations of situations in which certiorari is permitted although there would be an appeal from any subsequent judgment entered following the proceedings ensuing as the result of the order attacked. For example the following instances have been held appropriate situations for the use of certiorari: Where a court enters another and different judgment after final judgment (Barry v. Superior Court, 91 Cal. 486, 27 P. 763); an order vacating a judgment, which is void on its face, because the order is made more than six months after entry (Tinn v. United States District Attorney, 148 Cal. 773, 84 P. 152, 113 Am.St. Rep. 354; Moore v. Superior Court, 86 Cal. 495, 25 P. 22; Dean v. Superior Court, 63 Cal. 473); an order vacating an order settling a final account (Security-First Nat. Bank v. Superior Court, 1 Cal.2d 749, 37 P.2d 69).

The majority opinion relies upon Shrimpton v. Superior Court, 22 Cal.2d 562, 139 P.2d 889, but that case approves the cases heretofore cited and points out that the *very order which was under attack by certiorari was itself an appealable order.* That is obviously not true in the instant case as is conceded by the majority opinion. It will be noted that in the concurring opinion in the Shrimpton case, signed by the author of the majority opinion in this case, the express basis for not allowing certiorari was that *the order under attack was appealable.*

In my opinion the contention of respondents that counsel for petitioners stipulated that the order might be vacated is without merit, as it seems clear to me that the colloquy between the court and counsel at the hearing of the motion is not susceptible to such interpretation.

In my opinion the writ should issue annulling the order complained of.

25 Cal.2d 447

NEET et al. v. HOLMES et al.

L. A. 18495.

Supreme Court of California.

Dec. 23, 1944.

Rehearing Denied Jan. 18, 1945.

1. Mines and minerals 🔑59

Allegations that plaintiffs were induced, by fraudulent representations that mines had only problematical value, to exchange their interests in mineral lands for stock in mining corporation organized by defendants, did not show right to rescind lease executed by corporation to defendants with plaintiffs' consent, calling for 10 to 20 per cent royalties to lessors.

2. Mines and minerals 🔑59

Stockholders of mining corporation who accepted royalty payments under lease executed by corporation, after corporation had reconveyed mining property to stockholders, and who did not sue to rescind the lease until lease had been fully performed, were guilty of laches and waived right to rescission. Civ.Code, § 1691.

3. Contracts 🔑266(1), 270(1)

Where right to rescind exists, statutory procedure must be followed, including prompt rescission upon discovery of the right to rescind and restoration of everything of value received under the contract. Civ.Code, § 1691.

4. Mines and minerals 🔑59

Promptness in rescinding is especially applicable to contracts concerning mining property. Civ.Code, § 1691.

5. Contracts 🔑266(1)

Offer to restore what has been received under contract is a condition precedent to action founded on the assumption of rescission by act of party. Civ.Code, § 1691.

6. Contracts 🔑262

The right to rescind may be waived, and is waived by recognizing existence of the contract after right to rescind was created.

7. Contracts 🔑262

Waiver of right to rescind will be presumed against a party who, having full knowledge of circumstances which would warrant rescission, accepts and retains benefits accruing under the contract.

8. Mines and minerals 🔑59

Where lessors attempted to rescind mining lease, but permitted royalty payments to be made to their attorney who accepted such payments "without prejudice", the qualification "without prejudice" did not prevent lessors' conduct from constituting waiver of right to rescind, in absence of assent by lessees. Civ.Code, §§ 1589, 1691, 3521.

9. Contracts 🔑262

Assertion of rescission is nullified by subsequent acceptance of benefits growing out of contract claimed to have been rescinded. Civ.Code, §§ 1589, 1691, 3521.

10. Mines and minerals ⟹59

That lessors' acceptance of royalties after notice of rescission of mining lease was allegedly provisional, inferring retention thereof as "something else", did not prevent such acceptance from constituting waiver of right to rescind. Civ.Code, §§ 1589, 1691, 3521.

11. Pleading ⟹193(4)

Laches may be raised by demurrer where facts constituting laches are apparent on face of complaint.

12. Equity ⟹71(1)

Laches does not rest entirely upon lapse of time, and unlike the statute of limitations does not require any specified period of delay.

13. Equity ⟹72(1), 87(2)

Equity will refuse relief even where statutory time of limitation has not run, if in addition to mere passive neglect there is acquiescence in the acts complained of or other circumstances which, coupled with delay, render the granting of relief inequitable.

14. Equity ⟹72(4)

The doctrine of laches is strictly enforced as to mining lands because of their tendency to sudden and violent fluctuations in value.

15. Mines and minerals ⟹59

The correctness of trial court's conclusion that plaintiffs seeking rescission of mining lease were guilty of laches was not affected by denial of permission to amend complaint to show beginning and dismissal of prior actions, where prior actions were also delayed.

16. Executors and administrators ⟹115

An administrator of deceased former owner of mining property, who was operating the mines not as administrator but as holding in his individual capacity a lease from corporation which derived title from heirs, was under no duty to locate mining claims on adjoining land for benefit of the estate. Probate Code, § 571.

17. Executors and administrators ⟹114

Heirs who consented to administrator's operation of estate property as lessee of the property in individual capacity could not take the inconsistent position that he was acting as administrator.

18. Mines and minerals ⟹97, 101
Trusts ⟹103(1)

Where heirs of deceased part owner of interest in mines and owner of remaining interests organized corporation to which they transferred their interests in exchange for stock, and corporation leased the property to persons represented by owner of remaining interests, the parties were not joint venturers or copartners, and lessees were not, without more, under duty to hold claims located by them on adjoining land for benefit of heirs.

19. Trusts ⟹371(2)

Allegations that mineral lessees required possession of the leased mines in order to gain access to surrounding territory to ascertain its value, and promised through agent to cause locations to be made for benefit of mine owners, but made locations in their own names, were sufficient to show constructive trust.

20. Principal and agent ⟹145(2)
Trusts ⟹95

A promise by mineral lessees, made through agent who concealed their identity but was allegedly authorized by them, to make locations on adjoining lands for benefit of lessors, was as binding on lessees as though directly made, and made lessees and their agents trustees for benefit of lessors.

21. Trusts ⟹374

Mineral lessors would not be entitled to value of all ores mined from claims adjoining leased premises, as damages for conversion of ores by lessees who held such claims for benefit of lessors, but lessees were entitled to reimbursement for their expenses and labor, and recovery would be controlled by terms of lease as respects operations during continuance of the lease.

22. Limitation of actions ⟹37(2)

An action to enforce constructive trust in mining claims, if subject to any statute of limitations, was subject to three-year statute applicable to relief on ground of fraud or mistake. Code Civ.Proc. §§ 318, 338, subd. 4.

23. Limitation of actions ⟹100(2)

The statutory provision that action for relief on ground of fraud does not accrue until discovery of fraud applies to constructive fraud. Code Civ.Proc. § 338, subd. 4.

24. Limitation of actions ⚷179(2)

In action to establish constructive trust in mining claims, complaint indicating that defendants' fraud was not discovered until within three years of commencement of action was sufficient, in absence of allegations requiring conclusion that plaintiffs were placed on notice at earlier date. Code Civ.Proc. § 338, subd. 4.

25. Trusts ⚷357(2)

Plaintiffs as beneficiaries of alleged constructive trust in mining claims, arising out of defendants' promise to locate claims for plaintiffs' benefit, were not "subsequent claimants" within recording statute, and recordation was not notice of defendants' adverse claim. St.1939, pp. 1083, 1085, §§ 2313, 2322, 2323.

See Words and Phrases, Permanent Edition, for all other definitions of "Subsequent Claimant".

26. Limitation of actions ⚷46(6), 103(3)

Representations that promise to hold mining claims for benefit of plaintiffs was impossible of fulfillment were not repudiations of the trust or retractions of the promise so as to start the running of limitations. Code Civ.Proc. § 338, subd. 4.

27. Limitation of actions ⚷180(4)

Where petition alleged facts to excuse more diligent inquiry and earlier discovery of violation of constructive trust, whether plaintiffs could have made discovery sooner was not to be considered as matter of law on demurrer, but should be determined after trial.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Thomas Porter Neet and others against Kenneth A. Holmes and others to rescind a mining lease and to establish a constructive trust in mining claims. From a judgment dismissing the action, plaintiffs appeal.

Affirmed in part and reversed in part.

Prior opinion, 138 P.2d 705.

Wm. Ellis Lady, W. I. Gilbert, Jr., Finlayson, Bennett & Morrow, and Frank G. Finlayson, all of Los Angeles, for appellants.

Ralph D. Brown, Joseph Doyle, Geo. I. Devor, and Geo. L. Reimbold, all of Los Angeles, for respondents.

SHENK, Justice.

The plaintiffs have appealed from a judgment of dismissal following an order sustaining demurrers to the second amended complaint without leave to amend. The action is to rescind a mining lease and to establish a constructive trust of mining claims on the ground of the alleged fraud of certain of the defendants.

The original complaint was filed August 28, 1940. The final amended complaint contained four causes of action. The following appears from the allegations thereof:

In 1896, Mary E. Greathouse was the owner of the 55/100ths interest in three patented mining claims, known as the Padre, Madre and Cargo Muchacho, located in what was then a part of San Diego County but later became Imperial County. She died in the State of Kentucky in 1906. The plaintiffs are her successors and the present owners of said 55/100ths interest.

Kate S. Wright was the owner of the remaining 45/100ths interest in those patented mines, and later this interest was held by her jointly with her husband, the defendant Sumner B. Wright. On her death in 1938 her husband and his assigns succeeded to her interest. The latter were made defendants in the action because they declined to join in the complaint.

Early in 1935 the defendants Kenneth A. Holmes and Edmund A. Nicholson examined the mining property and the tailings thereon. They communicated with the defendant Ray H. Fitzgerrell, an attorney whose wife is a niece of the Wrights. They advised him of their examination and of their opinion that the mines were valuable, that large sums of money could be made from their operation if possession and permission to work them could be obtained. Fitzgerrell, with the assistance of Sumner B. Wright, inspected the Imperial County records and learned that Mary E. Greathouse was the record owner of the 55/100ths interest in the mines. The expense of the inspection trip to Imperial County was borne by the defendants Holmes and Nicholson. Thereupon the Wrights conveyed their interest to Fitzgerrell without consideration. Fitzgerrell and Nicholson conducted an investigation financed by Holmes and Nicholson to ascertain the whereabouts of Mary E. Greathouse. They learned that she had died in Versailles, Kentucky. At the expense of Holmes and Nicholson, Fitzgerrell journeyed to Kentucky for the purpose of locating the Greathouse heirs and obtaining control of their interest in the mines. On March 1, 1935, Fitzgerrell met the plaintiff Thomas Porter Neet, at Versailles, Kentucky. He represented to Neet that the properties in Imperial County, California, were old worked-out mines, of little or problematical value, a mere gamble and of no real or substantial merit; that he did not know of any one interested in the mines, did not have in mind any prospective operators, and that he was making the trip at his own expense on behalf of his relatives, the Wrights, to investigate the possibility for future action; that if a way could be found to consolidate all the interests in the claims he would devote his time to the matter in order to be helpful to the Wrights. He suggested that the interests of the various owners be transferred to a corporation to be formed; that Thomas Porter Neet should be one of the directors but that he could sign necessary consents in blank without the necessity of taking active part in the management in California; and that the management could safely be entrusted to him, Fitzgerrell. Fitzgerrell also represented to Neet that he would locate or cause to be located, for the benefit of the owners and the advantageous operation of the mines, certain claims on the contiguous public domain. After the interview with Neet, Fitzgerrell entered into correspondence with the other plaintiffs, Robert Clarence Schenck and Mary Greathouse Hickman Glenn, who also resided outside the State of California, and made to each of them substantially the same representations.

About March 12, 1935, a corporation known as Rayfitz Company was organized. Costs of incorporations were paid by Holmes and Nicholson. Five directors were elected, consisting of Ray H. Fitzgerrell, his daughter Peggy Fitzgerrell, C. Fuller Peters, Paul R. Peters, and the plaintiff Thomas Porter Neet. Ray H. Fitzgerrell was elected president; C. Fuller Peters, vice-president; Peggy Fitzgerrell, secretary and treasurer; and Jessie B. Fitzgerrell, wife of Fitzgerrell, assistant secretary. Thomas Porter Neet took no active part in the management of the affairs of the company in California.

About May 17, 1935, the plaintiffs conveyed their 55/100ths interest in the patented mines to the Rayfitz Company in return for fifty-five shares of the capital stock, and Fitzgerrell transferred to the company the remaining 45/100ths interest conveyed to him by the Wrights and received forty-five shares of stock. Those one hundred shares were the only shares issued by the company.

On August 7, 1935, the Rayfitz Company leased the patented mines to the defendants Holmes and Nicholson, for a term of five years. The consideration was $700 in cash and royalties of from 10 to 20 per cent of the returns based on the amount of recovery per ton. The plaintiffs were not then advised of the terms of the lease, but were informed by Fitzgerrell that the lease was fair to the company and the stockholders. On those representations the plaintiffs gave their written consent to the transaction.

During the course of examining and operating the mines the defendants considered that it would be good mining practice, as well as profitable and advantageous, to mine the surrounding territory in conjunction with the patented claims. They discovered that the veins located on the patented mines extended into the surrounding territory and that the owners of the mines possessed the apex rights with respect thereto. Between April 17, 1935, and April 15, 1939, they located nineteen claims in adjoining territory, all of which were taken in the names of Holmes and Nicholson or their agents.

Letters from the plaintiffs to Fitzgerrell remained unanswered and in 1938 the plaintiffs started an investigation. At the February, 1938, meeting of the stockholders they elected new directors and officers and took over the control of the company's affairs. The investigation terminated in October, 1938, and disclosed to the plaintiffs the following facts: 1. That Fitzgerrell had received funds from Holmes and Nicholson to finance the inspections and trips east. 2. That Fitzgerrell was receiving a salary of $200 a month from the corporation for his services. 3. That operations under the lease were extensive. 4. That outlying property including a mill and millsite had been acquired with corporate funds. 5. That numerous claims had been located in the contiguous outlying territory for the personal benefit of Holmes and Nicholson. In November, 1938, the Rayfitz Company and the plaintiffs gave notice of rescission of the lease and demanded surrender of the premises and an accounting. In June, 1939, the plaintiffs gave notice to the Rayfitz Company rescinding the conveyances of their 55/100ths interest in the patented mines, and the owners of the remaining 45/100ths interest gave a similar notice. Pursuant to those notices reconveyances of the interests were executed by the Rayfitz Company and delivered to the former owners or their assigns.

The defendants did not comply with the notice of rescission of the lease or the demand for surrender of the premises. Subsequent to the receipt of the notice the defendants made royalty payments to an attorney acting on behalf of the plaintiffs, who accepted them "without prejudice" to the plaintiffs' rights.

Royalties paid under the lease between August 7, 1935, and January 1, 1937, amounted to $1,608.19; and between January, 1937, and September, 1937, to $2,925.79. During the period between March, 1938, immediately after control of the corporation was taken over by the plaintiffs, and October, 1938, the sum of $607 was paid in royalties. From November, 1938, when notice of rescission was given and demand for surrender of the premises was made, to November, 1939, $26,876.26 in royalties were paid. The defendants remained in possession and operated the leased premises until the termination of the lease on August 7, 1940, when they surrendered possession. Before the end of the same month the present action was commenced.

The first cause of action, for money had and received in the sum of $550,000, was dismissed.

The second cause of action is to enforce rescission of the lease. It is based on fraud and conspiracy alleged to have been committed against the plaintiffs by Fitzgerrell, Holmes and Nicholson (hereinafter referred to as the defendants), whereby the plaintiffs were induced to part with their property, and which it is claimed rendered the lease void ab initio. The plaintiffs assert damages to the extent of 55/100ths of all ores mined during the leasehold period and which they estimate to be of the total value of $1,000,000.

There is no third cause of action in the second amended complaint.

The fourth cause of action, also subsequently dismissed, was based on the alleged negligence of the defendants in timbering additional tunnels, shafts, stopes, drifts and other underground workings whereby a certain portion of the mines caved in, to the plaintiffs' alleged damage in the sum of $110,000.

By the fifth cause of action the plaintiffs seek to establish a constructive trust as to the additional claims located and acquired in the names of Holmes and Nicholson, for a conveyance of the same to the plaintiffs to the extent of their interest in the patented mines, and for an accounting of all ores taken therefrom.

The trial court in sustaining the demurrers to the second cause of action determined that the plaintiffs had not stated facts sufficient to constitute a cause for rescission of the lease; that the plaintiffs were guilty of laches; that by their conduct they had waived the right of rescission; and that the alleged cause of action was barred by the provisions of section 338, subdivision 4, of the Code of Civil Procedure. The demurrers to the fifth cause of action were sustained for want of sufficient facts, and on the additional ground that any right to relief was barred by the statute of limitations as to all of the claims except those located within three years prior to the filing of the original complaint.

The plaintiffs contend that the facts stated in the second and fifth causes of action entitle them to the relief sought thereby.

The Second Cause of Action.

[1] The plaintiffs do not seek an accounting of expenditure of corporate funds, or of royalties under the lease. They do not contend that the royalties actually received by them were not the full amount due them if the validity of the lease be assumed. They stand upon their repudiation and rescission of the lease and their claim that the alleged conspiracy to defraud them of the possession and control of the mines voided the lease absolutely, and that as a consequence they are entitled to receive as damages the value of the ores actually taken from the mines during the period of operations to the extent of their 55/100ths interest. As ground for rescission they depend entirely on the allegations of concealment from them by Fitzgerrell of the terms of the lease, and his representation that the lease was fair. They alleged that those representations were false and that the lease was in fact unfair, basing their contention on the alleged false representations that the claims were old worked-out mines and had only a problematical value. They allege that they would not have parted with their property for stock in the corporation had they known the falsity of those representations, that is, had they known that the mines were valuable, and that the alleged falsity resulted in an unfair lease. But the plaintiffs have

effected rescission of the transfers of their property to the Rayfitz Company and have obtained a reconveyance of what they conveyed to the corporation. In order to enforce their attempted rescission of the lease (assuming they were proper parties to make the rescission and bring the action), they must allege facts showing that the lease was unfair and resulted in damage to them. They do not, however, allege wherein the lease executed by the Rayfitz Company with their consent was unfair. Their conclusion that the lease was unfair does not necessarily follow from the alleged false representation that the mines had only a problematical value. They have not stated facts which would indicate that a lease calling for royalties of from 10 to 20 per cent to the lessors from whom nothing in the way of direct contribution to expenses, material, or labor was required, would not be a fair arrangement in the event the plaintiffs had been informed that the mines had some other value. There is therefore an absence of allegations sufficient to establish that the lease was fraudulent, or unfair, or resulted in damage to the plaintiffs.

[2-4] Assuming, however, that fraud was sufficiently alleged, the facts otherwise alleged are support for the trial court's conclusion that the plaintiffs were guilty of laches and by their conduct waived a right to rescission. The plaintiffs alleged acceptance of monthly royalty payments pursuant to the lease after giving notice of recission, and they delayed bringing the action until the provisions of the lease had been fully performed and the term thereof had expired.

When the right to rescind exists section 1691 of the Civil Code prescribes the method of procedure which must be followed. Zeller v. Milligan, 71 Cal.App. 617, 622, 236 P. 349. Those requirements include a prompt rescission upon discovery of the right to rescind and restoration of everything of value received under the contract.

Promptness in rescinding is especially applicable to contracts concerning mining property. Hazzard v. Johnson, 45 Cal.App. 19, 28, 187 P. 121. In that case, where the attempt to rescind was not made until after the expiration of the contract, it was said that a party may not speculate as to the outcome, and thus wait until time shall demonstrate whether the contract sought to be rescinded turned out to be good or bad.

In Hogan v. Anthony, 52 Cal.App. 158, 166, 198 P. 47, it was said that a party to a contract who wishes to rescind cannot play fast and loose. He cannot conduct himself so as to derive all possible benefit from the transaction and then claim the right to rescind.

[5-7] The general rule, with certain exceptions not applicable to the facts involved in this case, is that the offer to restore what has been received under the contract is a condition precedent to maintaining an action founded on the assumption that rescission has been accomplished by the act of the party. See McCall v. Superior Court, 1 Cal.2d 527, 535, 36 P.2d 642, 95 A.L.R. 1019; Hellman Commercial T. & S. Bank v. Alden, 206 Cal. 592, 605, 275 P. 794; Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 84, 58 P. 92, 61 P. 667.

The right to rescind may be waived. Harrington v. Paterson, 124 Cal. 542, 57 P. 476; Bryan v. Baymiller, 95 Cal.App. 481, 272 P. 1106. It is waived by recognition of the existence of the contract after the right to rescind was created. Bryan v. Baymiller, supra. Waiver of a right to rescind will be presumed against a party who, having full knowledge of the circumstances which would warrant him in rescinding, nevertheless accepts and retains benefits accruing to him under the contract. 3 Black on Rescission, 2d Ed., § 595, and cases cited in note. It has been said that citation of authorities is unnecessary in support of the doctrine well established in this state that an affirmance of the contract at a time subsequent to the discovery of the falsity of the representations inducing its execution forecloses the exercise of the right of rescission. Hunt v. L. M. Field, Inc., 202 Cal. 701, 704, 262 P. 730. In Bancroft v. Woodward, 183 Cal. 99, 190 P. 445, it appeared that the party suing to enforce rescission of a lease collected rents thereunder after he was fully aware of his rights and was affirmatively seeking rescission. It was held that his action was unequivocal affirmance of the lease and destroyed whatever right of rescission he might theretofore have had.

[8, 9] But, say the plaintiffs, a notice of rescission was promptly given after knowledge of the facts, and the acceptance of further royalties under the lease was expressly "without prejudice." It may be assumed that the plaintiffs complied with the requirements of promptness in giving no-

tice of rescission. But by the terms of said section 1691 prompt notice does not complete the act of rescission. Restoration or offer to restore is also required. The plaintiffs neither restored nor offered to restore the benefits received under the lease. Instead they accepted further benefits, and now claim that their acceptance thereof "without prejudice" entitles them to retain both the previously and the subsequently received royalties as "damages" accruing to them pursuant to their demand for restoration of property received by the lessees. By the acceptance of royalty payments subsequent to the notice of rescission, the plaintiffs treated the lease as in existence and thereby waived their attempted rescission. Even if it be assumed that an offer to restore prior receipts of royalties was excusable, the subsequent acceptance "without prejudice" to their rights, in the absence of assent by the defendants, does not excuse their conduct as a waiver and permit them to claim retention of the royalties as payment on account of restoration of their alleged losses in an action to enforce rescission. The rule is stated in Brennan v. National Equitable Inv. Co., 247 N.Y. 486, 160 N.E. 924, 925, an action to enforce rescission of a stock purchase, where the court said: "The rule is thoroughly established that an assertion of a rescission is nullified by the subsequent acceptance of benefits growing out of a contract claimed to have been rescinded. * * * When, with knowledge of the facts, the purchaser accepts dividends, he will be held to have waived the fraud and to have ratified his purchase. Black on Rescission (1st Ed.), § 347. He cannot by words cancel his contract and then continue to assert rights and benefits under it. * * * Declarations of rescission followed by acts which negative them must be regarded in such a light as to require the inference of an abandonment of the declared act. Generally, the issue is one of fact, whether the commission of certain acts shows an intent to waive a rescission. * * * Waiver is rarely established as a matter of law, but an intent contrary to apparent acts must be disclosed. * * * When moneys are paid as dividends, a shareholder is not at liberty to avoid the effect of his acceptance by a notice not assented to by the company that he will take them as something else. * * * His retention of the dividends paid to him subsequent to his discovery of the alleged fraud and subsequent to the institution of his action on rescission must be held, as matter of law, to constitute an abandonment of rescission and reaffirmation of the contract."

[10] So, too, in the present case, the alleged provisional acceptance of royalties subsequent to notice of rescission, inferring retention thereof as "something else," does not harmonize the plaintiffs' inconsistent conduct. On the contrary it compels the conclusion that the plaintiffs subsequently treated the lease as in existence and that their conduct amounted to a waiver of the rescission as matter of law. The cases relied on by the plaintiffs, such as Boerum v. Schenck, 41 N.Y. 182, may be said to support a contention that provisional acceptance of the royalties would not foreclose a contest of the correctness of the amounts received, but they do not go so far as to hold that the plaintiffs may rescind and then accept benefits under the contract without waiving their rescission and becoming bound by its obligations. Civ.Code, §§ 1589, 3521.

Nor are we persuaded that the trial court erred in concluding that the plaintiffs were guilty of laches in seeking to invalidate the lease and to claim conversion by the defendants of all ores taken therefrom. The complaint alleges ownership of the mines by the plaintiffs and their predecessors since 1896. The fact that there were tailings on the property indicated that the mines had at one time been operated. For how long they had remained idle does not appear, but it is apparent that the Wrights in California did not know who were the co-owners of the mines. It is also inferable from the facts alleged that experienced operators were necessary in order to place the mines on a paying basis. A fair inference from the history of the operations under the lease is that it required about three years after resumption of activities before the mines produced profits to any extent. Therefore it can hardly be said that the plaintiffs were not guilty of such laches as would foreclose equitable relief when, after giving notice of rescission, they accepted the increased benefits under the lease and delayed bringing their action for nearly two years and until the lease contract had been fully performed. There is no allegation or contention that the delay resulted from an attempt to negotiate a settlement of the controversy. See Potter v. Contra Costa Realty Co., 220 Cal. 31, 34, 29 P.2d 189.

[11-15] The defense of laches may be raised by demurrer where the facts constituting laches are apparent on the face of the complaint. Garrity v. Miller, 204 Cal. 454, 455, 268 P. 622, and cases cited. Laches does not rest entirely upon lapse of time. Unlike the statute of limitations it does not require any specified period of delay. Verdugo Canyon Water Co. v. Verdugo, 152 Cal. 655, 674, 93 P. 1021. Courts of equity will refuse relief even where the statutory time of limitation has not run, if in addition to mere passive neglect there is a showing of facts amounting to acquiescence in the acts complained of, or other circumstances which, coupled with the delay, render the granting of relief inequitable. Stevenson v. Boyd, 153 Cal. 630, 636, 96 P. 284, 19 L.R.A.,N.S., 525. Mining lands, because of their known tendency to sudden and violent fluctuations in value, are a class of property as to which the doctrine of laches is strictly enforced. Patterson v. Hewitt, 195 U.S. 309, 321, 25 S.Ct. 35, 49 L.Ed. 214. The correctness of the trial court's conclusion that the plaintiffs were guilty of laches is not affected by the denial of permission to the plaintiffs to file an amendment to the complaint to the effect that two prior actions had been begun and were dismissed without prejudice before the present action was commenced. Assuming that the commencement of a prior action might have a bearing upon the question of laches, it nevertheless appeared that no such action was commenced until more than a year after the notice of rescission and after the plaintiffs had accepted over $26,000 in additional royalties under the lease.

The foregoing sufficiently indicates the correctness of the trial court's conclusions that the plaintiffs could not state a cause for rescission of the lease, as well as the propriety of its rulings on the demurrers, without the necessity of considering other questions presented in connection with the second cause of action.

Fifth Cause of Action

The plaintiffs seek to have the defendants declared constructive trustees of the mining claims located by the defendants Holmes and Nicholson in the adjoining territory. The plaintiffs reallege in the main the facts stated in the second cause of action, and the following in substance appears:

That the defendants agreed among themselves that they would explore and ascertain the nature and mineral bearing qualities of the territory surrounding the patented mines by means of the access gained through the underground workings in those mines; that Holmes and Nicholson appointed Fitzgerrell as their agent to negotiate for a lease in order to afford them the opportunity to make the necessary explorations, but directed Fitzgerrell not to reveal their identity in the transaction; that the defendants, through Fitzgerrell as their agent, promised the plaintiff Neet that Fitzgerrell would locate or cause to be located or acquired such of the surrounding territory as might be open to location or procurement for the benefit of the owners of the patented mines to the end that the patented mines could be worked advantageously; that by such representations and the subsequent false representation that it was impossible to locate any further claims in the surrounding territory, the defendants prevented the plaintiffs from making the locations; that through the access gained by the defendants to the patented mines they acquired knowledge of the fact that it would be in accordance with good mining practice, as well as profitable and advantageous, to mine the surrounding territory in conjunction with the patented mines; that the owners of the mines possessed the apex rights with respect to the surrounding territory; that notwithstanding their promise made through Fitzgerrell, the defendants made the locations for their own benefit and refused to surrender them to the plaintiffs; and that the acquisition of the claims in the public domain contiguous to the patented mines was and is necessary to the proper development and operation of the mining property owned by the plaintiffs. It is also alleged that large quantities of valuable ores have been taken from the adjoining claims and have been converted by the defendants to their own use. The plaintiffs seek a declaration that the defendants hold the mining claims for the benefit of the plaintiffs, a direction that the defendants execute conveyances thereof to the plaintiffs, an accounting of the ores removed therefrom, and a recovery based on such accounting.

The question then is whether the trial court properly sustained demurrers to the fifth cause of action on the grounds that the facts alleged were not sufficient to entitle the plaintiffs to relief and that the action was barred by statutory time limitation as to all claims except those located within three years preceding the commencement of the action.

If the plaintiffs are to succeed in maintaining a cause of action on the theory that the defendants became trustees of the mining claims, the facts alleged must support a conclusion that there was a duty owed by them to the owners of the patented mines to take and hold the surrounding mining claims for their benefit.

[16, 17] It is alleged that during the negotiations concerning the transfer of the mining interests to the Rayfitz Company, the defendant Holmes was appointed to administer the estate of Mary E. Greathouse in the State of California. The plaintiffs contend that as such administrator the duty devolved upon him to locate the claims for the benefit of the estate. This position of the plaintiffs may not be sustained. The duties of the administrator in respect to the assets of the estate are defined in section 571 of the Probate Code, and include taking possession of all property belonging to the estate and collecting debts due to the estate. The only property belonging to the estate was the 55/100ths interest in the patented mines distributable to the plaintiffs. Holmes did not operate the mines in his capacity as administrator. He was acting as lessee in his individual capacity. The plaintiffs consented to his participation in the lease and in the operation of the mines as lessee in his individual capacity, and they may not contend that his capacity as lessee, without more, was inconsistent with his trust as administrator. No duty devolved upon him as administrator to acquire the adjoining property for the estate, even though some benefit might thereby accrue to the estate. Nor may the plaintiffs successfully claim that any independent proprietary right acquired by Holmes in his individual capacity merely by reason of information gained while he was lessee, must inure to the benefit of the estate. Having consented to his operation of the estate property as lessee, they may not take the inconsistent position that he was acting as the administrator of the estate. Consequently, the question of Holmes' obligations in respect to the outlying territory must be resolved by the consideration of his status as lessee of the mines and as an alleged promisor to locate mining claims for the benefit of the owners. His obligations in that respect therefore are no different from that of his colessee.

[18] The facts alleged cannot be said to constitute the plaintiffs and the defendants joint venturers or copartners, such as in Holstrom v. Mullen, 84 Cal.App. 1, 257 P. 545, Koyer v. Willmon, 150 Cal. 785, 90 P. 135, or Moritz v. Lavelle, 77 Cal. 10, 18 P. 803, 11 Am.St.Rep. 229. The relationship here between the owners of the patented mines on the one hand and Holmes and Nicholson on the other was that of lessors and lessees. In that respect they were dealing at arm's length and their interests were adverse. The defendant Fitzgerrell's interest was that of co-owner with the plaintiffs. It is not alleged that he had any interest as a lessee, or that he personally gained anything of benefit from the lease, the patented mines, or the mining claims which he in turn should be deemed obligated to transfer to the owners of the mines. The lessees were Holmes and Nicholson and the claims were located by them or their agents. No duty was cast upon the lessees, as such and without more, to hold the claims for the benefit of the owners of the mines. If the facts alleged form any basis for determining that Holmes and Nicholson, who it may be assumed now hold the mining claims, are trustees for the benefit of the owners of the adjoining patented mines, it must be on the theory that they voluntarily solicited and accepted a trust by a promise made through the defendant Fitzgerrell as their agent that such claims would be located for the benefit of the mines and the owners thereof.

In the Restatement of the Law of Restitution, § 194, subsec. (2), it is said: "A person who agrees with another to purchase property on behalf of the other and purchases the property for himself individually holds it upon a constructive trust for the other, even though he is not under a duty to purchase the property for the other." Under Comment d it is observed that the rule applies even though there was no pre-existing fiduciary relationship between the parties, as where one person gratuitously and orally undertakes to purchase land on behalf of another, in which case he is under no liability if he fails to acquire the property, since there is no consideration for his undertaking and no other circumstance imposing a duty upon him to acquire the property; but if he does acquire the property, and in violation of his undertaking keeps it for himself, he holds it upon a constructive trust for the person for whom he undertook to acquire it.

The courts of this state have not applied the rule in cases involving real property where no pre-existing fiduciary relationship has been established, because of the intervention of the statute of frauds, or, no purchase money having been furnished by the plaintiff, because of the unauthorized extension of the doctrine of resulting trust. See Hardenbergh v. Bacon, 33 Cal. 356, 377; Roberts v. Ware, 40 Cal. 634; Taylor v. Kelley, 103 Cal. 178, 184, 37 P. 216; cf. Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732. Where the statute of frauds did not constitute a bar the courts have given effect to the promise. Seymour v. Salsberry, 177 Cal. 755, 171 P. 938. Thus the doctrine has been applied in cases of mining rights, which are not deemed to be real property. See Gore v. McBrayer, 18 Cal. 582, 583, 589; Settembre v. Putnam, 30 Cal. 490; Hardenbergh v. Bacon, supra; Stewart v. Douglass, 148 Cal. 511, 83 P. 699.

[19] True, the defendants Holmes and Nicholson did not make the promise direct to the plaintiff Neet that they would locate or cause to be located the claims for the benefit of the owners. But there are facts alleged which, if proved, constitute a sufficient voluntary undertaking by those defendants to locate the claims and to hold them for the benefit of the mines and the owners thereof. Those facts are that the defendants Holmes and Nicholson required possession of the patented mines in order to gain access to the surrounding territory and thereby ascertain its value and advantage to the operation of the patented mines; that one of the inducements offered by Holmes and Nicholson through Fitzgerrell for the execution of the lease was the promise that Fitzgerrell would cause such locations to be made; that Holmes and Nicholson authorized that promise although at that time they directed that their identity be kept secret; that upon entry upon and examination of the premises leased to them, they discovered the value of the surrounding territory and its advantage to the operation of the mines; that, in violation of their promise, they and their agents made locations in their own names and operated them for their own exclusive benefit.

The facts alleged are similar to those involved in the case of Stewart v. Douglass, supra. In that case the plaintiff gave access to a prospective mining claim to the defendant, who promised to take it in their joint names and operate it for their joint benefit, but violated that promise by taking and operating the claim in his own right and for his own benefit. Although nothing more was furnished by the plaintiff, it was held that a constructive trust was established by the breach of the defendant's oral promise. In Hardenbergh v. Bacon, supra, the defendant undertook to protect the plaintiff's interest in certain mining property. However, he acquired the property in his own name and claimed it for himself. It was held that a voluntary agency relationship was established. The court said: "Such agency, as we have remarked, may be both created and proved by parol, and when the agent—it being satisfactorily shown that he is such agent—in violation of the confidence reposed in him, and of his duty, purchases for his own use an outstanding or adverse title to the property, the principal does not proceed against him as his agent to purchase the property, but on the ground that he occupied such a position of trust and confidence in reference to his principal, that his purchase was fraudulent as against the principal, and therefore may be avoided, or he may at his election treat the agent as his trustee and claim the benefit of the purchase."

[20] In the case of Seymour v. Salsberry, supra, there was no formal consent on the part of the defendant to establish the agency whereby it was considered that he acted pursuant to the confidence placed in him by his principal with the resultant liability, but the court held that the consent was implicit in the facts in evidence. Likewise the facts alleged in the present case are sufficient to show that the lessees undertook to locate and operate claims in the adjoining territory for the benefit of the owners of the patented mines and to facilitate their operation, as a consequence of which they would hold the claims for the benefit of the owners and themselves during the existence of the lease, and for the owners upon its expiration. Viewed with the other facts alleged, the promise made through Fitzgerrell, if proved to have been authorized by them, should be considered as binding on the lessees as though directly made. That promise and the alleged breach thereof were sufficient to constitute the lessees and their agents, trustees of the mining claims for the benefit of the owners of the patented mines.

[21] It does not follow, however, that the plaintiffs would be entitled to recover as damages for the conversion of any ores mined therefrom by the defendant lessees, the value of all ores mined from the claims. The defendants are entitled to be reimbursed for their expenses and labor. Koyer v. Willmon, supra; Patterson v. Hewitt, supra. Insofar as operations during the

continuance of the lease are concerned, the plaintiffs' recovery would be controlled by its terms.

[22] The plaintiffs also assert that the trial court erroneously determined that section 338, subdivision 4, specifying a three year period of limitation for the commencement of an action for relief on the ground of fraud or mistake, was the applicable statute. They contend that the court should have applied a five year period pursuant to section 318 of the same code. However, the plaintiffs cannot comply with the requirements of said section 318 to the effect that they or their ancestors or grantors must show they have been seised or possessed of the property within five years of the commencement of the action. The plaintiffs must depend upon the facts tending to establish a constructive trust, and not upon any prior seisin or possession. The action is not one to quiet title to real property. The gravamen of the action is to establish the defendants as constructive trustees of the claims for the benefit of the plaintiffs. If there is any applicable statute of limitations, it is section 338(4) of the Code of Civil Procedure.

[23, 24] The plaintiffs also contend that the trial court erred in concluding that the statute was a bar to relief as to the outlying claims located by the defendants prior to three years preceding the commencement of the action. They invoke the provisions of said section 338 (4) to the effect that a cause of action for relief on the ground of fraud is not to be deemed to have accrued until the discovery by the plaintiffs of the facts constituting the fraud. Those provisions apply as well in cases involving constructive fraud (Boyd v. Blankman, 29 Cal. 19, 87 Am.Dec. 146), and the period of limitation is therefore three years from the discovery of the fraud. Estudillo v. Security Loan, etc., Co., 149 Cal. 556, 87 P. 19. The plaintiffs allege facts which, if true, indicate that their discovery of the fraud of the defendants was not made until within three years of the commencement of the action. The facts alleged do not require a conclusion that the plaintiffs were placed on notice at any earlier date.

[25] It is alleged that the notices of locations were recorded, in compliance with section 2313, Public Resources Code St. 1939, p. 1083 (including former section 1426b of the Civil Code). It is contended that recordation served as constructive notice to the plaintiffs of the location of the claims by the defendants. One of the purposes of the recording statute is to facilitate the modes of proof of the contents of the notices. Public Resources Code, §§ 2322, 2323, based on former §§ 1426p and 1426q, Civ.Code. It has been said, however, that the purpose of recording notices of mining locations is to give notice of the appropriation to others seeking to locate upon the same lands, and to show a compliance with mining laws and customs. 18 R.C.L. p. 1141. In Bender v. Lamb, 133 Cal.App. 348, 24 P.2d 208, it was held that the record was constructive notice to a subsequent claimant. The plaintiffs here, however, are not alleged subsequent claimants within the meaning of the statute. Confidence to locate the claims on a promise to hold for the plaintiffs was reposed by them in the defendants. The recording statute was not designed as a protection to the defendants against the plaintiffs' demand for fulfillment of the promise. The mere fact of recordation was not notice that the defendants claimed adversely to the plaintiffs.

[26] Nor may Fitzgerrell's alleged subsequent attempted retractions of the promise be said, without more, to start the running of the statute of limitations. It is alleged that Fitzgerrell represented that the promise was impossible of fulfillment, that locations could not be made because all the surrounding territory had already been claimed by persons unknown. The representations were not repudiations of the trust. The trust to hold the property when acquired for the plaintiffs was not created until the promise was fulfilled. A repudiation could not take place, therefore, until the property was acquired. Nor may it be said that the representations amounted to a retraction of the promise. There was no retraction or repudiation of the promise that, if the properties were in fact acquired, they would be held for the benefit of the owners of the mines. The properties having been acquired, the trust thereupon followed. Insofar as the facts alleged are concerned, repudiation of the trust did not occur until 1938 when, upon discovery of the fraud, the plaintiffs demanded conveyance of the trust property. The action was brought in 1940. Discovery and repudiation both, therefore, are alleged to have taken place within three years of the commencement of the action.

[27] Facts in excuse of a more diligent inquiry and sooner discovery are also al-

leged. Whether the plaintiffs could have made discovery sooner is not, in view of all the facts alleged, a question to be concluded as a matter of law. It is a question to be resolved by the trial court in appraising the weight and the credibility to be accorded to the evidence and the witnesses on a trial. Assuming the truth of the facts stated in the complaint, we must conclude that the allegations show that the action was commenced within the time prescribed by said section 338 as to all of the claims.

The demurrers to the second cause of action were properly sustained and the judgment thereon is affirmed. That portion of the judgment entered on the order sustaining demurrers to the fifth cause of action is reversed.

GIBSON, C. J., and CURTIS, CARTER, and TRAYNOR, JJ., concur.

EDMONDS, Justice.

I concur in the conclusion that, for the reasons stated by Mr. Justice SHENK, the demurrer to the second cause of action in the complaint of Neet and his associates was properly sustained. However, in my opinion, upon the facts pleaded by the appellants, the statute of limitations has barred any recovery by them, and the decision should also be placed upon that ground. More than three years before the suit was filed, according to the allegations of the complaint, the appellants knew that at least some of the representations assertedly made by Fitzgerrell on behalf of himself, Holmes and Nicholson were false. Under well settled principles the statute commenced to run at that time and it effectively bars the fifth cause of action as well as that stated in the second count of the complaint.

The pleading upon which judgment was rendered is the fourth one filed in this suit and the facts stated in each of them may be considered in determining whether the bar of the statute extends to either the second or the fifth cause of action. Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 716, 128 P.2d 522, 141 A.L.R. 1358; Williamson v. Joyce, 137 Cal. 151, 153, 69 P. 980. According to these complaints during Fitzgerrell's visit to Kentucky in 1935, and in correspondence of about the same time, he represented that the mining claims in which Neet, Schenck and Glenn together owned a 55 per cent interest were of no particular value but mere desert waste claims and a gamble in which no operators were interested. But for the purpose of facilitating possible future action, said Fitzgerrell, title to the claims should be transferred to a corporation in exchange for shares of capital stock to be issued in proportion to the respective interests of all concerned.

Less than a month later, Rayfitz Company was organized, and at the first meeting of stockholders, Neet became one of the directors. Soon after, upon the representations of Fitzgerrell that Holmes and Nicholson desired to lease the claims for a period of five years upon terms which were fair in every respect, Neet and his associates expressly authorized the corporation to execute the proposed agreement.

At the time of his visit to Kentucky, Fitzgerrell represented that he would cause to be located, for the benefit of all of the owners of the property in which Neet and his associates were interested, claims upon adjoining land. But immediately after the execution of the lease, Fitzgerrell informed Neet by letter that this would be impossible. The complaint does not state the reason if any given by Fitzgerrell for his conclusion or that Neet made any inquiry as to the basis for it.

About two years later, Fitzgerrell again visited Kentucky. The second trip was made for the purpose of obtaining Neet's consent to the execution of a lease of the mining claims by the corporation to Holmes and Nicholson for a term of 20 years. In his discussions with Neet, Fitzgerrell told him that locations on land surrounding the mining claims transferred to the corporation could not be made because the property had been taken up by unknown persons.

Neet refused to consent to another lease. Fitzgerrell then went to Massachusetts, where he saw the appellant Schenck, and obtained his written consent to the execution of the 20 year agreement. Schenck's approval was secured upon the representation that Neet would also consent to the new contract. Fitzgerrell then returned to Kentucky and showed Schenck's consent to Neet, renewing his request that Neet join in approving the proposed transaction. When Neet again refused, Fitzgerrell informed him that his consent was unnecessary and the lease would be executed because, with Schenck's consent, he controlled a majority interest in the corporation. Fitzgerrell then left for California. Neet communicated with Schenck, stating that he had refused to consent to the execution of the proposed lease and Schenck, by telegram dated August 7, 1937, addressed to Fitzgerrell, withdrew his approval of the transaction. Three days later, Fitzgerrell asked Schenck to state his reasons for withdrawing his consent and told him that all negotiations concerning a new lease had been terminated. Apparently Schenck did not reply to this request.

To summarize the allegations made by the appellants, in 1935 Fitzgerrell falsely represented to Neet that the mining claims in which they were jointly interested were of little value. Two years later, and after the appellants had transferred their interests to Rayfitz Company and approved a lease of the properties to Holmes and Nicholson, Fitzgerrell endeavored to obtain the appellants' consent to another lease to the same persons for 20 years and as long thereafter as mining operations were profitably carried on. During those negotiations, Fitzgerrell made representations to Schenck which were untrue. On or before August 7, 1937, Schenck learned that Fitzgerrell had deceived him and he withdrew the authorization which Fitzgerrell had obtained from him. Unquestionably Schenck gave Neet full information concerning the reasons for his telegram to Fitzgerrell. In any event, from an investigation made in January and February, 1938, the appellants found that all of the representations made by Fitzgerrell were false. As a result of these disclosures Fitzgerrell was ousted from control of the corporation.

A complaint upon which relief is sought because of asserted fraudulent representations made more than three years before suit was commenced must affirmatively show that the falsity of the defendant's statements was not discovered during that time. The cause of action is "not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake" Code Civ. Proc. § 338(4), but the word discovery is not synonymous with knowledge, and it is the duty of the court to determine, as a matter of law, when, according to the allegations made by the plaintiff, there was a discovery within the legal sense of that term. It has therefore been held that it is not sufficient to plead a lack of knowledge within the statutory period limiting the action. The plaintiff must allege when and how the facts concerning the fraud became known to him and also that, prior to three years before the commencement of the action, he had no means of knowledge or notice which, followed by inquiry, would have disclosed the falsity of the defendant's statements. Jackson v. Master Holding Corp., 16 Cal.2d 824, 108 P.2d 673; Bainbridge v. Stoner, 16 Cal.2d 423, 106 P.2d 423; Kelly v. Longan, 5 Cal.2d 274, 53 P. 2d 971; Johnson v. Ehrgott, 1 Cal.2d 136, 34 P.2d 144; Consolidated R. & P. Co. v. Scarborough, 216 Cal. 698, 16 P.2d 268; Original Min. & Mill. Co. v. Casad, 210 Cal. 71, 290 P. 456; Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243; Nichols v. Moore, 181 Cal. 131, 183 P. 531; Galusha v. Fraser, 178 Cal. 653, 174 P. 311; Lady Washington C. Co. v. Wood, 113 Cal. 482, 45 P. 809; Watson v. Santa Carmelita, etc., Co., 58 Cal.App.2d 709, 137 P.2d 757; Turner v. Liner, 31 Cal.App.2d 196, 87 P.2d 740; Nighbert v. First Nat. Bank of Bakersfield, 26 Cal.App.2d 624, 79 P.2d 1105; Haley v. Santa Fe Land Imp. Co., 5 Cal. App.2d 415, 42 P.2d 1078.

For the purpose of fixing the time from which the statute of limitations commenced to run against their causes of action, the appellants have pleaded the latter part of 1938 as the time when they "first realized that a fraud had been practiced upon them." Their conclusion in this regard is more fully explained by the allegation that because they "were widely separated and had to communicate with each other in writing and were compelled to consult lawyers, and the import and legal effect of the facts discovered on and subsequent to February, 1938, did not unfold itself to them until on or about November, 1938." But the determinative time is not the date when the appellants obtained from the corporate and public records evidence that the representations made by Fitzgerrell were untrue, for one must commence an action upon the ground of fraud within three years from the time he has that knowledge which, followed by inquiry, would disclose the falsity of the representations made to him. At least by August 7, 1937, the appellants had information which placed upon them the duty to make diligent inquiry concerning their rights. For as this court said in Ruhl v. Mott, 120 Cal. 668, 53 P. 304, 307, when a person "discovers that he has been put upon and defrauded as to one material matter, notice is at once brought home to him that the man who has been false in one thing may have been false to him in all, and it becomes incumbent upon him to make full investigation." Carpenter v. Hamilton, 18 Cal.App.2d 69, 62 P.2d 1397; Nicolaisen v. Toffelmier, 97 Cal.

App. 342, 275 P. 823; Gratz v. Schuler, 25 Cal.App. 117, 142 P. 899.

Unquestionably, it was the information obtained in July, 1937, which prompted the investigation of the transactions entered into upon Fitzgerrell's representations, and as a matter of law, the statute of limitations ran upon the appellants' causes of action at that time. Suit was not commenced until August 28, 1940, although it affirmatively appears from the complaints that all of the details concerning the value of the mining claims owned by the corporation and of Fitzgerrell's deception in regard to the adjoining land were known before the end of 1938. Under these circumstances, in my opinion, the demurrer to each of the causes of action was properly sustained and the judgment should be affirmed.

SCHAUER, J., concurred.

25 Cal.2d 593

PEOPLE v. WHITSON et al.

Cr. 4581.

Supreme Court of California.

Dec. 29, 1944.

Rehearing Denied Jan. 25, 1945.

1. Homicide ⇨253(1)
Robbery ⇨24(1)

Evidence supported conviction of both defendants of murder in the first degree and of robbery in the first degree.

2. Criminal law ⇨304(2)

It is common knowledge that although one may not be able to sufficiently describe a person so that person may be recognized by another, yet one can himself recognize and identify same person with certainty.

3. Criminal law ⇨824(1)

Generally, trial court is required of its own motion to give instructions on general principles involved in a criminal case.

4. Criminal law ⇨824(4)

Although substantial alibi evidence may be given by defense in criminal prosecution, in absence of any request for instruction in respect thereof, trial court need not give specific charge upon that subject.

5. Criminal law ⇨824(4)

Fact that defendants were charged with crime of murder in first degree involving death penalty was not a special circumstance requiring defense of alibi to be treated as a general principle of law rather than a specific point developed through evidence introduced at trial, so as to require trial court to give alibi instruction of its own motion.

6. Criminal law ⇨824(4)

Fact that an alibi was offered by one of codefendants and not by another would not change general rule that trial court need not give specific charge upon alibi in absence of a request therefor.

7. Homicide ⇨234(6)
Robbery ⇨24(3)

Fact that one of codefendants charged with murder in the first degree and with robbery in first degree was identified by only one person did not establish that identification of such defendant was weak, where identification was definite and positive.

8. Criminal law ⇨566

Statement by witness who identified defendants that lights were not lit in taxicab, and his statement at another time that headlights and lights on the cab were lighted, were not inconsistent, so as to tend to discredit his testimony.

9. Criminal law ⇨339

Where defendants were masked during holdup so that they could be positively identified by only one witness who had opportunity to observe them without masks, testimony of persons who were present at time of holdup as to general description of men staging holdup as to general appearance, height, weight and clothes they were wearing was proper to confirm identification of defendants as guilty parties.

In Bank.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Benjamin H. Whitson and Thomas Earl Brigance were convicted of murder in the first degree without recommendation, and of robbery in the first degree, and they appeal.

Affirmed.

Willard W. Shea, Public Defender, and L. A. Sullivan, both of Oakland, for appellants.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

CURTIS, Justice.

The defendants, Benjamin H. Whitson and Thomas Earl Brigance, were jointly charged with the murder of Police Officer George C. Haas, in the first count of an information. They were charged with the robbery of the cashier of the Oaks Club, a card club, situated near the corner of Park Street and San Pablo Avenue in Emeryville, in the second count of the information. The defendant Brigance was also charged with a prior conviction of the crime of second degree murder in the State of Missouri, which he admitted upon arraignment. Whitson, a baker in the navy, is the brother-in-law of Brigance, who was employed in the Richmond shipyards. In a joint trial by jury, each defendant was convicted of murder in the first degree without recommendation, and each was convicted of robbery in the first degree. The death penalty was imposed upon the first count, and life imprisonment in the state penitentiary upon the second count. Thereafter a motion for a new trial as to each count of the information was denied by the trial court. By virtue of the provisions of section 1239 of the Penal Code, an automatic appeal was taken to this court from the judgments and from the order denying a new trial.

A strong case against the defendants was presented by the prosecution. Anthony Davilla, a taxicab driver employed by the Yellow Cab Company, chief witness for the prosecution, positively identified at the trial the two defendants, Whitson and Brigance, as the men who had committed the robbery of the Oaks Club on March 8, 1944, and Whitson as the man who had shot and killed Officer Haas with a machine gun when Officer Haas accosted them as they were leaving the scene of the crime. Davilla testified that at about 1 a. m. in the early morning of March 8, 1944, he was stopped in front of the Sears Roebuck store on Telegraph Avenue near 27th Street in the city of Oakland by a man whom he later identified as Brigance. Another man whom Davilla identified as Whitson got into the back seat with Brigance, slammed the door, and said, "Down Town." The men directed Davilla to drive to 12th Street and Broadway, and from there down 12th Street to Grove Street toward Emeryville. As they drove down Telegraph Avenue, Davilla turned around to talk to the men, who were not then masked. Although there were no lights lit in the cab, the lights on the street corners were lit, and there were lights from streetcars. After driving about three blocks on Grove Street, Davilla heard something crash against the glass partition dividing the driver's compartment from the passengers' compartment, and the man whom he later identified as Whitson, who had a "long object" in his hand, said, "Keep your hands upon the wheel. Keep driving or else I will cut you in two. Keep your hands up where I can see you." Davilla kept driving until they finally stopped on Park Street about 50 or 100 feet from San Pablo Avenue. The two men then tied masks over their faces. Whitson used some kind of black material and covered his face to his eyes. The man identified as Brigance used a narrow piece of white cloth. The man identified as Whitson had in his hands a gun resembling a Thompson 45-caliber sub-machine gun called a "Tommy Gun" of the kind used in the navy. The two men then compelled Davilla to get into the back compartment, and Brigance tied his legs with a towel. Brigance tried to tie Davilla's arms securely with Davilla's own belt but was not able to do so satisfactorily. They, therefore, untied him, and ordered him to get out on the sidewalk. They then marched him ahead of them into the Oaks Club on San Pablo Avenue a few feet from Park Street. As they entered, the man identified as Whitson covered the card players in the club with his sub-machine gun, while the man identified as Brigance entered the cashier's cage, which was situated to the right of the entrance, and took the money which amounted to approximately $300. While this was happening, one of the card players spoke up and said, "They won't shoot," at which time the man with the machine gun said, "You think I won't"; and fired several shots into the ceiling and wall. The man whom Davilla later identified as Brigance then said, "Come along with me," and they went out of the club, leaving the man with the machine gun behind. Four or five feet from the entrance, they passed Officer Haas, a special police officer, who asked, "What is going on here? What is wrong here?" They continued on their way, and a few moments later Davilla thought he heard two or three shots. When they reached the taxi, the motor of which had been left running, the man identified as Brigance said, "Get behind the wheel of that cab." The man was carrying his hand in his pocket as though carrying a gun, and Davilla climbed in behind the wheel. The man with the machine gun then came along, got into the cab, and ordered Davilla to make a "U" turn. After driving two or three blocks north on San Pablo, the man identified as Whitson said, "Get this thing moving. I had to lay that copper low." Following the directions of the two men who had taken off their masks, Davilla drove them to the point where he had originally picked them up and into the private driveway alongside the Sears Roebuck store. There the two men got out. Davilla immediately drove to the City Hall in Oakland where he reported the crime to the police and gave them a description of the two men. Davilla testified that the holdup man with the machine gun had on a dark coat and dark blue pants, and wore a light hat. His height was about 5 feet 7 inches; he was wearing a mustache, had black eyes, and had a growth of beard. The other man was a man with blond hair, and wore a pair of khaki-colored, dark tan breeches, and a faded blue shirt, and wore no coat or hat. While Davilla was at the City Hall, an officer examined the cab and found a magazine or clip loaded with 45 automatic cartridges on the rear seat. Davilla, later the same night, gave a description of the men to the Emeryville police. On his way to the hospital, Officer Haas died from shock and hemorrhage due to three bullet wounds.

Two boys testified that several days subsequent to March 8, 1944, they found a Thompson sub-machine gun dismantled and several clips of cartridges cached under and near a garage platform in the rear of the First Presbyterian Church at 26th Street and Broadway in Oakland. A ballistic expert testified at the trial that in his opinion the bullets which had killed Officer Haas had been fired from that gun. The Brigance home was on 27th Street between Telegraph Avenue and Grove Street, Oakland, a half-block from the Sears Roebuck store, and was one block from the place where the machine gun was found by the boys.

The cashier of the Oaks Club, Walter Whalen, described the man with the machine gun as being about 5 feet 7 inches or 5 feet 8 inches tall, slender in build, and weighing about 140 pounds. He was wearing a hat and a dark raincoat or "some type of slicker." The man who went into the cashier's cage was about an inch taller than the other man; his hair was brown or a "dirty blond," and he had on a light shirt and light pants, and wore neither hat nor coat. Whalen testified that about thirty persons were present in the Oaks Club at the time of the holdup and that about $400 had been taken from the cashier's cage. He also testified that the submachine gun found by the boys, and an exhibit in court, was similar to the gun used in the holdup.

Fred Richmond, one of the card players who was at the first table just inside the door of the Oaks Club at the time, described the man with the machine gun as wearing a dark top coat and a soft hat. The other man, according to his testimony, was "lighter dressed."

Louis Martis, another card player at the Oaks Club, testified that the man with the machine gun was wearing a black coat and wore black gloves, and a hat; that the color of the hair of the man who took the money from the cashier's cage was light brown or almost blond, and he wore an open shirt and light tan pants.

An 18-year-old boy named Jones, a member of the United States Navy stationed at the Alameda Naval Base, testified that while he and Whitson were standing in line for mail, Whitson bumped him. When he protested, Whitson asked him if he thought he was tough. Jones replied he didn't think he was tough, but "I don't like anybody pushing me around." Whitson then said: "Maybe I have a deal for you." Later Whitson met Jones in the dormitory and told him he had to be sure he would go in with him on the deal before he would tell him about it, and that he (Jones) "had to be able to handle cold steel and maybe knock somebody's legs out from under him." He saw Whitson a few days later and Whitson volunteered that "the deal" was at the Oaks Club, and gave Jones the address by writing it on an envelope, and told Jones to go out and look it over. The address was San Pablo Avenue and 40th Street. Jones did go out to the Oaks Club and Whitson asked him what he thought about it. Jones replied that it was "all right." Whitson told him that the Oaks Club ought to be worth $4,000; that it would lead to bigger things; and that he knew another club "worth $10,000." Jones testified that Whitson showed him a pair of black thin leather gloves which he said was the type of glove to use as they wouldn't leave any prints, and told Jones he knew where he (Whitson) could get a "Tommy Gun." These conversations occurred during the second and third weeks of February, 1944.

After the arrest of Brigance, police officers removed from the home of Brigance, a dark blue trench coat, a pair of blue pants and a pair of brown pants. The trench coat was identified by the witnesses, Davilla, Richmond and Martis, as being similar to the coat worn by the man with the machine gun. The dark blue pants were identified by Davilla as similar to those worn by the man with the machine gun, and the other pair of pants as similar to those worn by the other holdup man.

Brigance, who took the stand in his own defense, testified that on the night of Tuesday, March 7, 1944, he, his wife, Whitson, and a young woman named Donna Coggen, left his house on 27th Street, between Telegraph Avenue and Broadway, and walked down to Telegraph Avenue. At 26th Street Mrs. Brigance and Miss Coggen left the two men to walk over to Broadway where Miss Coggen was taking a streetcar. He and Whitson went to a tavern on Telegraph Avenue where they were later joined by Mrs. Brigance. This was after midnight. They then crossed the street to another tavern, but could not purchase any liquor there. He, Mrs. Brigance, and Whitson then returned to his home where Mrs. Brigance went to bed while he and Whitson had a bottle of beer. Whitson then left the house and he, Brigance, went to bed. He did not see Whitson until the following morning about 7 or 8 o'clock when Whitson knocked at the door and was admitted by Mrs. Brigance.

Mrs. Brigance corroborated the story told by her husband. She testified that after the three of them returned from the tavern, she went to bed while her husband and brother were drinking beer in the kitchen. After they finished the beer, Brigance had gone to bed and Whitson had left the house. She did not know whether Brigance went out again after she went to bed. She testified that next morning her husband was in bed asleep at 7 a. m. when her brother knocked and she admitted him.

Whitson also took the stand and testified to the same effect as Brigance as to his movements up to the time he left the Brigance home. He testified that just before he left the Brigance home and while he was drinking the beer he changed into his navy uniform. He stated that it was 1 o'clock when he left. He went first to a bowling alley known as the Broadway Bowl where he stayed 30 or 40 minutes and talked with a chief engineer in the merchant marine. He then went to Compton's Restaurant where he had coffee and doughnuts. This, so he claimed, was about 2 a. m. He remained 15 or 20 minutes and while there talked with a man named Murphy who was there with a couple of other men and girls. He then went to the Down Town show on 12th Street across from Compton's where he saw two full pictures and remained about two or two and a half hours. He got out of the show about 3:30 or 4 o'clock and went to San Francisco on an A train to get a drink. Some men on the corner had told him he could get a drink in San Francisco by asking some cab drivers near the Terminal. He couldn't get any whiskey in San Francisco, and after 35 or 40 minutes returned to Oakland and to his sister's house. He stated that he had been drinking all day, and that he was "fairly tight" but didn't know if he was drunk. Upon his cross-examination he admitted that he was familiar "to a certain extent" with the operation of a Thompson machine gun, as he "had had a few pointers showed" him on board ship, and admitted that he had a Thompson machine gun on the night of Tuesday, March 7, 1944. He also admitted that he had owned a powder blue felt hat which he had sold to some man, and a pair of dark kid gloves. He also admitted that he used eyebrow pencil to darken his mustache.

Donna Coggen testified that about 11:20 p. m. of the night of March 7, 1944, she left the Brigance home accompanied by Whitson and Mr. and Mrs. Brigance. At the Sears Roebuck corner, she and Mrs. Brigance left the two men and walked up 26th Street to Broadway where she caught her streetcar. She stated that Whitson that night was wearing civilian clothes with a gray hat and had a black mustache. Brigance was wearing khaki clothes, and a brown leather jacket and she did not believe he was wearing a hat.

No briefs have been filed in behalf of defendant Whitson, but the record has been examined with care for the purpose of determining whether the evidence is sufficient to support the verdict and whether during the trial of the case any error was committed which prevented the defendant from having a fair trial.

[1] There can be no question that the evidence is sufficient to support the verdict. The defendant Whitson was positively identified by the taxicab driver as the man who operated the machine gun during the holdup of the Oaks Club, and as the man who actually fired the fatal shot. Although defendant Whitson was not identified by any of the card players at the club during the holdup, the description of at least two of these witnesses tallies with the height, build, and general appearance of Whitson. The fact that the mustache worn by the holdup man was darker than the mustache worn by Whitson at the trial only strengthens the identification of Whitson as the guilty man, since he admitted on the stand that he was accustomed to using eyebrow pencil to darken his mustache. Clothes similar to the clothes worn by the man with the machine gun were found in the house occupied by Whitson's sister and brother-in-law. To the positive identification of Whitson by Davilla, must be added the fact that Whitson was familiar with the use and operation of a Thompson submachine gun; the fact admitted by him on the witness stand, that on the night of March 7, 1944, he had had a Thompson machine gun; and also the admitted fact that on the evening in question he was at the home of his sister and brother-in-law in the close neighborhood of the Sears Roebuck store where the holdup men were picked up by the taxicab.

Moreover, there is the extremely damaging testimony of Jones, also stationed at the Alameda Naval Air Base, who testified that a short time prior to the holdup, Whitson had suggested to him the proposition that they collaborate in the holding up of the Oaks Club with the explanation that it was "worth $4,000." The fact that Whitson said Jones "would have to be able to handle cold steel" and perhaps "knock somebody's legs from under him," furnishes convincing proof that Whitson was capable of committing such a crime, and contemplated murder if it was necessary to the accomplishment of the robbery. The testimony of this same witness that Whitson showed him a pair of soft black leather gloves to be worn when handling the machine gun, taken in conjunction with the fact that the man using the machine gun at the holdup did wear such gloves, strengthens the conclusion that Whitson was the person who planned and carried out the holdup of the Oaks Club with a machine gun, and was the person who, in leaving the scene of the crime, shot and killed Officer Haas.

It appears from the record that the trial was fairly and impartially conducted. Certain evidence of statements made by Whitson during the investigation of the crime was excluded upon the ground that the statements had been made in the presence of a navy officer and might possibly be considered to have been made under duress. No claim can therefore be made that evidence which should have been excluded was improperly admitted.

[2] The jury, in bringing in its verdict of guilty, undoubtedly relied upon the positive identification of Whitson by Davilla, the taxicab driver. They heard his testimony and were in a position to judge whether or not he was telling the truth. Likewise, the trial judge in denying the motion for a new trial, by so doing, necessarily affirmed his belief in the identification by Davilla. The fact that Davilla was able to positively identify the defendant at the trial, but did not give as detailed a description as might be desired of the defendant at the police station where he reported the crime immediately after its occurrence, detracts very little, if at all, from his positive identification of the defendant. His forced participation under threat of death in a machine gun holdup may well account for his failure to perceive and relate minute details. Moreover, during the course of the cross-examination of Davilla, the defense attempted to give the impression that the description by Davilla at police headquarters was so sketchy that it demonstrated Davilla's inability to identify the men when he subsequently saw them. The description as given to the police was never presented to the jury, and it is impossible to determine the truth, if any, of this claim. However, it is a matter of common knowledge that although one may not be able to sufficiently describe a person so that the person may be recognized by another, yet one can himself recognize and identify the same person with certainty.

The crime of which defendants were convicted was murder of the first degree, in that it was committed in the perpetration of or attempt to perpetrate robbery, and on the record the only possible decision of an appellate court is an affirmance of the judgment.

[3-5] Briefs have been filed by the Public Defender of Alameda County in behalf of defendant Brigance, based upon a claim of mistaken identity and the contention that although an alibi instruction was not requested by the defense, the failure of the trial court to give such an instruction on its own motion was prejudicial error which requires a reversal of the judgment. Appellant's argument is based upon the general proposition that the trial court is required of its own motion to give instructions on the general principles involved in a case. 8 Cal.Jur. 309. Appellant does not question the fact that the rule in California is well established that, although substantial alibi evidence may be given by the defense, in the absence of any request for an instruction in respect thereof, it is not the duty of the trial court to give a specific charge upon that subject. People v. Foster, 198 Cal. 112, 243 P. 667; People v. Jori, 99 Cal.App. 280, 283, 278 P. 250; People v. Tracy, 18 Cal.App.2d 444, 446, 64 P.2d 166; People v. Ramirez, 21 Cal.App.2d 466, 69 P.2d 913; People v. Keilly, 54 Cal. App.2d 764, 129 P.2d 939; 118 A.L.R. 1303. Appellant argues, however, that there are special circumstances in the instant case which require the defense of alibi to be treated as a general principle of law rather than a specific point developed through the evidence introduced at the trial.

We cannot agree with this contention. The special circumstances relied upon by appellant may be enumerated as follows: (1) The crime of which defendant stands convicted is a very serious crime—the crime of murder in the first degree involving the death penalty; (2) a separate alibi was offered in the instant case by the defendant Brigance which in no way depended on the strength of his codefendant's case; (3) the sole defense offered by defendant Brigance was the defense of alibi; and (4) the identification of the defendant Brigance was weak, and there was a conflict in the evidence.

We can see no logical ground for concluding that reversible error was committed by the trial court in failing to give an alibi instruction of its own motion in the case of a defendant charged with murder, whereas it is not reversible error if the crime charged be robbery, rape, or other crimes less serious than murder. It is true the penalty is more severe, but this arises simply because the crime itself is a more serious crime. A murderer is no more entitled of right to an alibi instruction by the trial court on its own motion than is a robber.

[6] Neither do we perceive any valid reason why the fact that an alibi is offered by one defendant and not by another should change the general rule. In the case of People v. Tracy, supra, which involved a similar situation, the general rule was held applicable. And if the sole defense of a defendant is an alibi, it would seem that less reason exists for requiring an alibi instruction on the court's own motion, since the general instructions regarding reasonable doubt, burden of proof, etc., would apply directly to the only defense, and there could exist no possibility of confusion.

[7] We cannot agree with the claim that the identification of Brigance was weak. Although he was identified by only one person, the taxicab driver, that identification was definite and positive. It should be added that contrary to the claim that this witness Davilla lacked time and opportunity to gain a lasting impression of the two men who accosted him, forced him to drive them to the scene of the crime and forced him to accompany them into the Oaks Club, this witness had both ample time and opportunity to observe both men. Davilla testified that as he drove down Telegraph Avenue on the way to the Oaks Club he turned around and talked to them. Also when Brigance walked along to the right of him on the sidewalk as they left the Oaks Club, Brigance was unmasked, and both men were unmasked as Davilla drove them back to Sears Roebuck store where he let them out. This was ample time for him to fix their appearance in his mind.

[8] In an attempt to show that inconsistent statements were made by Davilla which tended to discredit his testimony, the appellant points out that Davilla at one time testified that the lights were not lit in the cab and at another time stated that the headlights and lights on the cab were lighted. It is apparent to anyone familiar with the lights on the roof of the Yellow Cab taxicabs that these statements by the witness are entirely consistent.

[9] The fact that the men were masked during the holdup adequately explains the reason they could be positively identified by only the one witness who had an oppor-

tunity to observe them without masks. However, the general description of the men as to general appearance, height, weight, and the clothes they were wearing all confirm the identification of these men as the guilty parties.

The record clearly demonstrates that the jury was warranted in bringing in the verdict of guilty. No reversible error was committed by the trial court.

The judgment and the order denying the motion for a new trial are affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concur.

25 Cal.2d 794

In re MARZEC.

Cr. 4547.

Supreme Court of California.

Jan. 23, 1945.

1. Pardon ⚷9

A prisoner on parole is constructively a prisoner under sentence in legal custody and under control of Department of Corrections.

2. Habeas corpus ⚷9

A prisoner on parole is not free from legal restraint by penal authorities, and habeas corpus is appropriate means for testing legality of such restraint.

3. Extradition ⚷30

One released from state prison on condition, expressed in parole agreement voluntarily signed by him, that he was being released into custody of authorities of another state for confinement by them and must return to state prison if he became eligible for release by such authorities before expiration of state prison sentence, became "fugitive from justice" within federal extradition statute when he refused to comply with such condition and his parole was revoked. 18 U.S.C.A. § 662; U.S.C.A. Const. art. 4, § 2, cl. 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Fugitive from Justice".

In Bank.

Habeas corpus proceeding by Pete Marzec for relief from conditions imposed on him as a parolee from a state prison.

Writ discharged, and petitioner remanded.

Pete Marzec, in pro. per.

Shamus O. McFadden, of Santa Barbara, for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondents.

EDMONDS, Justice.

By writ of habeas corpus, Pete Marzec is seeking relief from conditions imposed upon him as a parolee from the State Prison at Folsom following his conviction of a felony. He asserts that the state now has no authority either to further imprison him or to subject him to restraint by requiring compliance with certain conditions restricting his liberty.

The situation is a somewhat unusual one. Prior to 1940, Marzec twice had been convicted of a felony and was in this state after having escaped from the New Mexico State Penitentiary. In that year, by a judgment of the Superior Court of Los Angeles County, he was sentenced to imprisonment following his conviction upon four counts of robbery, which were found to be of the second degree. The court specified that the sentences should run consecutively. Three years later, his terms of confinement upon these sentences were fixed at a total of 30 years.

After seven years, the Board of Prison Terms and Paroles granted Marzec a parole effective when nine calendar years had been served. A condition specified by the board was that he was "to be sent to Poland by the Government or the Board, subject to detainer." The parole was to become effective on June 6, 1939, "or as soon thereafter as the necessary arrangements can be made for your transportation, and provided that you comply with all the rules governing parole and continue to maintain a clear conduct record."

On May 16, 1939, the Governor of California granted the request of the Governor of New Mexico for extradition of the petitioner. Two weeks later Marzec signed a document by which he "freely and voluntarily" agreed to accompany an officer from New Mexico "as a prisoner of the State Prison at Folsom * * * to the

New Mexico State Penitentiary * * * for the purpose of answering there the charges pending against" him. "Furthermore" he thereby waived "all informality of legal proceedings" and agreed that he was "willing to return to the New Mexico State Penitentiary with said officer without the Governor's requisition or other papers legally necessary to such cases."

The prison record shows that Marzec was released on June 6th "on parole." He was given a "Ticket of Leave" in printed form which included the following: "You are being released into the custody of the New Mexico State authorities to be by them confined. Should you become eligible for release by them before August 6, 1948 [date of expiration of sentence, with credits], you must be returned to the State Prison at Folsom unless the Board shall hereafter determine otherwise." Marzec signed an agreement in writing to abide by and strictly follow the conditions of his parole.

In February, 1942, the California Board of Prison Terms and Paroles received a letter from the warden of the New Mexico State Prison stating that, owing to Marzec's good behavior and assistance, the authorities of that state were considering the release of the petitioner. The warden recommended that Marzec be relieved of further imprisonment in California. Upon consideration of the matter, the board determined not to do so and ordered that, if he was released from the New Mexico institution before August 6, 1948, the date when his sentences in this state would expire, he be returned to Folsom prison to abide the further order of the board.

A month later the State Parole Officer recommended to the board that the parole previously granted to Marzec be suspended. As grounds for such suspension the parole officer reported the receipt of a letter from Marzec stating that he would not comply with the conditions of his parole and return to Folsom prison to abide the further order of the board, nor would he waive extradition. At the next meeting of the board Marzec's parole was suspended and his return was ordered for "refusing to comply with the conditions of his parole."

A short time later, upon request of the Governor of California, a warrant of extradition was issued in New Mexico and Marzec was returned to the State Prison at Folsom. After he had served more than two years' additional time there the Adult Authority, Department of Corrections (successor to Board of Prison Terms and Paroles) released him upon parole. In addition to the usual conditions of parole, the petitioner was required to report for employment in a specified hotel "and there remain until granted permission by the State Parole Officer to go elsewhere."

As grounds for relief in the present proceeding, the petitioner asserts that the parole of June 6, 1939 "never in fact became effective"; that he "never was released on parole" but "was removed from said Folsom Prison by the authorities of New Mexico State Prison in their custody, and through and on account of extradition papers signed by the Governor of California." By honoring the request for extradition made by the State of New Mexico, says the petitioner, the State of California forever waived all claims upon him and thereafter he was not subject to extradition from New Mexico because he was not a "fugitive from justice."

In opposition to these claims, the attorney general asserts that the issue as to whether the petitioner was a "fugitive from justice" from the State of California is wholly immaterial. The state maintains that there was no waiver of jurisdiction by California in the transfer of the petitioner to New Mexico and declares that the "petitioner was not transferred to the New Mexico authorities upon the consent of the Governor on extradition proceedings, but upon full consent and waiver of the petitioner." In reply, the petitioner, for the first time appearing by counsel, urges that "the transfer of the petitioner to the State of New Mexico was not a transfer under parole."

[1, 2] As a prisoner upon parole, Marzec is constructively a prisoner under sentence in the legal custody and under the control of the Department of Corrections. Accordingly, he is not free from legal restraint by the penal authorities and habeas corpus is the appropriate means for testing the legality of that restraint. In re Taylor, 216 Cal. 113, 13 P.2d 906; In re Stanton, 169 Cal. 607, 147 P. 264.

[3] Marzec's claim that he was never a fugitive from California justice, and therefore was not subject to extradition from New Mexico requires a determination as to whether the transfer of custody to the New Mexico authorities relieved him of further punishment by the State of California. If this state then waived juris-

diction over him in so far as any requirement for further imprisonment upon the judgment and sentence of this state is concerned, upon his release from the New Mexico penitentiary he was not "a fugitive from justice" and, accordingly, was not subject to extradition from that state. 18 U.S.C.A. § 662, Rev.Stats. § 5278; U.S. Const., art. IV, § 2, cl. 2. But the record submitted by the petitioner clearly shows that his release from the State Prison at Folsom in 1939 was not without limitation or reservation. At that time, he agreed voluntarily to go to New Mexico for the purpose of imprisonment and signed a "Ticket of Leave," or parole agreement, by which he expressly stipulated that his removal to New Mexico was subject to the condition that, should he be released from the custody of that state prior to 1948, he would be returned to the State Prison at Folsom. Moreover, the record does not support Marzec's contention that his removal to New Mexico was upon extradition proceedings. By his written agreement he expressly waived "all informality of legal proceedings" and agreed further that he was "willing to return to the New Mexico State Penitentiary * * * without the Governor's requisition or other papers legally necessary in such cases."

The petitioner relies upon People ex rel. Barrett v. Bartley, 383 Ill. 437, 50 N.E.2d 517, 147 A.L.R. 935, and In re Whittington, 34 Cal.App. 344, 167 P. 404, to support his contention that the State of California forever waived all claims over him when he left this state for New Mexico. The Bartley case, although presenting in several respects a situation similar to that of Marzec, is not here controlling because the State of Illinois unconditionally transferred the custody of McLaughlin, then a convict, to the Wisconsin authorities. The prisoner, as in the present proceeding, had been granted a parole to become effective at a future date but without the condition that he was then to be "subject to detainer" by authorities of another state. Also, when McLaughlin was transferred to Wisconsin he did not go voluntarily upon an agreement to return to prison in the asylum state after his imprisonment in the demanding state had been completed, nor did he waive extradition. Moreover, in the Bartley case, the Supreme Court of Illinois concluded that "McLaughlin was not released on parole" for "the conditions [admitting him to parole] were never complied with" and, when he was released to the Wisconsin agent, "there was no mention of parole." [383 Ill. 437, 50 N.E.2d 519]

The case of In re Whittington, supra, was decided upon a record showing facts quite different from those now before the court. There the petitioner, by extradition proceedings, was brought from Texas to California to face a charge of murder. The prosecution dismissed the case, and the Governor of Texas requested his return by extradition. The appellate court held that, as he did not voluntarily leave Texas, he was not a "fugitive from justice." But as Marzec went to the New Mexico prison voluntarily under a conditional parole, this state's jurisdiction over him continued. When he later refused to comply with the condition which had been imposed upon him, and his parole was revoked, he became a fugitive from justice within the meaning of the federal extradition statute. In re Tenner, 20 Cal.2d 670, 128 P.2d 338; In re McBride, 101 Cal.App. 251, 281 P. 651; for cases from other jurisdictions see notes in 78 A.L.R. 419, 8 A.L.R. 903.

The writ is discharged and the petitioner remanded.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

25 Cal.2d 799

Ex parte QUINN.

Cr. 4588.

Supreme Court of California.

Jan. 23, 1945.

1. Criminal law 🔑1208(9)

An indeterminate sentence without a fixed maximum is regarded for certain purposes as having the effect of a life sentence until the Prison Term Board has acted and fixed a term for years.

2. Criminal law 🔑1216(2)

Trial court has power to direct that subsequently pronounced sentences shall run consecutively to an indeterminate sentence with no prescribed maximum, but if the punishment for a crime is expressly prescribed to be life imprisonment, the term of imprisonment on other convictions runs concurrently with the life term. Pen.Code, § 669 as amended, St.1941, p. 2262, St.1943, p. 1122.

3. Criminal law ⚷1216(2)

Where defendant was convicted on three counts of robbery in first degree, with prior conviction of felony, and one count of assault with deadly weapon with intent to commit murder, and trial court ordered that sentence on second robbery count run consecutively to sentence on first count, and that sentences on the other two counts run concurrently with the first two, but before defendant could be delivered to warden he was convicted and sentenced for escape, and trial court directed that the term run consecutively to previously pronounced sentences, the trial court acted within its authority in directing that three of the sentences be served consecutively, as against claim that the first sentence which was for indeterminate term without specified maximum was a life sentence and that nothing could be added thereto. Pen.Code, §§ 107, 213(1); § 669, as amended, St.1941, p. 2262, St.1943, p. 1122.

◆

In Bank.

Habeas corpus proceeding by Roy V. Quinn.

Writ discharged and petitioner remanded to custody of warden of State Prison.

Roy V. Quinn, in pro. per.

Archer Zamloch, of San Francisco, for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

Petitioner contends that he is unlawfully deprived of his liberty in that he is detained in a state prison under a congeries of five sentences, all of which, he asserts, must be held to have run concurrently and therefore to have expired, but three of which (two for robbery of the first degree with prior conviction of felony and one for escape from custody with prior conviction of felony) the state insists upon enforcing consecutively. The determinative point presents the questions as to whether the trial court acted within its power in directing that the three sentences mentioned run consecutively, it being petitioner's position that a sentence for robbery of the first degree, being for an indeterminate term without a specified maximum (Pen.Code, § 213(1), is a life sentence, at least until the Board of Prison Terms and Paroles (now the Adult Authority; see chap. 2, Fifty-fifth [Third Extraordinary] Session, 1944) has acted and fixed the punishment at a term for years, that nothing can be added to a life sentence and, hence, that upon pronouncing judgment on the first robbery count the court became powerless to direct that any subsequent sentence run consecutively; that all the subsequent sentences must be deemed to have merged in the first judgment and to have run concurrently with it.

[1] There is no merit in petitioner's contention. Certainly an indeterminate sentence without a fixed maximum is regarded for certain purposes as having the effect of a life sentence until and unless the prison term board has acted and fixed a term for years (People v. Ralph (1944), 24 Cal.2d 575, 578, 150 P.2d 401; People v. Jones (1936), 6 Cal.2d 554, 556, 59 P.2d 89; People v. McNabb (1935), 3 Cal.2d 441, 456, 457, 45 P.2d 334) but this proposition of law does not preclude our recognizing the reality that, in the absence of action by the board, an indeterminate sentence *is an indeterminate sentence.* It is neither a life sentence nor a fixed term sentence; it is entitled to recognition as a distinct *species intelligibilis.* The fact that for some purposes it has the legal effect of a life sentence does not mean that it must be regarded as the equivalent of a life sentence for all purposes. (People v. Ralph (1944), supra, at pp. 578-582 of 24 Cal.2d, 150 P.2d 401.) A defendant against whom such a judgment has been pronounced may or may not be required to spend the entire term of his natural life in prison.

Here the defendant was first sentenced to prison on August 14, 1924, for the crime of robbery in the second degree. This was an indeterminate sentence, the term later being fixed at fifteen years with the last three and one-half years to be served on parole. After release from prison but before expiration of the parole term he was rearrested and (in April, 1933) was tried, convicted, and sentenced on three counts of robbery of the first degree (with prior conviction of felony) and one count of assault with a deadly weapon with intent to commit murder (with prior conviction of felony). The trial court ordered that the sentence on the second robbery count run consecutively to the sentence on the first count and that the sentences on the other two counts run concurrently with the first two. Before the defendant could be delivered to the prison warden under the above-mentioned sentences he escaped from the custody of an officer, was later apprehended, charged with escape (violation of Pen.Code, § 107) with a prior conviction of felony, pleaded guilty, and (in June, 1933) was sentenced on that charge, the court directing that the term run consecutively to the previously pronounced sentences. Each of the five sentences was indeterminate, the first three (each for robbery of the first degree, with a prior) carrying no fixed maximum and the last two (assault with a deadly weapon with intent to commit murder, with a prior, and escape, with a prior) carrying maximum terms of fourteen years and ten years, respectively. Later the Board of Prison Terms and Paroles (now the Adult Authority) fixed the terms of imprisonment at ten years on each count. The aggregate of the three consecutive terms is, therefore, thirty years and, obviously, the petitioner is lawfully held unless the court was without authority to direct that such terms run consecutively.

Petitioner relies principally upon certain language used by this court in People v. McNabb (1935), supra, 3 Cal.2d 441, 456, 457, 45 P.2d 334; and in People v. Jones (1936), supra, 6 Cal.2d 554, 556, 557, 59 P.2d 89. In the McNabb case the court was considering primarily the question as to whether a prisoner who, while on parole under a sentence for a fixed term of years, had committed, been convicted of, and returned to prison on, two counts of robbery, and who, prior to the completion of his original fixed term sentence and prior to action by the prison term authority on his last two sentences, committed, with malice aforethought, an assault with a deadly weapon, was liable to prosecution under section 246 (now section 4500) of the Penal Code. That section provides that "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon * * * is punishable with death." It was held that under the circumstances shown the prisoner was properly convicted of the offense charged.

The court observed that (at page 458 of 3 Cal.2d, at page 341 of 45 P.2d) "Section 246, Penal Code, was enacted as a disciplinary regulation and as a means of protection to prisoners themselves against the assaults of the vicious, and also to protect the officers who are required to mingle with the inmates, unarmed." The effect of the decision was to hold that within the intent of the Legislature the defendants there were in the classification of persons against whom the statute operated. (That this was a proper constitutional classification, see People v. Finley (1908), 153 Cal. 59, 94 P. 248, approved and judgment affirmed, Finley v. California (1911), 222 U.S. 28, 32 S.Ct. 13, 56 L.Ed. 75.) In other words, each defendant was held to be "undergoing a life sentence" and this was so even though McNabb had not yet completed the fixed term for years on which he had been released on parole. Since he was, at the time of the assault, being held not only as a parole violator under the fixed term sentence but also under a commitment which potentially subjected him to actual life imprisonment it was not unreasonable to conclude that he was within the classification intended to be reached by the Legislature in enacting section 246. If he was to be imprisoned for the remainder of his natural life on a commitment which was then in the hands of the warden it would have been absurd to have concluded that he was not "undergoing a life sentence" merely because a previously imposed term for years had not yet expired.

The question as to whether, under the circumstances shown in the cited case, the indeterminate sentences on the two robbery counts on which the prison term board had not acted were to be regarded as bringing the defendant (McNabb) within the category of persons "undergoing a life sentence" presented a problem of statutory construction. On that point the court held (at pages 456, 457 of 3 Cal.2d at page 341 of 45 P.2d): "The authorities of this and many sister states which have an indeterminate sentence law similar to ours hold that a statute which prescribes a minimum sentence of not less than five years and with no maximum is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term. This question was definitely settled by In re Lee, 177 Cal. 690, 171 P. 958, in 1918 and has been the pronounced law of the state since." That is still the law but, as previously suggested, it does not preclude our recognizing the reality that an indeterminate sentence, under the circumstances shown here, may eventually become a sentence for years. And because such sentences may become sentences for years rather than for life our present penal system contemplates that trial courts shall have, and vests in them, power to direct whether multiple sentences shall run concurrently or consecutively.

Section 669 of the Penal Code, at the time the sentences involved herein were pronounced (1933), provided that "When any person is convicted of two or more crimes, the judgment shall direct whether the terms of imprisonment or any of them * * * shall run concurrently or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be." (Stats.1931, p. 1052.) The pertinent part of that section has now been amended to include a proviso that "if the punishment for any of said crimes is *expressly prescribed* to be life imprisonment, whether with or without possibility of parole, then the terms of imprisonment on the other convictions, whether prior or subsequent, shall be merged and run concurrently with such life term." (Italics added.) (Stats.1943, p. 1122.) We do not need to consider whether such amendment could be given retroactive effect upon petitioner's sentences; it is obvious that the punishment is not as to any of the counts *expressly prescribed* to be life imprisonment. Hence the quoted amendment has no application to the present case in any event.

The case of People v. Jones (1936), supra, 6 Cal.2d 554, 59 P.2d 89, adds nothing to petitioner's position. The court there was passing only on the question as to whether a life sentence as an habitual criminal under section 644 of the Penal Code commenced "with the entry of judgment" or not until "the expiration of his unexpired term on the prior sentence, part of which he was serving on parole at the time of his last conviction." The court quoted from the McNabb case, supra (3 Cal.2d 441, 45 P.2d 334), and held that the life sentence commenced immediately upon the defendant's return to prison. This holding is not germane to petitioner's contention.

[2] Concerning the basic point involved in this case—the power of the trial court to direct that subsequently pronounced sentences shall run consecutively to an indeterminate sentence with no prescribed maximum—we are satisfied that, subject to the limitations imposed by the amendments of 1941 (Stats.1941, p. 2262) and 1943 (Stats. 1943, p. 1122) to section 669 of the Penal Code, applying in the case of punishment "expressly prescribed to be life imprisonment," the discussion by Judge Charles W. Fricke, acting pro tempore for the District Court of Appeal, in People v. Hayes (1935), 9 Cal.App.2d 157, 160, 49 P.2d 288, 289, correctly states the law. Subject to the limitations necessarily implied by the amendments mentioned, we adopt his language as follows: "While it is true, as said in the cases of In re Lee, 177 Cal. 690, 171 P. 958, In re Wignall, 193 Cal. 387, 224 P. 452, and In re Daniels, 106 Cal.App. 43, 288 P. 1109, that when a sentence is imposed under the Indeterminate Sentence Law (section 1168, Pen.Code) the term of imprisonment is for the maximum period provided by law as the penalty for the offense in question, this is true only to the extent that the term of imprisonment is the maximum provided by law until action is taken by the board of prison terms and paroles, which may and is required to fix the period of imprisonment at a period between the maximum and minimum penalties, and when so fixed the term of imprisonment is the period fixed by order of that board. People v. McNabb [3 Cal.2d 441], 45 P.2d 334; In re Daniels, supra. Since the San Francisco sentence was imposed in 1928, and assuming that the board has acted in accordance with the provisions of the so-called Indeterminate Sentence Law, a definite term of imprisonment has been fixed, and this court is justified in so assuming, since appellant has failed to make a showing to the contrary. But even where a defendant is already under a life sentence or even a sentence of death, this does not afford him immunity from prosecution and conviction of other offenses; nor does it preclude the court from passing judgment and sentence upon a subsequent conviction. The fact that a prisoner who serves a life term, and, while serving such, dies in prison cannot serve other sentences imposed for other offenses and runing consecutively does not prevent, as a matter of law, the imposing of such consecutive sentences even though, as stated in In re Woofter, 134 Cal.App. 580, 583, 25 P.2d 859, the additional penalty cannot be imposed, i.e., actually inflicted, upon such life termer. It might also be mentioned that even where a prisoner is serving a life sentence this does not of necessity mean that he will remain in prison until he dies. Parole, commutation, or pardon may release

him from prison long before his term of life ends." The Hayes case was followed in People v. Cowen (1937), 20 Cal.App.2d 674, 67 P.2d 737.

[3] It follows from what has been said that the trial court acted within its authority in directing that the three questioned sentences be served consecutively and, hence, that the petitioner is not unlawfully detained.

For the reasons hereinabove stated the writ is discharged and the petitioner is remanded to the custody of the warden of the State Prison at Folsom.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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25 Cal.2d 697

In re LINDQUIST'S ESTATE.

UNITED STATES v. STATE OF CALIFORNIA et al.

S. F. 16883.

Supreme Court of California.

Dec. 30, 1944.

1. Escheat 🔑1, 3

The word "escheat" has outgrown its restricted meaning under the old English feudal system and now includes personal property as well as land, and is now an incident of sovereignty, not of tenure.

See Words and Phrases, Permanent Edition, for all other definitions of "Escheat".

2. Constitutional law 🔑103

A veteran had no vested right to a pension under the World War Veterans' Act, since "pensions" are bounties which Congress has the right to give, to withhold, to distribute, or to recall at its discretion. 38 U.S.C.A. § 368.

See Words and Phrases, Permanent Edition, for all other definitions of "Pensions".

3. States 🔑4

The laws of the United States dealing with matters within its jurisdiction are supreme, and, if the terms of an act are constitutional and if due process is complied with, state courts and agencies may with propriety lend their aid in their enforcement. U.S.C.A. Const. art. 6, cl. 2.

4. Wills 🔑58(1)

If not prescribed by statute, a formal contract is not required to bind one in the disposition of his property upon his death.

5. Army and navy 🔑51

Federal statute providing that, in certain contingencies, the unused pension given to a war veteran will revert to the Government, creates a valid contract, to which no formal consent by pensioner or his guardian is required; the statute itself plus the acceptance of its benefits constituting the contract. World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

6. Pensions 🔑2

The rule that upon the granting of a pension to an employee a vested right accrues to the recipient simply means that the vesting is subject to contingencies if the pension statute so provides.

7. Army and navy 🔑51

The rule that the Legislature may provide that an unexpended portion of an allowance may revert or escheat to a designated governmental body applies also to pensions. Probate Code, § 1027; World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

8. Insane persons 🔑73

That a veteran had been declared incompetent did not establish that acceptance of pension from the federal government did not constitute an acceptance of contract that unexpended balance would revert to the government upon death of veteran intestate and without heirs. Probate Code, § 1027; World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

9. Army and navy 🔑51
Escheat 🔑3

The state had no right to escheat funds of one who died intestate without heirs merely because funds were found within jurisdiction of the state, and where the funds represented unexpended balance of pension to war veteran which were paid to him under provision for reversion to the government upon veteran's death intestate, without heirs, the federal government was entitled to funds remaining upon veteran's death. Probate Code, § 1027; World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

10. States ⚷4

The intrusting of an incompetent veteran's funds to the management of a guardian appointed by a state court is proper. World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

11. Insane persons ⚷78

Contract a veteran would be compelled to make to obtain pension from federal government was equally binding upon guardian of veteran. World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

12. Army and navy ⚷51

Federal statute providing that unused pension given to war veteran, which would under law of state escheat to the state, shall escheat to the United States, is not unreasonable. World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

13. States ⚷4

Although state has control over disposition of property of a deceased within its jurisdiction and the authority to determine the right of succession, there is no constitutional provision precluding federal authority from ordaining as a condition to grant that in a given contingency property shall escheat to the federal governmental agency.

14. Constitutional law ⚷93(1)

Whatever constitutional rights the state possesses, it may not decree to one party or to one governmental agency property that was obtained by donation from another if there was an agreement, express or implied, that upon certain contingencies it should revert to the donor.

15. States ⚷4

A state escheat statute is based upon state sovereignty and is a direction for the devolution of property which cannot prevail over federal Constitution, or over a federal act which does not deprive one of property without due process of law. Probate Code, § 1027; World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3); U.S.C.A.Const. Amend. 10.

16. States ⚷4

Where federal government delegated state government of residence of deceased veteran to act in its probate capacity to determine intestacy and lack of kindred, the federal government was bound by procedural methods adopted by state. Probate Code, §§ 231, 1027; World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

17. Army and navy ⚷51

Where the United States was entitled to the return of unexpended balance of war veteran's pension upon his death intestate without heirs, the funds could not revert to the United States until the five-year period fixed by state escheat statute had elapsed. Probate Code, §§ 231, 1027; World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

18. Escheat ⚷7

Title to property distributed to the state pursuant to escheat statute does not vest absolutely and unconditionally in the state until lapse of five years, as the escheat is not complete until lapse of five-year period without the appearance of claimants and title held by the state is conditional and subject to divestment by the appearance of legitimate claimant. Probate Code, § 1027.

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Proceedings in the matter of the Estate of Carl A. Lindquist, between the United States of America and the State of California and another. From a decree adjudging that certain funds in the estate escheat to the State of California, the United States appeals.

Decree reversed in part with directions.

Prior opinion, App., 144 P.2d 438.

Francis M. Shea, Asst. U. S. Atty. Gen., and Frank J. Hennessy, U. S. Atty., and W. F. Mathewson, Asst. U. S. Atty., both of San Francisco, and Leavenworth Colby, Atty., Department of Justice, of Washington, D. C., for appellant.

Earl Warren, Atty. Gen., and Clarence A. Linn and L. G. Campbell, Deputy Attys. Gen., for respondents.

SCHAUER, Justice.

The United States of America has appealed from "the Decree of Settlement of Final Account and of Final Distribution" in the estate of Carl A. Lindquist, deceased, "distributing the residue of the estate of the decedent to the State of California under the provisions of Section 1027 of the Probate Code of the State of California, and denying the claim of the United States of America for distribution of said residue under the provisions of Section 450 of Title 38 of the United States Code." A hearing was granted by this court, after decision by the District Court of Appeal, First Appellate District, Division One, for the purpose of giving further study to the problems presented and in order to provide a decisive precedent for guidance in the settling of similar controversies which it has been suggested would otherwise arise in the future. After such study we have concluded that the opinion of the District Court of Appeal, prepared by Mr. Justice Ward, correctly treats and disposes of the issues involved, and it is therefore, with further discussion concerning one phase of the matter which was the subject of an added memorandum of authorities before us, adopted as and for the opinion of this court. Such opinion (with appropriate deletions of introductory and conjunctive matter as indicated) is as follows:

"* * * Lindquist, a veteran of the United States Navy, was declared incompetent and the Pacific National Bank of San Francisco was appointed guardian of his estate. Shortly thereafter the Veterans' Administration awarded him a pension under the provisions of the act of August 13, 1935, ch. 521, 49 Stats. 614 (38 U.S.C. 368, 38 U.S.C.A. § 368) in the amount of $60 a month, and this was regularly paid to the guardian. At the time of the veteran's death his estate, consisting entirely of an unexpended balance of pension payments and amounting to the sum of $1,445.87, was turned over to the public administrator, and the Superior Court of the State of California in and for the City and County of San Francisco sitting in probate ordered distribution of the residue thereof to the State of California as escheated property. (Cal.Prob.Code, § 1027.)

"The main question presented is the construction of section 450(3) of title 38 U.S.C., 38 U.S.C.A. § 450(3). The respondents contend that the act purports to lay down a rule of succession to property—a matter in which the federal government is without authority. The act so far as pertinent here provides as follows: 'Where any payment of compensation, adjusted compensation, pension, emergency officers' retirement pay, or insurance under any Act administered by the Veterans' Administration is to be made * * * to a person mentally incompetent, or under other legal disability adjudged by a court of competent jurisdiction, such payment may be made to the person who is constituted guardian, curator, or conservator by the laws of the State of residence of claimant, or is otherwise legally vested with the care of the claimant or his estate. * * *

"'Authority is granted for the payment [from funds so derived] of any court or other expenses incident to any investigation or court proceeding for the appointment of any guardian, curator, conservator, or other person legally vested with the care of the claimant or his estate or the removal of such fiduciary and appointment of another, and of expenses in connection with the administration of such estates by such fiduciaries, or in connection with any other court proceeding hereby authorized, when such payment is authorized by the Administrator. * * *

"'*Provided further*, That any funds in the hands of a guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, derived from compensation, automatic or term insurance, emergency officers' retirement pay, or pension, payable under said Acts, which under the law of the State wherein the beneficiary had his last legal residence would escheat to the State, shall escheat to the United States and shall be returned by such guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, or by the personal representative of the deceased beneficiary, less legal expenses of any administration necessary to determine that an escheat is in order, to the Veterans' Administration, and shall be deposited to the credit of the current appropriations provided for payment of compensation, insurance, or pension.'

"The state contends that the pension was an outright, absolute and complete gift; that the statute above uses the term 'escheat' in a technical sense to mean succession to property where there are no heirs; and that the statute constitutes an attempt by the federal government to regulate the laws of succession of this state as to a particular type of property. It is admitted that the federal government has no power to pass laws regulating succession to property by citizens of the states, that being a power reserved by the Tenth Amendment to the states.

"The appellant contends that the word 'escheat' as used in the statute does not have the technical, limited meaning urged by the respondents; that when the statute is read as a whole it has a broader meaning; that the obvious purpose, intent and meaning of the statute is that the federal government has not made the gift of a pension absolute and complete, but has retained in itself a contingent reversionary interest—that is, if the pensioner die possessed of any portion of the gift, and if he has not by will disposed of the interest, and if under the laws of the state the gift would otherwise escheat to the state, then the reversionary contingent interest of the federal government will vest.

[1] "The word 'escheat' under the old English feudal system relating to the lapsing or reversion of lands to the lord of the fee upon a failure of heirship has survived but outgrown its restricted meaning. The custom or practice was originally confined to land, but its scope has been enlarged to include personal property. (19 Am.Jur., p. 383, § 5.) In the case of In re Melrose Ave. in Borough of the Bronx, 234 N.Y. 48, 136 N.E. 235, 237, 23 A.L.R. 1233, the court, in an opinion delivered by Justice Cardozo, said: 'Escheat, as it survives in the Constitution of New York, preserves the name but ignores the origin of its feudal prototype. In origin it was an incident, not of sovereignty, but of tenure.' 'Escheat to-day is not the privilege of one, but the collective right of all when the individual right has failed.'

"In the United States, a state or some governmental agency is ordinarily the beneficiary of an escheat. In Canada, a province succeeds unless the Dominion by statute provides to the contrary. 'As between the country or state of domicil and the country or state in which the property is located, real property escheats to the country in which the property is found, since every sovereign state has dominion over the land within its borders. In England it has been held that the personal property of an intestate dying without heirs, located in a foreign country, escheats to that country, and not to the country of domicil of the owner, the maxim "mobilia sequuntur personam" not applying, because the right claimed is not in the nature of a succession. However, in the United States it has been held that the state is not entitled by escheat to unclaimed property owned by non-residents within the state.' (19 Am. Jur., p. 382, § 3.) The United States Government, in dealing with objects of its bounty, by statutory provision has applied the principle of escheat. In Tax Commission of Ohio v. Rife, 119 Ohio St. 83, 162 N.E. 390, 391, involving the question of exemption from taxation of insurance payable under an act of Congress known as the World War Veterans' Act, the following is set forth: '"That the compensation, insurance, and maintenance and support allowance payable under titles II, III, and IV, respectively, * * * shall be exempt from all taxation. * * *" 43 Stats. at L. 607, 613, c. 320, § 22, June 7, 1924 (38 U.S.C.A. § 454)'; '"that in cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation. This section shall be deemed to be in effect as of October 6, 1917." 43 Stats. at L. 1302, 1310, c. 553, § 303, March 4, 1925 (38 U.S.C.A., § 514).' The court said, 162 N.E. at pages 392, 393: 'It is to be noted that there shall be no escheat to the state of Ohio, as would be the case in the event the state statutes controlled entirely; but by the Act of March 4, 1925, the insurance shall not be paid to the estate of the insured, but shall escheat to the United States and shall be credited to the United States government life insurance fund or the military and naval insurance appropriation, as may be appropriate. * * * This right to take this property is by virtue of a contract between the United States government and the soldier, and does not arise by reason of the statutes of descent and distribution of this state, even though the government has seen fit to distribute such fund through the agency of an administrator acting under the statutes of descent and distribution of the state of Ohio.

" 'It is reasonable to assume that the purpose of Congress in making the payment to the administrator of the deceased soldier was for the benefit of the government, to relieve the government of the necessity of selecting and determining the next of kin of the deceased soldier to whom payment should be made, and to place this burden upon the administrator appointed in the state of the soldier's residence. The administrator becomes a mere trustee or conduit for the government to make the payments to the persons entitled to the same under the provisions of the federal law. The intestate laws do not operate upon the decedent's property, but are referred to in order to determine who shall take the proceeds of the insurance. Congress had a right to adopt the course of descent prevailing in the state of the residence of the soldier, and the proceeds of the insurance therefore pass under the federal act, the intestate laws of Ohio being adopted as a standard or guide for ascertaining the next of kin to whom payment shall be made.'

[2] "The deceased * * * herein had no vested right to a pension. In Abbott v. Morgenthau, 68 App.D.C. 83, 93 F.2d 242, a case quite similar to the present, accumulated pension payments made to a guardian who had signed an application for his incompetent ward's admission to a veterans' home, were involved. At page 86 of 68 App.D.C., at page 245 of 93 F.2d, the court said: 'It must be borne in mind that Folley had no vested interests or rights in the pension money. He had no vested legal right to a pension at all, for, as has been said time and time again, pensions are bounties which Congress has the right to give, to withhold, to distribute, or to recall, at its discretion. When, therefore, it is considered that Congress could annex whatever conditions it pleased whenever it pleased to the grant or the gratuity, it seems to us clear that it was competent for Congress to say, as it did say, that, if any one enjoyed the benefits of the home and was still a member of the home at the time of his death, his accumulated pension money should be distributed in a particular manner. Indeed, the provision in the act for distribution of the balance to certain limited relatives of the deceased pensioner was itself but another gratuity, and since, as we have pointed out, there is and can be no dissent to the proposition that Congress may give, withhold, distribute, or recall and change at will its gratuities, it seems beyond dispute that when it does so it is the duty of the courts to give effect to the congressional purpose.' (Writ of certiorari denied 303 U.S. 638, 58 S.Ct. 526, 82 L.Ed. 1098.)

[3] "The laws of the United States dealing with matters within its jurisdiction are supreme 'and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' (U.S.Const., art. VI, par. 2; People ex rel. Happell v. Sischo (1943), 23 Cal.2d 478, 491, 144 P.2d 785, 150 A.L.R. 1431.) Upon the state courts is often imposed the duty of enforcing federal laws, and in this connection they are likewise called upon to determine their constitutionality. If the terms of an act are constitutional, and due process is complied with, state agencies, judicial or otherwise, may with propriety and to the great convenience of the federal government lend their aid in their enforcement. Laws of the United States, when constitutional, are binding upon state courts (Tax Commission of Ohio v. Rife, supra, 119 Ohio St. 83, 162 N.E. 390, 393), and should not be viewed as emanating from a foreign jurisdiction. The principle of cooperation, not competition, should be followed. (Miller v. Municipal Court, 22 Cal.2d 818, 142 P.2d 297.) Congress is required to establish adequate and exact standards for the practical administration and reasonable enforcement of an act, and, Congress having done so, the state courts should assist and cooperate in any policy declared for all the states. (Miller v. Municipal Court, supra.)

"That unexpended pension money, under the conditions enumerated in the statute, should be returned to its source and be used in further aid of veterans, is eminently just and equitable, and state agencies should accept the burden of aiding in the enforcement of the act unless the method of return is contrary to constitutional provision. In Beaver v. Short, D.C., 300 F. 113, the power to legislate relative to property constituting a gift from, or within the provisions of, the federal government is held to be exclusively within such government.

[4] "If not prescribed by statute, a formal contract is not required to bind one in

the disposition of his property upon his death. (Keefe v. Keefe, 19 Cal.App. 310, 125 P. 929; Barr v. Ferris, 41 Cal.App.2d 527, 107 P.2d 269; Davis v. Jacoby, 1 Cal. 2d 370, 34 P.2d 1026; Wolf v. Donahue, 206 Cal. 213, 273 P. 547.)

[5] "There is no doubt that if the pension statute requires the pensioner to contract that in certain contingencies the unused pension fund shall revert to the donor, that such contract is valid, and that no formal consent by the pensioner or his guardian is required, the statute itself plus acceptance of its benefits constituting the contract. United States v. Stevens, 302 U. S. 623, 58 S.Ct. 388, 82 L.Ed. 484, reversing Stevens v. United States, 1 Cir., 89 F.2d 151, is similar to the present case except that in the Stevens case in his written application for admission to a national soldiers' home the applicant agreed that upon his death all of his personal property should pass to and vest in the board of managers of the home. (36 Stats. 736, 24 U.S.C.A. § 136). Basing its decision primarily upon the Tenth Amendment to the Constitution the circuit court (89 F.2d 151) had held the act to be unconstitutional and void. In United States v. Stevens, supra, 302 U.S. 623, at page 624, 58 S.Ct. 388, 82 L.Ed. 484, the question was concisely stated as follows: 'Can the United States enforce a contract executed by an ex-soldier in order to obtain admission into the National Home for Disabled Volunteer Soldiers, which contract provides that upon the death of the veteran while a member of the Home, all his personal property shall pass to the Home subject to be reclaimed within five years by any legatee or person entitled to receive the property by inheritance?' The Supreme Court there said (302 U.S. at pages 626, 627, 58 S.Ct. at page 389, 82 L.Ed. 484): 'The Court of Appeals was of the opinion that the act of Congress authorizing the contract was void as an interference with the reserved rights of the state of the veteran's legal domicile when he died (Massachusetts) in that "it was at most but an attempt to make a future testamentary disposition of McGovern's property, when such a disposition could only be effected by will"' and held (302 U.S. at page 628, 58 S.Ct. at page 390, 82 L.Ed. 484): 'Nothing in the record indicates that the agreement was not fairly and voluntarily entered into between the parties, or that it was inequitable, unjust, or not upon valuable consideration. Both parties were competent to make the contract. This contract is valid and enforceable.' The statutory provision in the Stevens case specified *'all personal property'*; that in the present, applies to funds derived from 'compensation, automatic or term *insurance*, emergency officers' retirement pay, or *pension*' only. (Italics added.) If the federal government simply by statute can lawfully create a contract that requires all the personal property of the pensioner to be paid over in certain circumstances, it can also provide that as to the particular fund that is the subject of the gift, the donor retains a contingent interest. That is all the statute here involved attempts to do.

[6, 7] "The statute herein makes no provision for consent by the veteran; the pension, if accepted, must be held in accordance with the statutory provisions applying to a gift, county or periodical allowance, the granting of such pension being sometimes referred to as part consideration of a contract of employment, or as additional payment for past meritorious service. While in California it has been held that upon the granting of a pension to an employee a vested right accrues to the recipient, this simply means that the vesting is subject to contingencies, which may cause a discontinuance of payment, such as conviction of a felony or an automatic decrease in amount (Douglas v. Pension Board, 75 Cal.App. 335, 242 P. 756; Klench v. Board of Pension Fund Com'rs, 79 Cal. App. 171, 249 P. 46; Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973) if the pension statute so provides.

"Likewise, a legislative body may provide that an unexpended portion of an allowance may revert or escheat to a designated governmental body. (United States v. Stevens, supra, 302 U.S. 623, 58 S.Ct. 388, 82 L. Ed. 484.) This rule applies to pensions. (Abbott v. Morgenthau, supra, 68 App.D.C. 83, 93 F.2d 242, 245.)

[8] "The fact that the veteran herein had been declared an incompetent makes no difference in the determination of the issues involved. In the Abbott case, the veteran was insane and, as regards the absence of a requirement of consent, the court declared that 'It is a self-executing act.' In the present case the incompetent was represented by a duly appointed and qualified guardian. The receipt of the pension, a benefit to the incompetent, was one of the elements in a quasi contractual transaction which, it may be assumed, was approved by the superior court in the guard-

ianship proceeding. The decree of distribution sets forth the appointment of the guardian, the award of the pension, the period of payment to the guardian and that the entire estate consisted of money received from the Veterans' Administration.

[9] "California has no right, by virtue of its sovereignty, to escheat the funds herein merely because they are found within the jurisdiction of the state. (First Nat. Bank v. California, 262 U.S. 366, 43 S.Ct. 602, 67 L.Ed. 1030.) They were derived from the United States government as an absolute gift only in the sense that the guardian might have expended the full amount had it been necessary. The gift was limited to the extent that if the veteran died intestate and without heirs, any unexpended balance reverted to the donor. There is nothing inequitable in this provision of the federal statute. As between state and federal governments, there can be no question of the justice of the federal claim.

"Had the veteran in this case not been declared an incompetent he could have confided his pension to the keeping of the treasurer of a veterans' home, reserving the right to withdraw and expend it as he desired, but with an agreement on his part that if unexpected at the time of his death it should be retained by the home. In Mauck v. United States, 9 Cir., 94 F.2d 745, at page 746, using the Stevens case as authority, the court said: 'It was pointed out in the Stevens case that the statute requiring the contract did not operate to invade the reserved powers of the state over the course of intestate descent and distribution, inasmuch as the law of the veteran's domicile, Massachusetts, permitted and enforced contracts directing the distribution of the promisor's property after his death.

"'Such is also the law in California. Nichols v. Emery, 109 Cal. 323, 331, 41 P. 1089, 50 Am.St.Rep. 43; Booth v. Oakland Bank, 122 Cal. 19, 54 P. 370; Treadway v. Board of Directors, 14 Cal.App. 75, 85, 86, 111 P. 111, hearing by Supreme Court denied; Monsen v. Monsen, 174 Cal. 97, 99, 162 P. 90; cf. Cal. Civ.Code, § 1624, subd. 6; Levi v. Murrell, 9 Cir., 63 F.2d 670, 671.'

[10] "The entrusting of an incompetent pensioner's funds to the management of a guardian appointed by a state court, has been recognized by the Congress of the United States as proper. (Hines v. Stein, 298 U.S. 94, 56 S.Ct. 699, 80 L.Ed. 1063.) The necessity of a guardian applying for a pension on behalf of an incompetent veteran is apparent. (World War Veterans' Act, 1924, § 21, 43 U.S.Stats., pp. 607, 613, 38 U.S.C.A. § 450.) Whatever terms of a contract the veteran would be compelled to make, expressly or impliedly, in order to obtain the pension, they bind the guardian with equal force.

[11] "The objection that the incompetent veteran cannot be considered as having consented to the condition of the gift is without merit. This conclusion is strengthened when the holding in Abbott v. Morgenthau, supra, 68 App.D.C. 83, 93 F.2d 242, is considered, namely, that the terms of the statute became operative upon the award and acceptance of the pension, and that formal consent to reversion of the unexpended funds was not necessary.

[12] "There is nothing unreasonable in the provision that the particular funds herein shall escheat to the federal government. The reference to 'funds * * * which under the law of the State wherein the beneficiary had his last legal residence would escheat to the State' is simply adopting, as regards the operation of escheat to the federal agency, the same rule that the state has adopted for itself. The method is a matter of convenience. There may be cases in which pension money would escheat to the Veterans' Administration, and other property, real or personal, owned by the decedent, would escheat to the state. Respondents' contention that the pension money was paid to the deceased or his guardian without reservation that the United States could any longer assert control over it, is not well founded when the provisions of the pension act are given due consideration.

"This opinion would be unduly lengthened if each of respondents' citations should be analyzed. None of them covers facts similar to those of this case. As an example, in Spicer v. Smith, 288 U.S. 430, 53 S.Ct. 415, 77 L.Ed. 875, 84 A.L.R. 1525, in which a living incompetent veteran was involved, whose guardian used as a depositary an institution which became insolvent, it was held that the guardian was not an agent of the United States, and that federal authority is not concerned in the depositary selected by him. No question of the right of escheat upon the death of the veteran was considered.

"In Carrier v. Bryant, 306 U.S. 545, 59 S.Ct. 707, 83 L.Ed. 976, the court held that bonds of the United States purchased by a guardian on behalf of an incompetent veteran with 'payments of benefits' were not exempt from execution. At page 549, of 306 U.S., at page 709, of 59 S.Ct., 83 L.Ed. 976, the court simply said, quoting from Trotter v. Tennessee, 290 U.S. 354, 54 S.Ct. 138, 78 L.Ed. 358: 'We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises.' In this respect it is interesting to observe changes in the statute as noted in Culp v. Webster, 25 Cal.App.2d Supp. 759, 70 P.2d 273, and Lawrence v. Shaw, 300 U.S. 245, 57 S.Ct. 443, 81 L.Ed. 623, 108 A.L.R. 1102.

"In Christianson v. King County, 239 U.S. 356, 36 S.Ct. 114, 60 L.Ed. 327, the court determined that territorial schemes of government for Washington territory properly included provisions establishing and defining the jurisdiction of probate courts. The failure of heirs resulted in an escheat to the county, but the opinion was not based upon an agreement of the deceased that, in the absence of testamentary disposition or heirs, the property should revert to the federal government. The right of succession to estates of deceased persons is a matter for state cognizance. Referring to 'escheat,' the Christianson case, 239 U.S. at page 366, 36 S.Ct. at page 118, 60 L.Ed. 327, said 'In the case of the territories, Congress could have dealt with this subject if it chose, but it did not see fit to establish a rule of its own.'

[13] "There is an abundance of authority, statutory and judicial, to the effect that the state has control over the disposition of the property of a deceased within its jurisdiction, and the authority to determine the right of succession, but there is no constitutional provision that federal authority may not ordain as a condition to its grant that in a given contingency property shall escheat to a federal governmental agency.

[14] "In some instances a distinction has been drawn between real and personal property—a question not necessary to discuss here. Whatever constitutional rights the state possesses, it may not decree to one party or to one governmental agency property that was obtained by donation from another if there was an agreement, express or implied, that upon certain contingencies it should revert to the donor.

[15] "In determining the main question involved it must be borne in mind that the federal government has the right to grant pensions with reservations, as for example, by providing for a reversion, as it did in the case before us. A state escheat statute is based upon state sovereignty and is a direction for the devolution of property. It may not prevail over the United States Constitution or over a congressional act which does not deprive one of property interests without due process of law.

[16, 17] "* * * The United States government delegated the state government of residence of the deceased veteran to act in its probate capacity to determine intestacy and lack of kindred; it is therefore bound by the procedural methods adopted by such state. California statutes provide that property [provisionally] escheats to the state as of the date of the death of a decedent (Prob.Code, § 231) and 'shall be held by the State Treasurer for a period of five years from the date of the decree making such distribution, within which time any person may appear in the superior court for the county of Sacramento and claim the estate or any part thereof.' (Prob.Code, § 1027). In view of the adoption by the federal statute of the state law on the subject of heirship, under the facts of this case the property may not revert to the donor, the United States or its agency, until the five-year statutory period allowed for claimant heirs has elapsed. * * *'

[18] Appellant, in the hearing before this court, has contended vigorously that immediately upon entry of the decree of distribution it became entitled to receive possession of the property involved and that we should accordingly modify the order of the District Court of Appeal requiring that the money be held by the State Treasurer for the period of five years. We are satisfied, however, that such order is proper. Section 1027 of the Probate Code, above mentioned, which concerns the time at which escheated property shall finally vest in the state, provides that "Executors or administrators, public or otherwise, must apply for distribution of an estate at the time of filing a final account. * * * If the court, at the time set for the hearing of the final account, or such time thereafter to which the matter may be continued,

does not distribute the entire balance of the estate remaining for distribution to known heirs, devisees or legatees entitled to succeed thereto, it must distribute to the State of California that portion of such estate not distributed to such known heirs, devisees or legatees.

"If the court distributes the estate or any portion thereof to the State of California, and the distributing clause contains words otherwise creating a trust in favor of certain unknown or unidentified persons as a class, such distribution shall vest in the State of California both legal and equitable title to the property so distributed; saving, however, the right of claimants to appear and claim the estate or any portion thereof, as in this section provided." After setting forth various procedural steps thereafter to be followed and specifying that claimants may assert their claims within five years from the date of distribution to the state, the section then concludes: "Any person who does not appear and claim, as herein required, shall be forever barred, and such property, or so much thereof as is not claimed, shall vest absolutely in the State." It thus appears that title to property distributed to the state pursuant to the provisions of section 1027 does not vest absolutely and unconditionally in the state, nor is the escheat complete, until the lapse of the five-year period without the appearance of claimants; theretofore the title held by the state is conditional and subject to divestment by the appearance of legitimate claimants. Thus until the five-year period has elapsed it cannot be finally determined whether the property will go to heirs of the deceased veteran or whether the situation contemplated by the statute under which the federal government is now claiming—i.e., ultimate escheat to the State of California—will take place. As stated in Re Estate of Williams (1940), 37 Cal.App.2d 181, 186, 99 P.2d 349, 352, "The very purpose of the escheat statute is to permit heirs who were unknown at the time of distribution to subsequently establish their right to property distributed to the State for lack of 'known heirs.'" Until expiration of the period during which such rights may be established it is substantially impossible for the United States to prove the fact which would make the reversionary provision of its statute operative (see State v. Smith (1886), 70 Cal. 153, 156, 157, 12 P. 121; People v. Roach (1888), 76 Cal. 294, 296, 297, 18 P. 407; State v. Miller (1906), 149 Cal. 208, 85 P. 609, which cases, although arising under a different statute, are analogically pertinent) and hence it is proper that the funds here involved be held by the State Treasurer. We have considered the cases of Lyeth v. Hoey (1938), 305 U.S. 188, 59 S.Ct. 155, 83 L.Ed. 119, 119 A.L.R. 410, and United States v. Allegheny County (1944), 322 U.S. 174, 64 S.Ct. 908, cited by appellant, but find nothing therein which would lead us to a contrary conclusion on this point.

That portion of the decree appealed from which denied unconditionally the claim of the federal government to the residue of the estate of decedent is reversed, and the probate court is directed to amend its decree to provide that such residue shall revert and be paid to the United States of America upon elapse of five years from the date of distribution if the same has not theretofore been claimed by any legal heir pursuant to the laws of California.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. In my opinion the provision in the federal statute (38 U.S.C. § 450, 38 U.S.C.A. § 450) providing for the escheat to the United States of funds belonging to the estate of a deceased veteran is in contravention of the Tenth Amendment to the Constitution of the United States and is therefore invalid. Under this amendment all powers not delegated to the United States nor prohibited to the states are reserved to the states. By this reservation the rights of sovereignty are guaranteed to the states by the Constitution. No act of Congress can subtract an attribute of sovereignty from a state. Citation of authority is not necessary to demonstrate that probate jurisdiction over the property of a resident situated within a state is the exercise of the right of a sovereign.

There are many authorities to the effect that the State has the sole and exclusive power over the disposition of property under its jurisdiction. United States v. Fox, 94 U.S. 315, 24 L.Ed. 192; Sunderland v. United States, 266 U.S. 226, 45 S.Ct. 64, 69 L.Ed. 259; United States v. Perkins, 163 U.S. 625, 16 S.Ct. 1073, 41 L.Ed. 287; Beaver v. Short, D.C., 300 F. 113. In the case of Hamilton v. Brown, 161 U.S. 256, at page 263, 16 S.Ct. 585, at page 587, 40 L.Ed. 691, the Supreme Court of the United States lays down the rule as follows:

"By the law of England, before the Declaration of Independence, the lands of a man dying intestate and without lawful heirs reverted by escheat to the king as the sovereign lord; but the king's title was not complete without an actual entry upon the land, or judicial proceedings to ascertain the want of heirs and devisees. Attorney General of Ontario v. Mercer [L.R.] 8 App.Cas. 767, 772; 2 Bl.Com. 245. The usual form of proceeding for this purpose was by an inquisition or inquest of office before a jury, which was had upon a commission out of the court of chancery, but was really a proceeding at common law; and, if it resulted in favor of the king, then, by virtue of ancient statutes, any one claiming title in the lands might by leave of that court, file a traverse, in the nature of a plea or defense to the king's claim, and not in the nature of an original suit. Lord Somers, in The Bankers' case, 14 Howell State Tr. 1, 83; Ex parte Webster, 6 Ves. 809; Ex parte Gwydir, 4 Madd. 281; In re Parry, L.R. 2 Eq. 95; People v. Cutting, 3 Johns. [N.Y.] 1; Briggs v. Light Boat, 11 Allen [Mass.] 157, 172. The inquest of office was a proceeding in rem. When there was a proper office found for the king, that was notice to all persons who had claims to come in and assert them, and, until so traversed, it was conclusive in the king's favor. Bayley, J., in Doe v. Redfern, 12 East 96, 103; 16 Vin.Abr. 86, pl. 1.

"In this country, when the title to land fails for want of heirs and devisees, *it escheats to the state* as part of its common ownership, either by mere operation of law, or upon an inquest of office, *according to the law of the particular state.* 4 Kent Com. 424; 3 Washb. Real Prop. (4th ed.) 47, 48." (Italics supplied.)

See, also, United States v. Repentigny, 5 Wall. 211, 72 U.S. 211, 18 L.Ed. 627. Even money deposited in the United States Treasury when an escheat occurs escheats to the state where it was originally situated. (United States v. Klein, 303 U.S. 276, 58 S.Ct. 536, 82 L.Ed. 840; American Loan & Trust Co. v. Grand Rivers Co., C.C., 159 F. 775.)

Statutes providing for escheat have been held to be part of the intestate laws of a state. People v. Richardson, 269 Ill. 275, 109 N.E. 1033; 29 Harv.L.Rev. 455.

This being the case it is all the more evident that there can be no federal escheat statute. Laws governing the devolution of property have always been the subject of exclusive state jurisdiction.

There is only one exception to the rule that a state has exclusive control over the devolution of title to property located within its jurisdiction. This exception tends to prove the general rule. The exception is in the case of the property of restricted Indians whose property is held in trust for them by the government. In the case of such property the courts have held that:

"Restricted Indian lands do not become subject to the operation of the laws of the state until all restrictions from the right of the allottee to alienate have been removed and relinquished by the Congress." Beaver v. Short, D.C., 300 F. 113, 116.

In the instant case, the veteran is not to be treated as a restricted Indian. There are no restrictions on his right to alienate his property and the government does not hold it in trust for him.

The fact that the money in the estate was derived from the United States does not change the general rule, that the state escheat statutes control property situated within the state. Etheridge v. Doe, 18 Ala. 565.

It has been held by the Supreme Court of the United States and by the courts of several states that when money is paid to a veteran pursuant to a pension, title vests in the recipient and the United States has no right or interest in said money. Spicer v. Smith, 288 U.S. 430, 53 S.Ct. 415, 77 L.Ed. 875, 84 A.L.R. 1525; Carrier v. Bryant, 306 U.S. 545, 59 S.Ct. 707, 83 L. Ed. 976; United States Fidelity & Guaranty Co. v. Montgomery, 226 Ala. 298, 146 So. 528; State ex rel Smith v. Board of County Commissioners, 132 Kan. 233, 294 P. 915, (certiorari denied State ex rel. Boynton v. Board of Com'rs, 283 U.S. 855, 51 S.Ct. 648, 75 L.Ed. 1462).

In Spicer v. Smith, supra, the Supreme Court of the United States speaking through Mr. Justice Butler stated that the very escheat provision of the federal statute was evidence that title to the money had passed to the veteran.

The fact that the money was paid to a guardian does not alter the situation. The intervention of a guardian does not leave the pension funds in the hands of the government but, when paid to the guardian, the title and possession have both passed from the government. State ex rel. Smith v. Board of County Commissioners, 132

Kan. 233, 294 P. 915 (certiorari denied State ex rel. Boynton v. Board of Com'rs, 283 U.S. 855, 51 S.Ct. 648, 75 L.Ed. 1462).

This rule is best expressed by the Supreme Judicial Court of Massachusetts, in the case of Kellogg v. Waite, 12 Allen, Mass., 529. The pertinent portion of this decision reads as follows:

"It is undoubtedly competent for the United States to attach such conditions as they may see fit to the grant of a pension, and to fix by law the time and manner in which the property shall finally pass to the pensioner. But when this money was paid to the agent of the principal defendant, by her consent, and in conformity with the existing provisions of law, *it became her property,* and created a debt from the agent to her, *over which the United States government had no longer any control or jurisdiction.* It was no longer, in the language of the statute of 1866, a 'sum of money due or to become due to any pensioner under the laws of the United States.' It had been paid, and was received by her in the manner she had chosen. *It could not be recalled by the government, nor could its disposal be qualified* or in any manner limited or abridged." (Italics supplied.)

The pension money in the estate of the deceased had been his money. He had both title and possession and the money itself was within the jurisdiction of the California courts and subject to its statutes.

In support of its conclusion that the federal escheat statute will prevail over the state escheat statute, the majority opinion relies in part on the case of Tax Commission of Ohio v. Rife, 119 Ohio St. 83, 162 N.E. 390, 392. This case involved the proceeds of a war risk insurance policy. Under the law and the contract, payments under the contract of insurance were not subject to inheritance taxes. The court held that the beneficiaries named in the policy took under the contract and not by reason of the statutes of descent and distribution, and therefore the inheritance tax did not attach. In the instant case, however, the State of California is taking under its statutes of distribution and the United States is attempting to take the funds involved not by reason of any contractual relationship between the deceased and the government, or by virtue of any trust impressed upon the money, but by virtue of a statute of distribution which the Congress was powerless to enact. The Ohio case points out this provision in the following language:

"This right to take this property is by virtue of a contract between the United States government and the soldier, and does not arise by reason of the statutes of descent and distribution of this state, even though the government has seen fit to distribute such fund through the agency of an administrator acting under the statutes of descent and distribution of the state of Ohio." Tax Commission of Ohio v. Rife, supra.

Reliance is also placed upon the case of Abbott v. Morgenthau, 68 App.D.C. 83, 93 F.2d 242, 245, (certiorari denied 303 U.S. 638, 58 S.Ct. 526, 82 L.Ed. 1098.) This is another case involving a contract between the government and the veteran. The veteran entered a soldiers' home. Upon entering the home the veteran agreed that "'The balance due the pensioner at the date of his death shall be disposed of as directed by Act of Congress approved July 1, 1902 [24 U.S.C.A. § 139].'" The statute was amended in 1910, 24 U.S.C.A. § 136. The court held that the 1910 amendment did not affect the contract and that as the claimant was not entitled to take under the 1902 statute, the balance of the pension money or deposit with the home should be paid into the federal treasury in accordance with the 1902 statute and the contract. There is dicta in the cited case to the effect that there is "no vested legal right to a pension at all, for, as has been said time and time again, pensions are bounties which Congress has the right to give, to withhold, to distribute, or to recall, at its discretion." I am disposed to agree with this dicta. "To recall" a pension means to repeal the act so that the pension does not continue. I know of no case in which, in the absence of fraud, an attempt is made to recover title to pension money once the pensioner has taken title and possession of the same.

The statute relied on by appellant in the instant case does not attempt to distribute or recall the pension. What it does is to attempt to engraft an escheat statute on the substantive law of the State of California contrary to the state law and in violation of the Tenth Amendment to the Constitution.

Beaver v. Short, D.C., 300 F. 113, 116, is likewise relied upon by the majority opinion. This case provides the only exception to the rule that a state has exclusive control of the devolution of title to property located within its jurisdiction. This exception tends to prove the general rule. The cited case concerned the property of *restricted* Indians whose property was held *in trust* for them by the government. In case of such property the court held that:

"Restricted Indian lands do not become subject to the operation of the laws of the state until all restrictions from the right of the allottee to alienate have been removed and relinquished by the Congress." Beaver v. Short, supra.

In the instant case the veteran is not to be treated as a restricted Indian. The Congress has impressed no restrictions on his right to alienate his pension award and the government does not hold the same in trust for him. He can do as he pleases with the money—spend it, give it away, or throw it away.

The fact that the money in the estate was drived from the United States does not change the general rule, that the state escheat statutes control property situated within the state. Etheridge v. Doe, 18 Ala. 565.

The majority opinion, however, relies principally on the case of United States v. Stevens (1938), 302 U.S. 623, 58 S.Ct. 388, 82 L.Ed. 484.

The cited case is analogous to the case at bar. The rationale of the decision, however, supports the position of the respondents in this case. In the Stevens case the veteran died an inmate of a federal veterans' home. By statute (24 U.S.C. § 136, 24 U.S.C.A. § 136) and as a prerequisite to admission to the home, inmates were required to turn over to the home all property which the inmate did not dispose of by will, and upon death the property was to vest in the board of managers of the home. The inmates were required to execute a written contract which embodied the statutory requirements. In the Stevens case such a contract was executed. Upon the death of a veteran inmate, the United States *sued* his administratrix for the proceeds of the estate. The Circuit Court of Appeal (1 Cir., 89 F.2d 151) held that the statute and contract were in violation of the Tenth Amendment to the Constitution as an interference with the reserved rights of the state.

The Supreme Court in reversing the Circuit Court of Appeal stated:

"This contract, however, is valid under the applicable state law. * * *

"During the life of the veteran, his property was his own to dispose of as he desired. * * *

"In passing the Act of June, 1910, Congress merely directed the terms and conditions under which veterans, *consistently with state law,* can obtain admittance to Homes built, maintained, and operated by the government for the benefit of veterans. Homes for the aged, needy, or infirm, in return for the benefits bestowed by them, generally receive some benefit from any property or estates of their members." (Italics supplied.) United States v. Stevens, supra [302 U.S. 623, 58 S.Ct. 390].

The decision just cited is based upon the proposition that the veteran's property is his own, to be dealt with as he sees fit. If he chooses to become an inmate of a veterans' home, he does so by contract and the home succeeds to the veteran's property by virtue of a contract with the veteran made and enforced in accordance with the laws of the state.

All of the important cases relied upon by the majority opinion in arriving at its determination are cases based upon contracts between the veteran and the government, either insurance contracts or domiciliary contracts. In each of these cases the government took, not by virtue of an escheat law, but by reason of a contract with the veteran.

In the instant case the government attempts to take under an escheat statute. If the government is entitled to the money in question under a contract, it would have established its right in a plenary action by the filing of a claim and the institution of a suit. However, recognizing that its right is not based upon contract, it appeared in the probate proceeding and asked for distribution of the estate under the federal escheat law.

In my opinion the federal government cannot prevail because escheat statutes are part of the laws providing for the devolution of title to property located within the jurisdiction of a state. Such laws are part of the sovereign powers of a state, reserved to the state under the Tenth Amendment to the Constitution of the United States.

In my opinion the decree should be affirmed.

25 Cal.2d 719

In re WALKER'S ESTATE.

UNITED STATES v. STATE OF CALIFORNIA et al.

L. A. 18719.

Supreme Court of California.

Dec. 30, 1944.

Army and navy ⟹51

Where funds remaining in hands of administrator of estate of Spanish-American War veteran were derived from pension payments made subsequent to amendment of federal statute to provide that in certain contingencies the unused pension should revert to the government, the residue was impressed with reversionary right in favor of the United States. World War Veterans' Act of 1924, § 21(3), as amended, 38 U.S.C.A. § 450(3).

CARTER, J., dissenting.

In Bank.

Appeal from Superior Court, San Diego County; L. N. Turrentine, Judge.

Proceedings in the matter of the estate of Patrick Walker, deceased, between the United States of America and the State of California and another. From a decree adjudging that certain funds in the decedent's estate escheat to the State of California, the United States appeals.

Decree reversed with directions.

Francis M. Shea, Asst. Atty. Gen., Charles H. Carr, U. S. Atty., and James L. Crawford and Clyde C. Downing, Asst. U. S. Attys., all of Los Angeles, and W. F. Mathewson, Asst. U. S. Atty., of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, L. G. Campbell, and Bayard Rhone, Deputy Attys. Gen., for respondents.

SCHAUER, Justice.

The legal issues to be considered in determining this case are largely similar to those appearing in Estate of Lindquist, Cal. Sup., 154 P.2d 879. There is, however, a substantial factual difference in that here the decedent, Patrick J. Walker, was a veteran of the Spanish-American war and as such received pension payments from the federal government from June 27, 1899, to the date of his death on December 11, 1940. Prior to the amendment in 1935 (49 Stats. 607, chap. 510, § 1) of the federal statute under which the United States claims its right to receive the funds in question (38 U.S.C., § 450, subd. (3)), such statute did not specify funds from pension payments as being subject to its operation. However, respondents have conceded that the funds remaining in the hands of the administrator of Walker's estate for distribution were all derived from pension payments made to him (or to his guardian, appointed October 17, 1938) subsequent to the enactment of such amendment. The residue of those funds is, therefore, impressed with the reversionary right in favor of their donor, the United States.

As in the Lindquist case, both the State of California and the United States of America claim to be entitled to distribution of such funds under the terms of the statutes discussed in that case. The trial court decreed that distribution be made to the State of California, and from such decree the United States of America took this appeal. For the reasons set forth in the Estate of Lindquist, 154 P.2d 879, supra, and upon the authority of that case that portion of the decree appealed from which denied unconditionally the claim of the federal government to the residue of the estate of decedent is reversed, and the probate court is directed to amend its decree to provide that such residue shall revert and be paid to the United States of America upon lapse of five years from the date of distribution if the same has not theretofore been claimed by any legal heir pursuant to the laws of California.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. For the reasons set forth in my dissenting opinion in the Estate of Lindquist, 154 P.2d 879, supra, this day filed, I am of the opinion that the decree herein should be affirmed.

25 Cal.2d 624

CALIFORNIA EMPLOYMENT COMMISSION v. BUTTE COUNTY RICE GROWERS ASS'N et al.

Sac. 5530.

Supreme Court of California.

Dec. 30, 1944.

Rehearing Denied Jan. 25, 1945.

1. Taxation ⊂=59

The tax feature as to reciprocal contributions of employers and employees is but an incident, not the essence, of state Unemployment Insurance Law, which is integrated with operation of comparable federal legislation. Gen.Laws 1937, Act 8780d.

2. Master and servant ⊂=78

Unemployment insurance legislation is remedial in character, subject to a liberal construction to effectuate its purpose and to coincide with its reflection of public policy. Gen.Laws 1937, Act 8780d.

3. Statutes ⊂=245

The purpose of provisions for unemployment insurance contributions is broader than mere raising of revenue, and hence such provisions should not be whittled down by narrow construction and exceptions not clearly justified by their language should not be engrafted upon them by judicial interpretation. Gen.Laws 1937, Act 8780d.

4. Master and servant ⊂=78

The principal reason for exempting agricultural labor from social and industrial benefits resulting from remedial legislation, such as unemployment insurance, has been administrative difficulties and accounting inconveniences in farm work, to which operation of packing houses by co-operative associations is not subject. Gen.Laws 1937, Act 8780d; St. 1933, pp. 255–264, §§ 1191–1221.

5. Taxation ⊂=319(1)

The employment commission's rule restricting "agricultural labor", for purposes of exemption from unemployment insurance contributions, to operations performed on farm on which materials were produced, and excluding operations incidental to manufacturing or commercial operations, is valid. Gen.Laws 1937, Act 8780d; St.1933, pp.255–264, §§ 1191–1221.

6. Constitutional law ⊂=62

Where Legislature has declared policies and fixed primary standards, as in the Unemployment Insurance Act, it may confer on administrative officers power to fill up the details by prescribing rules to promote the spirit and purpose of the legislation and its complete operation. Gen.Laws 1937, Act 8780d.

7. Taxation ⊂=219

Warehouse employees of co-operative agricultural association were not engaged in "agricultural labor" within exemption provisions of Unemployment Insurance Act and regulations issued thereunder, where warehouse was a general one open to the public, and hence unemployment insurance contributions were payable in respect of their wages. Gen.Laws 1937, Act 8780d; St.1933, pp. 255–264, §§ 1191–1221.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural Labor".

8. Agriculture ⊂=6

In determining status of co-operative agricultural association, as independent of farmers comprising its membership, principle that a corporation is a complete legal entity separate and apart from individuals who own it was applicable. St. 1933, pp. 255–264, §§ 1191–1221.

9. Corporations ⊂=1

Co-operative corporations are just as distinct entities as are other private corporations.

10. Corporations ⊂=1

The doctrine of separate entity will be disregarded only to prevent fraud or grave injustice.

11. Taxation ⊂=219

Section 1213 of the Agricultural Code, providing for same treatment for co-operative association as for farmer members as to exemptions under laws applying to agricultural products, did not affect liability of association for unemployment compensation contributions. St.1933, pp. 110, 209, 262, §§ 307, 830, 1213; Gen.Laws 1937, Act 8780d, §§ 9(a, e), 38.

12. Statutes ⊂=225

The later expression of legislative intent should prevail.

13. Evidence ⚷20(1)

Courts as courts should not shut their eyes to what they know of the common affairs of business and industry.

14. Taxation ⚷59

Farmer co-operative associations should not be treated in a different manner from any other business concern as bearing their share of social responsibilities flowing from the state Unemployment Insurance Law. Gen.Laws 1937, Act 8780d; St.1933, pp. 255–264, §§ 1191–1221.

15. Taxation ⚷219

The nature of work modified by the custom of doing it determines whether it falls within the "agricultural" or "industrial" field, as respects Unemployment Compensation Law. St.1933, pp. 265–270, 267, §§ 1231–1258, 1242.

See Words and Phrases, Permanent Edition, for all other definitions of "Agricultural" and "Industrial".

16. Taxation ⚷219

The practical reason motivating exemption of agricultural labor from payment of unemployment compensation benefits does not apply where employer maintains a central place of business easily accessible to taxing authorities, and is equipped to keep adequate employment records. Gen.Laws 1937, Act 8780d; St. 1933, pp. 255–264, §§ 1191–1221.

CARTER and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Butte County; Harry Deirup, Judge.

Action by the California Employment Commission against the Butte County Rice Growers Association and others to recover unemployment insurance contributions and penalties. From a judgment for defendants, plaintiff appeals.

Reversed with directions.

Prior opinions, 146 P.2d 908, and 138 P. 2d 347.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Doris H. Maier, and John J. Dailey, Deputy Attys. Gen., and Forrest M. Hill, Ralph R. Planteen, Miriam E. Wolff, Maurice P. McCaffrey, and Glenn V. Walls, all of Sacramento, for appellee.

Herbert W. Whitten, Ware & Ware, and Phil Ware, all of Chico, for respondents.

Ivan G. McDaniel and Jack Barry, Jr., both of Los Angeles, and Rogers & Clark and John H. Painter, all of San Francisco, Schauer, Ryon & McMahon and Alfred D. Haines, all of Santa Barbara, and Charles J. Janigian and Charles P. Scully, both of San Francisco, amici curiæ on behalf of respondents.

CURTIS, Justice.

This action was instituted by the California Employment Commission under authority of the California Unemployment Insurance Act, Stats.1935, p. 1226, as amended, Deering's Gen.Laws 1937, Act 8780d, to recover unemployment compensation contributions, together with interest and penalties, from the Butte County Rice Growers Association upon the basis of wages paid by the association to certain employees during the period February 14, 1937, to September 30, 1939. The trial court upheld the position of the defendant that the labor involved in the activities of the association constituted "agricultural labor" and was therefore exempt from the coverage provisions of the act. From the adverse judgment accordingly entered, the plaintiff prosecutes this appeal.

The defendant is a cooperative association incorporated in 1914 under the laws providing for the formation of "nonprofit" farmers' organizations. Civ.Code, §§ 653m–653s, added by Stats.1909, p. 16, now in Agr.Code, §§ 1191–1221, St.1933, pp. 255–264. It owns and operates a large warehouse located near a railroad siding at Richvale, Butte County, where it stores rice and grain for shipment to market, serving alike "members" (persons who own membership certificates valued at $300 each) and "applicants for membership" (persons who have made an initial payment of $10 each). Membership is limited to owners or tenants of a minimum quantity of land in said county. At the time in question there were forty-eight paid-up members and twenty-three applicants; or according to the defendant's corporate accounts, approximately one-third of the persons entitled to use its storage facilities were so privileged upon proceeding to file an application for membership and making a nominal payment of $10. As a further part of its service, the defendant purchases and sells without profit to "members" and "applicants" certain merchandise commonly used in connection with farming operations. On occasion, according to testimony of the defendant's secretary, sales of these commodities were made to employees and might be made to other persons in the district calling at its warehouse. The defendant also operates a public scale for checking weights on truck loads of rice and other commodities incident to their movement over the highway.

At the beginning of each season it is the defendant's practice to fix a storage charge, and at the end thereof the amount collected in excess of the cost of operation is divided in the form of "rebates" among the fully *paid-up* members. "Applicants for membership" do not share in this refund. The defendant is licensed by the State department of agriculture to conduct a general warehouse business and authorized to issue negotiable warehouse receipts (Agr.Code, §§ 1231–1258, St.1933, pp. 265–270), which are subject to assignment and nonmember assignees pay storage charges. By reason of its maintenance of a bonded warehouse under state license, the defendant has assumed the following legal duty:

"Every warehouseman conducting a licensed warehouse shall receive for storage therein, so far as its capacity permits, any product of the kind customarily stored therein by him, which may be tendered to him in a suitable condition for warehousing in the usual manner in the ordinary and usual course of business, without making any discrimination between persons desiring to avail themselves of warehouse facilities." Agr.Code, § 1242, St.1933, p. 267.

Except for its warehouse manager and bookkeeper each working on a yearly basis, the defendant's employees are seasonal laborers hired by its manager, who has complete supervision and control over their varied warehouse activities. It is the classification of these general services in furtherance of the defendant's enterprise that is here in question. The defendant carries Workmen's Compensation Insurance on all its employees.

The California Unemployment Insurance Act expressly excepts "agricultural labor" but does not expand the term in any detail. (§ 7(a). However, plaintiff, as the administrative agency created by the act and entrusted with its enforcement (§ 75), is authorized to "adopt and enforce rules and regulations which to it seem necessary and suitable to carry out the provisions of this act." (§ 90(a). Upon this basis the plaintiff promulgated rule 7.1, effective February 14, 1937, and in force during the period here involved, which administrative aid defined the term "agricultural labor" as including all services performed:

"(1) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, the raising, feeding, management of livestock, poultry, and bees; which includes, among others, the spraying, pruning, fumigating, fertilizing, irrigating, and heating which may be necessary and incident thereto;

"(2) By an employee in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm or articles produced from such materials, providing such drying, processing, packing, packaging, transporting, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

"The services hereinabove set forth do not constitute agricultural labor unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced. Such services, however, do not constitute agricultural labor if they are carried on as an incident to manufacturing or commercial operations.

"As used herein the term 'farm' includes, among others, stock, dairy, poultry, fruit and truck farms, plantations, ranches, ranges, orchards and vineyards.

"Forestry and lumbering are not included within the exemption of agricultural labor."

[1-3] Preliminary to the discussion of the questions raised on this appeal, there are two general points of observation to be noted. First, in evaluating the defendant's activities to determine whether its employees are engaged in "agricultural labor," it must be remembered that the issue of classification arises in connection with the extension of an exemption from the provisions of a general welfare statute designed to reduce economic insecurity from unemployment by the levy of "contributions" or taxes upon employers and their employees for the accumulation of a reserve fund from which "benefits" can be paid to such latter persons as may become unemployed. The tax feature as to the re-

ciprocal contributions of employers and their employees is but an incident, not the essence of the state unemployment insurance law, which in turn is integrated with the operation of comparable federal legislation. Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595. Such legislation is remedial in character, subject to a liberal construction to effectuate its purpose and to coincide with its reflection of public policy. County of Los Angeles v. Frisbie, 19 Cal.2d 634, 122 P. 2d 526; California Employment Comm. v. Black-Foxe Military Inst., 43 Cal.App.2d Supp. 868, 110 P.2d 729. In the latter case the broad coverage intent of the act here involved is recognized in the following language at page 872 of 43 Cal.App.2d Supp., at page 732 of 110 P.2d: "The income tax law is purely a revenue measure, and upon the rule of strict construction applied to such laws, its scope may well be restrained to such matters as are clearly covered by it. Here we have a statute which, while it requires a 'contribution' that in itself may possibly be regarded as a tax, has a much broader object than the mere raising of revenue. It sets up a scheme for ameliorating the hardships of unemployment, and undertakes, in conjunction with the United States Government, to pay unemployment benefits to those who, without fault of their own, are out of work, to impose the financial burden of doing this upon both employers and employees, and to measure both burden and benefits by the amount of compensation paid to employees when they are working. * * * *In view of the purpose of these provisions they should not be whittled down by narrow construction, nor should exceptions not clearly justified by their language be engrafted upon them by judicial interpretation.*" (Italics ours.)

[4] Second, the principal reason for exempting "agricultural labor" from social and industrial benefits resulting from remedial legislation has been administrative difficulties and accounting inconveniences in farm work. (Carmichael v. Southern Coal & C. Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327), but with relation to employment in and operation and management of packing houses by respective associations, no such practical impediment exists. On the contrary, the usual economy, efficiency and skill with which such association units, functioning as adjuncts to agricultural pursuits, are operated by boards of directors and expert business managers, complemented with systematic office service, place them on no different level than other business enterprises insofar as concerns ability to comply with administrative computation procedure under unemployment compensation insurance laws. H. Duys & Co., Inc. v. Tone, 125 Conn. 300, 5 A.2d 23.

Now to consider the controversial issues on this appeal—the propriety of the judgment discharging the defendant from liability under the California Unemployment Insurance Act for contributions based upon wages paid to its general warehouse employees depends in the main upon the validity, interpretation and application of rule 7.1 as above quoted. The plaintiff maintains that the rule is a proper administrative aid in carrying out the intent of the act in question, and that under such labor classification the services of the defendant's employees must be deemed commercial, not agricultural, in nature, as performed for a corporate enterprise. In opposition to these views the defendant argues that the rule unreasonably restricts the statutory labor exemption and to that extent constitutes illegal administrative legislation; and further, even accepting the challenged definition as of controlling force, the character and organization of the defendant's activities would nevertheless exclude it from the operative force of the act.

[5, 6] Considering at the outset the challenge of the validity of rule 7.1, the objection is not well taken. Where the Legislature has by its enactments declared policies and fixed primary standards, as it did in the Unemployment Insurance Act, there can be no question but what it may validly confer on administrative officers power to "fill up the details" by prescribing rules and regulations to promote the spirit and purpose of the legislation and its complete operation. In its general form of distinction, rule 7.1 appears to be a practical, workable definition in amplification of the unexpanded statutory exemption here presented. Practically all of the courts that have been required to pass upon regulations identical with or very similar to rule 7.1 have upheld the same as proper interpretations of the statutes involved. Great Western Mushroom Co. v. Industrial Commission, 1938, 103 Colo. 39, 82 P.2d 751; H. Duys & Co., Inc. v. Tone, 1939, 125 Conn. 300, 5 A.2d 23; Park Floral Co.

v. Industrial Commission, 1939, 104 Colo. 350, 91 P.2d 492; Christgau v. Woodlawn Cemetery Ass'n, 1940, 208 Minn. 263, 293 N.W. 619; Chester C. Fosgate Co. v. United States, 5 Cir., 125 F.2d 775, writ of certiorari denied in 1942, 317 U.S. 639, 63 S. Ct. 31, 87 L.Ed. 515; Employment Security Commission v. Arizona Citrus Growers, Ariz. 1944, 144 P.2d 682. In view of the harmony of judicial decisions on the point, it is unnecessary to discuss the matter further.

Turning now to the correlation of rule 7.1 with the present record, strikingly pertinent in both factual and legal features involved is the case of North Whittier Heights Citrus Ass'n, v. National Labor Relations Board, 109 F.2d 76, decided by the Circuit Court of Appeals, Ninth Circuit, in 1940. There the association was engaged in the business of receiving, handling, washing, grading, assembling, packing and shipping the citrus fruits of its members and others for marketing. The proceeding was instituted by the Citrus Packing House Workers Union Local No. 21,091, charging the association with unfair practices under the National Labor Relations Act, commonly called the "Wagner Act." 29 U.S.C.A. § 151 et seq. Following a hearing before the National Labor Relations Board, the association was ordered to desist from certain practices, and to do certain other things. The association petitioned the court to review the action of the board, and one of the questions raised was whether the employees in the packing house were "agricultural laborers" and as such exempt from the provisions of the act. In sustaining the board's jurisdiction over the association's employees by reason of the character of their work, the court points out distinguishing features in the consideration of remedial statutes in the industrial relationships of packing house services performed by employees of an individual grower upon his own products in his own physical plant and packing house and packing house services rendered by employees of an association or confederation of individual growers working in a packing house distant from the producing orchards and operated and conducted by an entity legally separate and distinct from the individual growers whose fruit such employees are processing and preparing in such packing houses for marketing. Thus, after noting in its opinion at page 79 of 109 F.2d that "the growers themselves have separated from the farm, the work now done in the packing house and with which we are here concerned, and have assigned it to an incorporated organization brought into being by the growers for such particular purpose," the court aptly observes at page 80 of 109 F.2d:

"Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry'. In this status of this industry there would seem to be as much need for the remedial provisions of the Wagner Act, upon principle, as for any other industrial activity.

"Petitioner [the association] maintains that the nature of the work is the true test. Perhaps it would more nearly conform to the true test to say that the nature of the work *modified by the custom of doing it* determines whether the worker is or is not an agricultural laborer." (Italics ours.)

With reference to the transition that has taken place in activities incident to the preparation of farm products for marketing, the opinion in language peculiarly applicable to the factual situation here involved continues at page 80 of 109 F.2d: "Petitioner argues that if each member of the non-profit cooperative corporation that runs the packing house were to personally hire and direct those doing his own packing and sorting, the work would be agricultural and his employees would be agricultural laborers; that it follows, therefore, that in the case of the same members acting under a single organization to accomplish the same result there can be no change in the nature of the work nor in the status of the persons doing it. The conclusion does not follow. *The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it.* The premise laid down by petitioner in this phase of its argument is not, however, the exact situation facing us. The packing house activity is much more than the mere treatment of the fruit. When it reaches the packing house it is then in the practical control of a great selling organization which accounts to the individual farmer under the terms of the statute law and its own by-laws." (Italics ours.)

In concluding this phase of the case the court quotes with approval at page 81 of 109 F.2d, the following "apt language" in

Pinnacle Packing Co. v. State Unemployment Com., an unreported decision of the Circuit Court of Jackson County, Oregon, rendered in 1937: " 'The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading, packing, and marketing, then the exemption ceases. The plaintiffs engaged in processing, grading, and packing and marketing the fruits are engaged in industry and are, therefore, subject to the provisions of the act and are not exempt as being engaged in agricultural labor.' "

[7] The North Whittier case represents a realistic appraisal of modern development in business methods whereby many activities formerly embraced in farming operations or in intimate connection therewith have become specialized and removed from the farm, so that as the result of such evolutionary process the work may properly be regarded as industrial in nature rather than agricultural in the common conception of that term. Moreover, contrary to the defendant's claim, that case cannot be differentiated from the facts involved here as to service of nonmembers by the association. While *there* the cooperative's packing house facilities were *directly* available to "others" than members, *here* the defendant association's complete storage services are *indirectly* available to nonmembers—that is, "applicants for membership" or "temporary members" who, by paying the negligible application fee of $10 and without requirement to become fully paid-up ($300) members, are entitled to share in *all* the warehousing privileges. Such a tenuous line of demarcation between the two cases is in fact no distinction at all insofar as mode of operation is concerned. In addition, the defendant association under its state license as a bonded warehouse is prohibited from "making any discrimination between persons desiring to avail themselves of warehouse facilities." In the light of these observations the North Whittier case has particular significance here.

The defendant association is placed on no different plane from a legal standpoint because it is smaller in size than the large citrus fruit packing house involved in the North Whittier case. The important consideration is the *comparable record* here prevailing: (1) Divorced from the farm, the defendant as a *corporate entity* engages in one main business function—the acceptance, storage and releasing of rice and grain deposited in its warehouse, and the handling and sale of certain miscellaneous merchandise; (2) The defendant's employees are subject to its exclusive right of direction and control, stand in an employment relationship with it alone, and perform services customarily and usually performed by warehousemen in preparing commodities for shipment and disposition in the market; (3) Purporting to restrict its services to members, the defendant permits *others* upon the payment of a nominal application fee to use its storage and shipping facilities; (4) Purporting to be a nonprofit organization, the defendant "rebates" to members alone *all* storage fees collected in excess of operating expense—thus including the profitable overcharge from nonmembers using the warehouse; (5) The defendant issues negotiable warehouse receipts and operates under a license requiring that its storage facilities be available without discrimination to anyone desiring to avail themselves thereof; and (6) General load-weighing service performed by the defendant for the public upon request. Upon this record the conclusion seems inescapable that the defendant association is in essence a commercial enterprise—a profitable *public warehouse business.*

[8-10] While the North Whittier case was decided in the light of the statutory language alone, the rationale of that decision becomes even more persuasive when correlated with the administrative definition of the term "agricultural labor" embodied in rule 7.1, above quoted. Concededly, the services performed by the defendant's employees are *not* "on a farm" and so do not meet the specification of subdivision (1) of said rule. Equally exclusive is the plain language of subdivision (2), for it requires that services rendered "in connection with the drying, processing, packing, packaging, transportation, and marketing of materials which are produced on the farm" be *"incident to ordinary farming operations as distinguished from manufacturing or commercial operations"* and be *"performed by an employee of the owner or tenant of the farm."* (Italics ours.) Thus, to come within the

"agricultural labor" exemption, *off the farm* services must be an integral part of farming operations performed for the farmer as such—*not for a third person* separate and apart from such fundamental concept. Regardless of any argument as to the commercial nature of the defendant association's enterprise, it admittedly is not the owner, tenant or operator of any farm land. To overcome the barrier of the qualifying employment provision of said subdivision (2), the defendant argues that "the corporation, the association, is nothing more than an instrumentality of the owners and tenants of the farms," and "defendant's employees were in effect the employees of the landowners or tenants." Such observation is not only squarely at variance with the facts of this case—demonstrating that the defendant association in *all* its services functions as a unit *wholly independent* of the farmers comprising its membership—but is likewise contrary to the elementary legal principle that a corporation is a complete legal entity separate and apart from the individuals who own it. The nature of the defendant's corporate structure is immaterial for "cooperative corporations * * * are just as distinct an entity as are other private corporations." Fletcher's Cyclopedia of Corporations (Perm. Ed.) vol. I, § 25, p. 90. The doctrine of separate entity will be disregarded only to prevent fraud or grave injustice. Hollywood Cleaning, etc., Co. v. Hollywood Laundry Service, 217 Cal. 124, 17 P.2d 709. Obviously no such reason exists here for ignoring the plain language of the effective administrative definition—but, on the contrary, to treat the defendant corporation nevertheless as the *alter ego* of its individual farmer members *would, in fact, promote injustice* by unnecessarily restricting the operative scope of the unemployment insurance law of this state, a limitation wholly out of line with the beneficent purpose of such legislation that, consistent with its terms, the coverage provisions have a broad application. California Employment Comm. v. Black-Foxe Military Inst., supra.

In support of its contrary view on this phase of the case, the defendant cites Industrial Commission v. United Fruit Growers Ass'n, 1940, 106 Colo. 223, 103 P.2d 15, 16, wherein the Colorado Supreme Court interpreted their somewhat similar state regulation as exempting employees of a cooperative marketing association from the operation of the Unemployment Compensation Act as being "agricultural laborers." Regardless of the point of *factual distinction there prevailing* in that the association was a *nonprofit* cooperative association limiting its operations "solely [to] marketing the fruit crops of its members," that case nevertheless stands alone in its disregard of the corporate entity of a cooperative even under those circumstances, and its rationale has been expressly rejected as unrealistic when the precise question has been raised in analogous situations before the courts of other states. Cowiche Growers, Inc. v. Bates, 1941, 10 Wash.2d 585, 117 P.2d 624; Employment Security Commission v. Arizona Citrus Growers, Ariz. 1944, 144 P.2d 682. Moreover, it should be noted that these last-cited cases, though concerning *nonprofit* cooperatives performing marketing services for *members only,* make extensive reference to the North Whittier opinion and hold that the fundamental principles there determinative of the separate legal entity of the citrus fruit packing house serving members *and others,* apply with equal force to preclude cooperative associations organized for the exclusive benefit of their members, and not for profit, from claiming exemption on the ground here involved with respect to state unemployment insurance legislation. See, also, In re Yakima Fruit Growers Ass'n, 1944, 20 Wash.2d 202, 146 P.2d 800. The authoritative discussion in these cases regarding the substantial point of corporate entity wholly accords with settled rules of law and cannot be successfully attacked.

[11, 12] Nor does section 1213 of the Agricultural Code, St.1933, p. 262, to which the defendant refers as lending *implied* support to its claim of exemption, have any bearing on the issue in controversy here. It expressly provides for the same treatment for an association as for its farmer members only as to those "exemptions under *any and all existing laws* applying to *agricultural products*"—for example, exemptions with reference to inspection (Agr.Code, § 307, St.1933, p. 110) and standards (Agr. Code, § 830, St.1933, p. 209). But such statutory language has no logical application to the question of whether an individual is engaged in agricultural labor as the problem is here presented. Moreover, the cooperative marketing statutes were enacted in 1923 and compiled in the Agricultural Code in 1933; the Unemployment Insurance Act (as now designated)

was passed in 1935. Stats.1935, p. 1226. By the terms of the latter act, as amended in 1937 (Stats.1937, p. 2052), exactions are levied upon an "employer" (§ 38); an "employer" means "any employing unit" (§ 9(a); and an "employing unit" means "any individual or *type of organization,* including any partnership, *association,* trust * * *." (§ 9(e). If despite this inclusive language, the Legislature nevertheless intended to exclude cooperative associations from the application of the act, it is but reasonable to assume that it would have so stated. Such specific exemption not having been declared in the *particular legislation* here involved, it should not be "engrafted * * * therein by judicial interpretation" in defeat of the law's beneficent purpose. The *later* expression of legislative intent should prevail. United Milk Producers v. Cecil, 47 Cal.App.2d 758, 118 P.2d 830.

[13-16] Courts as courts should not shut their eyes to what they know of the common affairs of business and industry. Farmer cooperative associations have become increasingly numerous as the result of changing economic conditions. Organized to secure definite financial advantages by performing certain functions at a smaller cost per unit than would be possible for the individual farmer acting in his own right, such associations are commendable in modern economy and to be encouraged; but where they operate as distinct entities in activities such as warehousing, conducted separate and apart from farming operations and at a distance from them, such enterprises, while helpful, are "not an incident to ordinary farming operations as distinguished from * * * commercial operations" and should not be treated in a different manner from any other business concern insofar as bearing their share of the social responsibilities flowing from the state unemployment insurance law. The duties of the employees of the defendant association are in all respects identical with the duties of any commercial warehousemen; and the fact that such services are performed by individuals in the employ of a farmers' cooperative association is immaterial, for it is "the nature of the work modified by the custom of doing it" which determines whether it falls within the "agricultural" or "industrial" field. The defendant's employees are in need of the same insurance protection against the hazards of unemployment; and the practical reason motivating the exemption in question—not a paramount purpose to benefit and encourage agriculture as such, but the avoidance of administrative difficulties in ascertaining and collecting the tax, involving expense disproportionate to the resulting advantage—does not exist here where the defendant association maintains a central place of business easily accessible to the taxing authorities and is equipped to keep adequate employment records. Having in mind, then, these points—(1) the stated purpose of the California Unemployment Insurance Act and the administrative interpretation thereof embodied in rule 7.1, (2) the persuasive reasoning of the pertinent decisions following the well-considered opinion in the North Whittier case, analyzing the structure and functions of a farmers' cooperative association, and (3) the commercial aspect of the defendant's enterprise in relation to its features of profit-sharing and service to nonmembers as disclosed by the record—the conclusion seems inescapable that it was not the intent of the Legislature that the services here involved should be excluded from the operation of the act as constituting "agricultural labor." It therefore follows that the defendant association may not claim the exemption sought but is liable for "contributions" computed on the wages paid to its employees as provided by the statute.

The judgment is reversed, with directions to the trial court to enter judgment against the defendant association in accordance with the plaintiff commission's claim under the provision of the California Unemployment Insurance Act.

GIBSON, C. J., SHENK and TRAYNOR, JJ., and SPENCE, Justice pro tem., concurred.

CARTER, Justice (dissenting).

I dissent. In this case the trial court found that the services performed by the employees of defendant were agricultural labor as that term is used in the California Unemployment Insurance Act. Stats. 1935, p. 1226 as amended. Hence, only the evidence favorable to defendant may be considered and all conflicts resolved in its favor. Therefore, I believe that at the outset the facts should be clearly stated.

Defendant is a cooperative association incorporated in 1914 under the laws providing for the organization of cooperative agricultural associations, *not created to make a profit for themselves or their members as such but only for their members as producers.* Civ.Code, §§ 653m–653s, added by Stats.1909, p. 16, now in Agr. Code, §§ 1192–1221. Under the above cited provisions, *only* persons *who are producers* may form such a corporation (Agr. Code, § 1193, St.1933, p. 255), and may admit as members *only persons engaged in the production of products* "to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises." Agr.Code, § 1195, St.1933, p. 256. Defendant *limited its membership to owners or tenants of a minimum quantity of land in Butte County, and all of its members are producers of agricultural products.* Its membership certificates are valued at $300 each, there being 48 outstanding at the time in question. There are 25 applicants for membership who have each paid $10 on account.

Defendant owns and operates a warehouse in which *it stores grain and rise for its members,* including the applicant members, *but not others,* except sometimes the assignees of members. Persons become assignees of members only by reason of a transfer to such persons by members of their right to the grain stored and such transfers are solely for the purpose of securing loans. The assignees do not become members. *It does not process or sell rice, grain or other products.* At the beginning of the season it fixes a storage charge and makes rebates at the end thereof if the charge is more than the amount necessary to meet the cost of operation. No rebate is made to the applicant members unless they pay the balance due on their membership. Defendant purchased usually *upon order of its members,* and sold *to its members,* merchandise *commonly used in farming but made no profit thereon.* It made a few sales of merchandise to one of its employees, not one of its members, but did not make or offer to make sales to others. It is licensed by the State Department of Agriculture to conduct a general warehouse business and authorized to issue negotiable warehouse receipts (Agr.Code, §§ 1231–1258), which are sometimes assigned by the members and the assignee pays the storage charges. *The storage rates have been fixed by defendant's directors but not by the Railroad Commission. It did not solicit business from nonmembers or permit the public to use the warehouse.* And although licensed under the warehouse act defendant does not purport to operate a public warehouse.

With the foregoing factual background we turn to the statute.

The Unemployment Insurance Act was adopted in 1935. It provides for the payment of contributions to alleviate conditions of unemployment in industry generally, but exceptions from its operation are provided for therein. Section 7(a) reads in part: "The term 'employment' does not include: (a) Agricultural labor; * * *." No definition of that term is given in the act. Plaintiff, California Unemployment Commission is created by the act (§ 75), and to it is entrusted the enforcement of the act. It is authorized, and it is its duty, to "adopt and enforce rules and regulations which to it seem necessary and suitable to carry out the provisions of this act." (§ 90(a). Its first rule, and an amplification thereof defining the term "agricultural labor," were effective in 1935. It generally embraced anyone engaged in the art or service of cultivating the ground, the harvesting, or the packing and preparation for market of products where the commodity does not change its original state. The amplification dealt with horticultural products. A rule effective in January, 1936, also exempted from the operation of the act services performed in the packing and preparation for market by growers and nonprofit cooperative marketing associations, where the commodity did not change its original state, and such services were performed exclusively for members and no profit was made.

There is a clear indication in those rules that it was intended that the term "agricultural labor" should embrace more than employment in the mere cultivation and harvesting of products. Packing and preparation for market were also included when done by a nonprofit association, which may imply that services rendered in connection therewith need not be performed upon the land where the commodities were produced or for the actual producer. In the instant case the storage was an incident of the harvesting, packing and preparation of the products for market. The rule (rule 7.1) effective on February 14, 1937, which was in force during the time here involved, is quoted in the majority opinion. The rule adopted in April, 1940, added nothing material to the above quoted rule 7.1, insofar as the facts in the instant case are concerned. The Legislature evinced its approval of those rules by its action and inaction after their adoption. During the first session of the Legislature following the adoption of the act (1937), rule 7.1 became effective. At that session section 7 of the act was twice amended (Stats. 1937, pp. 2052, 2057), but the term "agricultural labor" remained the same as it had theretofore existed without amplification. Likewise, in 1939, section 7 was amended but no definition of what constituted agricultural labor was given. Stats.1939, ch. 628, p. 2048; ch. 1039, p. 2850. At the 1939 session section 90(b) of the act dealing with the authority of the commission to adopt rules and regulations was amended by adding thereto the sentence: "Rules or regulations heretofore adopted shall continue in effect until amended or rescinded in accordance with the procedure prescribed by this section." Stats.1939, ch. 1083, p. 3006. Also during the 1939 session of the Legislature, amendments to the Federal Social Security Act dealing with unemployment insurance were being considered and such amendments were adopted by Congress on August 10, 1939, 26 U.S.C.A. Int. Rev.Code, § 1600 et seq.; they defined agricultural labor in detail and broadly, the term having theretofore been undefined by Congress. It read in part: "The term 'agricultural labor' includes all service performed—(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and furbearing animals and wild life. * * *

"(4) *In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity;* but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption." 26 U.S.C.A. Int.Rev.Code, § 1607. A bill introduced in the Legislature providing for the adoption of the federal definition of the term, whatever it might be did not pass. However, the 1939 amendment to section 7 of the California Unemployment Insurance Act did add many of the other amendments made by Congress in 1939. At the extra session of the Legislature in 1940, a resolution directing the commission to adopt the definition given to the term by Congress in 1939 did not pass. In 1941, the Legislature again amended several sections of the act but did not amend section 7. A bill was introduced to amend section 7 so as to define the term practically the same as was done by Congress in 1939, but on recommendation of the committee to which it was assigned, the amendment was stricken. In 1943, the Legislature passed a bill amending section 7, giving the definition of the term used by Congress in the 1939 federal statute; it was vetoed by the Governor.

It should also be noted that the act was adopted in California in the light of contemplated conformity to the federal act. Because of the interrelation of the acts, the obligations imposed by them, and the necessity for the adoption of an approved state act in order that benefits under the federal act may be enjoyed, there is a strong justification for the policy that they operate uniformly and harmoniously. See Industrial Commission v. Woodlawn Cemetery Ass'n, 232 Wis. 527, 287 N.W. 750; Woods Bros. Const. Co. v. Iowa U. Compensation Comm., 229 Iowa 1171, 296 N.W. 345; Matcovich v. Anglim, 9 Cir., 134 F.2d 834; Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, 60 S.Ct. 279, 84 L.Ed. 322. That policy is evinced by the state act. Section 2 provides in part: "This act is enacted as a part of a National plan of unemployment reserves and social security, and for the purpose of assisting in the stabilization of unemployment conditions. The imposition of the tax herein imposed upon California industry alone, without a corresponding tax be imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of this act set forth in section 1. Therefore this act shall take effect only if and when there is enacted legislation by the United States Government providing for a tax upon the payment of wages by employers in this State, against which all or any part of the contributions required by this act may be credited." Hence, heed must be given to the federal act as interpreted by the rules adopted thereunder and also by the latest amendments thereto which define agricultural labor to clearly embrace the activities involved in the instant case. The federal cases have recognized that the services need not be performed by employees of the farmer. Stuart v. Kleck, 9 Cir., 129 F.2d 400, and Chester C. Fosgate Co. v. United States, 5 Cir., 125 F.2d 775, follow the federal definition. They held that in its orthodox sense the services performed where a corporation supplied labor to cultivate the soil and do other things on the land for the owners thereof, constituted agricultural labor within paragraph (a) of the treasury regulation, and that the second sentence in paragraph (b) was not intended to qualify paragraph (a). Indeed, they applied the regulation. In line with those cases (see, also, California Employment Comm. v. Bowden, 52 Cal.App.2d Supp. 841, 126 P.2d 972) under the first paragraph of the rule the services may be agricultural labor where the employees are not employed by the owner or tenant of a farm when, however, the services performed are of the character which are clearly acts of farming. When it comes to packing, processing, transporting and storing in a warehouse off the farm we find activities which are in many respects a part of farming operations.

Applying rule 7.1 to the facts in the instant case, it clearly appears that the services performed by defendant's employees constituted agricultural labor as therein defined. True, the employees were not engaged by the farmers or tenants in person, but as above shown that was not necessary and the activities engaged in by defendant were concerned either with storage of the products of farms owned or operated by its members, or the procurement and handling of merchandise used by its members in farming operations. The corporation, the association, is nothing more than an instrumentality of the owners and tenants of the farms. None but owners or tenants are accepted as members. The corporation is nonprofit and operates for its members thus indicating its noncommercial character and that it is only an instrumentality of the members. This view finds support by implication in the law under which defendant is organized. Section 1213 of the Agricultural Code, St.1933, p. 262, provides: "* * * Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association." That clause embodies *a broad statement of policy that the association and its members may be treated as one in connection with exemptions in the laws although it refers only to products.* That is a policy which has been declared by the Legislature and was on the books when the act in question was adopted. The two must be read together and in so doing the only reasonable conclusion is that there was no intent to treat farmer exception provisions as applying only to instances where the farmers were not banded together in associations. In the case at bar it must be remembered that the trial court found for defendant and the evidence must be interpreted in a light most favorable to it. Only one instance is shown where a nonmember was supplied merchandise. The trial court may have disregarded that. Storage facilities were supplied *only to members.* The fact that defendant has a license to operate its warehouse and thus has assumed the duty to serve the public was not deemed controlling by the trial court. More vital is the actual manner in which defendant operates. The services performed are of the character that is common in conducting a farm, and a necessary part thereof, that is, handling and storage of the crops produced and handling and procuring equipment. *If a farmer stores his products on his property it would not be doubted that such was a part of his agricultural pursuit.* It is not required that such storage be made on his farm. If he or his neighbors form a group to perform the same functions off the farms they are still engaged in agriculture. If it be said that paragraph (1) of rule 7.1 does not embrace the activity here involved because it is not performed on the farm, and that likewise paragraph (2) does not include the activities here involved, then we have an activity which is clearly agricultural in character but which is neither embraced in nor excluded by the rule. However, we believe the storage of materials produced on a farm is included within paragraph (2), and, as we have seen, defendant's employees were in effect the employees of the landowners or tenants, and that the procurement of equipment for use on a farm is a farming activity. There is no commercial aspect to defendant's activity considering the manner in which it is conducted. In arriving at this conclusion I am not disregarding the corporate entity of defendant as that phrase is commonly understood but are merely arriving at a definition of agricultural labor.

The foregoing reasoning is ably supported in the case of Industrial Commission v. United Fruit Growers Ass'n, 106 Colo. 223, 103 P.2d 15, 17, where the court said: "Also it is conceded that if an individual farmer member of the association marketed the fruit produced from his orchard, the labor attendant to such marketing operation would enjoy an exempt status under both regulation 6 and statute. The commission contends, however, that a transition from an exempt to a non-exempt position occurs when the association takes over the marketing function, and the labor incident thereto is performed by *its* employees, and not the *farmers*. We cannot agree with this contention. If the labor employed by one individual grower in marketing his crop is within the exception of the statute, as unquestionably is the case, it would seem that if two or more farmers pool their crops and cooperate in marketing them, their situation would not be different from that of the individual grower. It is a matter of common knowledge that all fruit growers do not belong to cooperative associations and that such producers individually, with labor employed by them, attend to their own marketing operations. Thus we can perceive no reason for holding that because a number of fruit farmers cause a cooperative association to be organized for the purpose of facilitating the marketing of their farm products, they should be subject to the terms of a regulatory statute which concededly would not apply to the labor employed by them if acting individually, or by other persons engaged in the same activity who are not members of such an association. * * * The basic conception of an agricultural cooperative association is that of a group of farmers who reside in the same vicinity acting together for their mutual benefit in the cultivating, harvesting and marketing of their agricultural products, and the association itself, with the special powers and limitations conferred by statute, is merely a convenient instrumentality in the hands of the farmers for carrying on such activities. As is stated in United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 1008, 83 L.Ed. 1446: 'These agricultural cooperatives are the means by which farmers and stockmen enter into the processing and distribution of their crops and livestock.' In Mountain States Ass'n v. Monroe, 84 Colo. 300, 269 P. 886, we held that the relation between a cooperative marketing association and its members is that existing between a trustee and his beneficiary or a principal and his agent. Under our cooperative marketing law, such associations are given the power 'to act as the agent or representative of any member or members in any of the above mentioned activities' (c. 106, sec. 19(c), '35 C.S.A.), which includes 'marketing' (c. 106, § 17, '35 C.S.A.). Section 35 of the Cooperative Marketing Act provides: 'Any provisions of law which are in conflict with this article shall be construed as not applying to the associations herein provided for. Any exemptions whatsoever under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its members, in the possession or under the control of the association.' Accordingly, because of the peculiar relationship between the cooperative association and its members, it would seem evident that such of the purely agricultural activities of the producer members as are incidental to his ordinary farming operations remain so whether they are performed by him on his farm or for him through the medium of his cooperative marketing association."

The cases of Great Western Mushroom Co. v. Industrial Commission, 103 Colo. 39, 82 P.2d 751; H. Duys & Co., Inc. v. Tone, 125 Conn. 300, 5 A.2d 23; Park Floral Co. v. Industrial Commission, 104 Colo. 350, 91 P.2d 492; Christgau v. Woodlawn Cemetery Ass'n, 208 Minn. 263, 293 N.W. 619; Unemployment Comp. Div., etc., v. Valker's Greenhouses, 70 N.D. 515, 296 N.W. 143; and Oak Woods Cemetery Ass'n v. Murphy, 383 Ill. 301, 50 N.E.2d 582, relied upon in the majority opinion were concerned chiefly with the question of *industrial as distinguished from farming activity* or that the labor be performed on the farm. Those matters have heretofore been discussed. See St. Louis Rose Co. v. Unemployment Comp. Commission, 348 Mo. 1153, 159 S.W.2d 2[illegible]9. The latter factor is not required by the rule.

These views are not contrary to those expressed in Cowiche Growers, Inc., v. Bates, 10 Wash.2d 585, 117 P.2d 624. There, although reliance was placed upon North Whittier Heights Citrus Ass'n v. National Labor Relations Board, 9 Cir., 109 F.2d 76, the *state statute required that the services be performed on the farm for the owner or tenant.* Also see Appeal of Wenatchee Beebe Orchard Co., 16 Wash.2d 259, 133 P.2d 283.

Much reliance is placed by the majority opinion on North Whittier Heights C. Ass'n v. National L. R. Board, supra. That case is clearly distinguishable from the case at bar. First, the association there was engaged *in more than merely storing products grown by its members* and an incidental sale of farm equipment to its members as is true in the case at bar. It was engaged in "receiving, handling, washing, grading, assembling, packing and shipping the citrus fruit of its members *and others* for marketing under a marketing contract with the Semi-Tropic Fruit Exchange, which has a marketing agreement with the California Fruit Growers Exchange. Through these agencies practically all of the fruit handled by Petitioner moves directly from its plant to vehicles for transportation under the direction of the California Fruit Growers Exchange into interstate and foreign commerce." [109 F.2d 78.] The point is stressed by the court that it was a *big commercial enterprise* a condition certainly not present in the instant case. The court said at page 79 of 109 F.2d:

"The production and marketing of citrus fruits in California have *undergone changes as have various other activities in their transition from 'one man' affairs to 'big business'.* The public regard for the product itself has changed from that of a pretty and tasty tidbit to that of a standard widely used fruit food. Large acreages, in fact large sections of the State of California, are devoted almost wholly to this horticultural product. In the early days everything connected with the product was done 'on the farm'. Experience produced better fruit, better fruit created greater demand, greater demand impelled system in handling. *Possibly the most marked change in this transition was that of systematic marketing and uniformity in preparation for marketing, and these changes brought about the desirability of separating certain processes from the service of the 'farmer' to specialists.* The farmer also learned through bitter experience that individual grove product sale to middlemen or through consignment to independent fruit marketers resulted too often in ruin. The *vast and comprehensive system* which has been hereinbefore briefly alluded to was built up to adequately handle this large industry and to eliminate the practices which were so costly to the growers. Thus the growers themselves have separated from the farm, the work now done in the packing house and with which we are here concerned, and have assigned it to an incorporated organization brought into being by the growers for such particular purpose." (Italics added.) And at page 80 of 109 F.2d:

"When every detail of farming from plowing to delivering the produce to the consumer was done by the farmer and his 'hired man', this common denominator was present. But when in the transition of citrus fruit growing from this independent action to the *great industry of the present* in which the fruit is passed from the individual grower through contract to a corporation for treatment in a packing house owned and run by such corporation, to be delivered by this corporation to an allied corporation for transportation and market, we think the common denominator has ceased to exist." (Italics added.) And at page 80 of 109 F.2d:

"Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and *enters a factory for processing and marketing* it has entered upon the status of 'industry.'" (Italics added.) Second, contrary to the case at bar it held itself out to the public as serving and did serve all comers not merely members. That is indicated from the foregoing quotation. Third, there was involved much more than mere storage. The court said at page 80 of 109 F.2d:

"The premise laid down by petitioner in this phase of its argument is not, however, the exact situation facing us. The *packing house activity is much more than the mere treatment of the fruit.* When it reaches the packing house it is then in the practical control of a great selling organization which accounts to the individual farmer under the terms of the statute law and its own by-laws." (Italics added.) Fourth, the *same court in the later case of Stuart v.*

Kleck, 129 F.2d 400, held that where a corporation furnished agricultural services to be rendered to farmers on a farm, the labor was agricultural even though the employees were not hired by the farmer. In that case they were concerned with the Federal Social Security Act, 42 U.S.C.A. § 301 et seq., as distinguished from the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., involved in the Whittier Heights case. The court said in the Stuart case at page 402 of 129 F.2d:

> "When the Congress, in providing for an exemption from the provisions of the Act, made use of the broad term 'agricultural labor', this expression, used by itself, *must be given a meaning wide enough to include agricultural labor of any kind,* as generally understood throughout the United States.
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> * * * * *
>
> "In the recent case of Chester C. Fosgate Co. v. United States, 5 Cir., 125 F.2d 775, it was held that services rendered by a company in cultivating crops of citrus fruit under contracts with crop owners were 'agricultural labor' rendered in connection with the cultivation of the soil, even though crop owners did not directly hire laborers but dealt with the company, which in turn put laborers to work, and the company was entitled to recover back social security taxes assessed with reference to wages paid to those laborers."

(Italics added.) Moreover, the majority opinion here stresses the point (indeed the whole basis of the opinion rests on that point) stated in the Whittier Heights case that: *"The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it."* That theory was later *wholly repudiated by the same court in the Stuart case.* The court there said at page 402 of 129 F.2d:

> "Accordingly, the exemption attaches to the 'services performed', which refers to the *type of work that is being done, and is not dependent on the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor. * * * The important question, then, is: What is the nature of the services furnished and were these performed upon a farm?"*

(Italics added.) Fifth, and this goes to the heart of the whole matter, all of the above factors indicate *that the activity was so altered from ordinary farming operations that it became an industry.* But in the case at bar those conditions do not exist. There is no answer in the Whittier Heights case or in the majority opinion in the case at bar to the simple proposition that where farmers in a confined area (Butte County here) associate themselves for the sole purpose of maintaining a storage house near their farms for storing their products they are in no different position than if each of the members maintained such a house on his land, or on the land of one of the members. To say otherwise is to ignore the realities of the situation.

The majority opinion states that in the Whittier Heights case "the cooperative's packing house facilities were *directly* available to 'others' than members, *here* the defendant association's complete storage services are *indirectly* available to nonmembers—that is, 'applicants for membership' or 'temporary members' who, by paying the negligible application fee of $10 and without requirement to become fully paid-up ($300) members, are entitled to share in *all* the warehousing privileges. Such a tenuous line of demarcation between the two cases is in fact no distinction at all insofar as mode of operation is concerned." *That statement is not borne out by the record.* The applicant members must have the same qualifications as the regular members and must be farmers in the area. That is quite different from a business holding itself out to the public generally.

The case really simmers down to the proposition as to whether farmers can do collectively through a nonprofit association in the legal form of a corporate entity that which they could do individually or in small groups on their individual farms without incurring liability for the unemployment insurance tax. It is conceded that the work which the employees perform for defendant is the same work which they would perform for the individual farmers if they had similar storage facilities on their farms, and that such work would be classified as farm labor under the definition of that term promulgated by the Unemployment Insurance Commission. This, to my mind, is the controlling factor in this case.

From what I have said in the foregoing dissenting opinion it is obvious that the judgment should be affirmed.

EDMONDS, J., concurred.

Rehearing denied; EDMONDS and CARTER, JJ., dissenting; SCHAUER, J., not participating.

67 Cal.App.2d 586

TANNER v. SHERMAN.

Civ. 3149.

District Court of Appeal, Fourth District, California.

Jan. 18, 1945.

1. Replevin ⚿72

In action in claim and delivery for recovery of a slot machine and for damages for detention, where evidence disclosed that machine was new when placed in cafe, that it had not been opened to determine what money it had earned, that when taken by defendant sheriff it was out of working condition, and that it had only $3.80 in it when opened in court, court was not bound to accept plaintiff's testimony that the machine was capable of earning $5 per day and was justified in determining that plaintiff was not damaged by the seizure and detention. Pen. Code, § 330a.

2. Appeal and error ⚿931(1)

Where it is claimed in support of appeal from judgment that findings on which judgment is based are contrary to evidence, all inferences reasonably possible from the evidence favorable to judgment must be indulged in by the appellate court.

◆

Appeal from Superior Court, Tulare County; Clark Clement, Judge.

Action in claim and delivery by Walter D. Tanner against S. B. Sherman, individually and as Sheriff of Tulare County, Cal. From the judgment, plaintiff appeals.

Affirmed.

Clyde E. Cate and Ralph Robinson, both of Fresno, for appellant.

Walter C. Haight, Dist. Atty., and John R. Locke, Jr., Deputy Dist. Atty., both of Visalia, for respondent.

GRIFFIN, Justice.

This is an action in claim and delivery for the recovery of a "Jennings Silver Moon Console" slot machine from defendant, and for damages in the sum of $5 per day for the period of withholding.

The defendant admitted the seizure thereof in his official capacity as sheriff and contended that such seizure was lawful because the machine was a gambling device.

The evidence shows that the machine paid off in "free games". The trial court ruled that it was not a gambling device under Penal Code, section 330a, and under the authority of Gayer v. Whelan, 59 Cal.App. 2d 255, 138 P.2d 763, (decided during pendency of the instant case), and that plaintiff was entitled to recover the machine from defendant. It expressly found that the plaintiff was not damaged by defendant's seizure and withholding of the slot machine in the sum of $5 per day or in any amount.

It is true that plaintiff testified that the slot machine was capable of earning $5 per day. In support of his contention that the court erred in refusing to allow him damages, plaintiff cites Atlas Development Co. v. National Surety Co., 190 Cal. 329, 212 P. 196, which was an action on an attachment bond based upon a judgment for the recovery of a certain oil rig outfit and for the rental value thereof during the wrongful detention. The court in that case made an allowance for such wrongful detention. In the present case the court refused such an allowance.

There is evidence that at the time the machine was taken by the sheriff it was in a cafe in Sultana and was in a state of unrepair, and that it had been out of working condition for most of the time it was in the cafe, which was a period of two or three months.

Plaintiff testified that it was a new machine when placed there and that the machine had not been opened to determine what money it had earned. There was no evidence as to whether, after its seizure, the machine could have been repaired so that it might thereafter be operated. Undoubtedly, the slot machine in question had a very complicated mechanism and it might well be that the necessary parts to repair it would not be available due to war time shortages or priorities. The machine had only $3.80 in it when unlocked and opened in the court room. The amount found therein would not even equal one day's claimed earnings, and according to plaintiff's testimony the owner of the cafe where it was located was entitled to one-half of that.

[1, 2] The trial court was not bound to accept plaintiff's testimony that the particular machine here involved earned or was capable of earning $5 per day. When it is claimed in support of an appeal from a judgment that the findings on which the

judgment is based are contrary to the evidence, all inferences reasonably possible from the evidence favorable to the judgment must be indulged in by the appellate court. Bandle v. Commercial Bank of Los Angeles, 178 Cal. 546, 174 P. 44.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

67 Cal.App.2d 524

CARTER et al. v. CITY OF LOS ANGELES et al.

Civ. 14499.

District Court of Appeal, Second District, Division 2, California.

Jan. 12, 1945.

1. Evidence 🔑506

The court, rather than expert witnesses, must decide the ultimate facts.

2. Evidence 🔑506

Expert witnesses may not give opinions on matters which are essentially within the province of the court to decide.

3. Evidence 🔑506

Court, in asking expert witnesses whether suspension of civil service employees was in accordance with accepted principles of civil service and whether the employees were fairly treated, improperly shifted the responsibility of deciding the issues before the court from its shoulders to those of the expert witnesses.

4. Appeal and error 🔑1048(2)

Where suspension of civil service employees from positions of field collectors in municipal department of water and power was justified on ground that they had never qualified by examination, but substantial evidence supported employees' contention that they had obtained such position after civil service examination, error in permitting expert witnesses to express opinion that employees had been fairly treated and that suspension was in accordance with accepted civil service principles required reversal.

5. Mandamus 🔑168(4)

In mandatory proceeding to compel reinstatement of civil service employees in municipal department of water and power, the weight of evidence affecting good faith of the department was for consideration of court and not for expert witnesses.

5. Evidence 🔑1506

Municipal corporations 🔑205

Reclassification of position in municipal department of water and power did not justify removal of civil service employees from positions of field collectors which they had obtained after civil service examination, and question whether they had obtained such a position was required to be determined by court and not by expert witnesses.

◆

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Mandatory proceeding by Ruby Carter and another against the City of Los Angeles and others to compel restoration of petitioners to their positions as civil service employees in the Department of Water and Power of the City of Los Angeles and to recover their salaries. From an adverse judgment, plaintiffs appeal.

Reversed.

Jerrell Babb, of Los Angeles, for appellants.

S. B. Robinson, of Los Angeles, for respondent Water & Power Co.

Ray L. Chesebro, Mark A. Hall, Asst., George William Adams, A. L. Lawson, and Wendell Mackay, Deputies, all of Los Angeles, for respondent City of Los Angeles.

W. J. WOOD, Justice.

The petitioners, Ruby Carter and Elizabeth A. Baltes, have appealed from a judgment against them in a mandatory proceeding wherein they seek to be restored to their positions as civil service employees in the Department of Water and Power of the City of Los Angeles and to recover their salaries from the date on which they were suspended from their positions, December 31, 1940. The respondents are the City of Los Angeles, The Department of Water and Power of the City, the Board of Civil Service Commissioners of the City and the Controller and the Treasurer. Appellants allege that they were improperly removed from their positions as field collectors in the Department upon the unfounded charge that there was a lack of work.

Appellants now contend that at the time of their discharge they were actually performing field collection work and work related thereto in accordance with the outlined duties set forth in the notice of the civil service examination for field collector which they took and successfully passed; that there has been no lack of work in the position they held but that since their discharge the positions have been occupied by two women having a classification different from that of appellants.

During 1939 and 1940 a survey was made by respondent commission for the purpose of improving the efficiency of the civil service system of the city. As a result of the survey the various duties that had been performed by those holding the position of field collector were separated into two classes, the number of field collectors was decreased and the work which had been performed by appellant Baltes was assigned to an employee having the classification of general clerk and the work which had been performed by appellant Carter was assigned to an employee having the classification of junior clerk typist. The position of respondents is shown by the following quotation from their brief: "The respondents agree that the reclassification of a position cannot effect the removal therefrom of a civil service employee who has qualified for such position through examination. An employee loses none of his prior rights to a position because of its reclassification, nor does he gain any rights thereby. But this is not the problem which is involved in this appeal. In this case the appellants had never been examined for the respective positions which they occupied. They were not removed therefrom because of any claim that such positions had been reclassified. On the contrary, they were removed therefrom because they had never qualified by examination to perform the duties of such positions."

Respondents presented as witnesses several experts in civil service matters who testified that in their opinion appellants were not doing the work of field collectors. When their testimony was completed the trial court recalled them and propounded questions which were answered over the objection of appellants. These unusual rulings call for a reversal of the judgment. One of respondents' witnesses, Louis P. Smeltzer, testified that he had been an employee of the Department of Water and Power since 1933, his duties being to direct all matters concerning "the removal or suspension or discharge or transfer" of civil service employees. The record discloses:

"Q. By the Court: Mr. Smeltzer, you have testified as a civil service expert, will you tell the court whether or not, in your opinion, the suspension of the petitioners was according to the rules and accepted procedure of civil service? A. The lay off, the suspension of the two petitioners along with others that took place at that same time, is directly in accordance with the regulations provided by Section 125 of the City Charter, and the Civil Service rules as brought up thereunder.

"Q. Have you studied and given consideration as a civil service expert to the proceedings of the commercial division, Water and Power Department, Civil Service Commission, to determine whether, in your opinion as an expert, the proceedings by which the petitioners were suspended December 31st, 1940, was in any respect a violation of accepted principles of civil service? A. After carefully investigating the various factors that led up to laying off of petitioners, it is my belief that there are no grounds for which a violation of civil service principles of a fair, free field and no favor, can be based. In other words, were not only the procedure ordered by civil service carried out, but in our carrying them out, no favors or prejudices were assessed against any of the group of employees who were liable to lay off, namely, those in the class group of field collectors."

One of the other expert witnesses, Charles Steven, testified that he was director of the personnel commission of the Los Angeles City schools. The record discloses the following:

"Q. By the Court: Mr. Steven, you have testified as an expert as a civil service worker in the field personnel since 1909, have you studied the question whether these young women were in any way unfairly treated in the order of lay off? A. I have.

"Q. What is your answer? A. They were not unfairly treated.

"Mr. Babb: The answer came so fast I didn't get a chance to object. I move the answer be stricken so I may object.

"The Court: The answer is stricken for the purpose of objection.

"Mr. Babb: I object to that question on the ground that the witness hasn't qualified himself to give a proper answer, he not having shown, for the purpose of the record or otherwise, that he has made an investigation inquiring into the unfairness or fairness of the matter, he merely qualified himself as an expert here by stating what he had done in past years, and not one word of evidence has come into this case as to what investigation he did make. The question is calling for a decision on a question of law, calling for a conclusion of facts which are not in evidence.

"The Court: That is your objection? Mr. Babb: And the witness hasn't stated sufficient qualifications to entitle him to give such an answer.

"The Court: Objection overruled. Motion to strike is denied, the answer is reinstated. That is all I wanted to ask. I wanted your opinion as an expert, a man I know quite well to be an honest worker.

"Mr. Babb: I don't doubt that. Cross-Examination.

"By Mr. Babb: Q. You said you investigated this matter to determine whether or not these employees had been unfairly treated? A. Yes.

"Q. Now just tell us what investigation you made on that? A. Besides what I have mentioned before, I have been quite a constant attendant in this court for several days, heard the arguments of the attorneys and heard the testimony of Mr. Smeltzer and others, and I think I have quite a comprehensive view of the issues in this case from attendance in this court.

"Q. Have you ever interrogated these plaintiffs in your investigation? A. I have not.

"Q. Have you interrogated anybody in this investigation you mentioned? A. Yes.

"Q. Who did you interrogate? A. I interrogated Mr. Smeltzer, Mr. Fisher, Mr. Mackey, Mr. Lawson, the people in my office whom I talked this over with, my classification technician, my junior research assistant—

"Q. Did the people in your office know the facts of the plaintiffs' case themselves, beyond your say? A. Yes, we had copies of their complete civil service record, with the Water and Power Commission.

"Q. I believe you stated that you have not discussed the matter at all with the plaintiffs? A. I have not.

"Q. So then you are basing your answer upon—primarily you are basing your answer upon what you have heard here in the court room, is that right? A. It would be a little hard to evaluate it at the moment; I think from what I studied in the records, what I discussed with my office staff, are very essential parts in making up my mind."

[1-3] It is not contended by respondents that the trial court could properly refer the decision of the ultimate issues to an expert even though he be one whom the court knew quite well as an honest worker. But if by chance such a contention should be made it would be unavailing for, in addition to the general rule that the court must decide the ultimate facts, the witness Steven did not claim to have heard all of the evidence, especially that bearing on the discharge of Gordon Rogers and the views of the Division Head concerning the employment of women as field collectors, hereinafter alluded to. On the other hand the witness stated that he had not interrogated appellants. He stated that he had based his answers in part upon his discussion with his own office staff, including his "junior research assistant." Conceding, without deciding, that expert testimony was proper on any of the issues before the court in the present proceeding, it is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide. Morgan v. Myers, 159 Cal. 187, 113 P. 153; 10 Cal.Jur. 953 and cases there cited. It is apparent that the court, in asking the experts whether the suspension of appellants was in accordance with accepted principles of civil service and whether appellants were fairly treated, was shifting the responsibility of deciding the issues before the court from its own shoulders to those of the expert witnesses.

[4] We cannot agree with the contention of respondents that notwithstanding the action of the court in propounding questions to the experts the judgment should be nevertheless affirmed, for appellants presented evidence giving substantial support to the allegations of their petition. After working for sometime as emergency employees appellants took a civil service examination for the position of field collector. In announcing the examination for field collector respondent commission prescribed the duties as follows: "Duties: Under general supervision, to route the

daily collection work which consists of getting all delinquent water, light and power bills, closing bills and bills returned by the Post Office Department in street and street number order; to present such bills for collection and collect monies from consumers; to trace consumers who have moved without leaving a forwarding address; to follow up checks that have not been honored by banks; to present charity bills for verification of occupants; to obtain contracts from consumers for water and light; to make shut-offs on account of unpaid delinquent bills and to apply lock fuses to services that have been shut off; to turn in collections, bills, stubs and other records; to make out daily reports of collections; and to perform related work as required."

After an eligible list for the position of field collector had been established, respondent department requested respondent commission to certify the names of two females for the position of field collector and in response to this request respondent commission certified the names of appellants. On and after November 6, 1936, appellants were employed pursuant to certification as field collectors in the commercial division of respondent department.

During the course of the trial respondents produced in court an organization chart entitled "Commercial Division, Field Collection Activity Progress Chart showing source and kind of material, checking material, and distribution of material to field collectors." The chart divided the work of the field collection activity into three parts, namely: 1. Source and kind of material accumulated in special collection unit during the day. 2. Checking of corresponding account by bookkeeping unit during that night. 3. Distribution of Collection Material to field collection unit the next day. The first part mentioned on the chart is divided into 8 parts, namely: 1. Closing bills. 2. Delinquent regular bills. 3. Bills previously sent to field. 4. Three star and special bills. 5. B.C. and I.C. bills. 6. E.H. F.H. bills. 7. Notice to Guarantee. 8. N.G. checks. Appellants were assigned to perform work embraced within the title in the first division of the chart, namely, source and kind of matter accumulated in special collection unit during the day. The unit to which they were assigned was called by the head of the division the "special collection unit." Each of appellants testified concerning the work she performed and the number of hours given to each particular task. From their testimony it could be reasonably concluded that they were performing services as field collectors, a position which included both office work and outside work. Indeed, at the time of the trial, it was shown by witnesses for respondents that, notwithstanding the division of the work into office work and field work, some of those who at the time of the trial were holding the position of field collector were in fact doing office work, due to the shortage of man power.

[5] The witness Gordon Rogers testified that he was laid off from the position of field collector on February 21, 1941, and that prior to that time he had held the position for approximately eight years and had had seniority over appellants; that during most of his time he was doing office work; that Mr. White, head of the division, had threatened to lay him off and told him that he would dispose of him one way or the other, even if he had to lay off other people who were below him in seniority in order to reach the witness. Mr. White admitted that he wanted men and not women in the position of field collector. The weight of these matters, as affecting the good faith of respondent department, was for the consideration of the court and not for the experts. It was not shown that the experts had any knowledge of this evidence.

[6] There was not at the time of the suspension of appellants or at the time of the trial a lack of work in the collection activities of respondent department, the claim being merely that there was a lack of work "in class." The reclassification of positions following the survey in 1940 cannot justify the removal of appellants from a position which they obtained after civil service examination. The question whether they did in fact obtain such a position should have been determined by the trial court and not by expert witnesses.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

67 Cal.App.2d 486

McALPINE v. LOS ANGELES RY. CORPORATION.

Civ. 14426.

District Court of Appeal, Second District, Division 2, California.

Jan. 10, 1945.

1. Street railroads ⇨102(1)

There could be no recovery from street car company if sole cause of injury to person waiting in street loading zone to transfer to another car was protrusion of body of another person who had boarded moving street car contrary to ordinance.

2. Municipal corporations ⇨595

An ordinance forbidding boarding of moving street cars or vehicles in motion was enacted for the benefit of the public generally.

3. Trial ⇨252(8)

Where there was no evidence that person whose body struck plaintiff was standing on steps of street car, and it was not shown that plaintiff was at time of accident a passenger to whom street car company owed duty to adopt some means of preventing persons from boarding or attempting to board moving street cars, an instruction based on assumptions to the contrary was properly refused

4. Carriers ⇨247(1)

The relation of passenger and carrier terminates when a passenger alights upon a public street and clears the car from which he alights.

5. Carriers ⇨247(5)

A passenger who had alighted from street car and walked about 50 feet along the safety zone where she intended to transfer to another street car, but was injured before doing so, was no longer a "passenger".

See Words and Phrases, Permanent Edition, for all other definitions of "Passenger".

6. Street railroads ⇨118(1)

An instruction that if street car company could have adopted some means of preventing passengers from boarding or attempting to board street car while in motion, failure to do so would be negligence, was properly refused.

7. Trial ⇨252(8)

Where plaintiff had ceased to be a passenger before she was injured, and there was no evidence that she was struck by an obstruction attached to street car, refusal to give an instruction based upon assumptions to the contrary was proper.

8. Street railroads ⇨112(2)

Res ipsa loquitur was not applicable where person standing in street loading zone was injured by protrusion of body of another person who had boarded moving street car contrary to ordinance.

◆

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action for personal injuries by Lillian J. McAlpine against Los Angeles Railway Corporation. From a judgment for defendant, the plaintiff appeals.

Judgment affirmed.

Clyde C. Downing, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover for damages suffered when she was injured after she had alighted from a street car operated by defendant. A jury returned a verdict in favor of defendant and plaintiff has appealed from the ensuing judgment.

There is no dispute as to the facts. Plaintiff was a passenger on one of defendant's cars on June 16, 1942. When the car stopped at 7th and Hill Streets in Los Angeles she alighted from the car and stepped into the loading zone and walked along the loading zone to its end, a distance of about 50 feet, with the intention of transferring to another car. At the end of the loading zone she stood inside the painted white line waiting for the traffic signal to change. A street car which had stopped in front of the car from which plaintiff had alighted passed on, followed by the car in which plaintiff had been a passenger. After this car had resumed its forward motion a man named Ward came from the curb and boarded the rear steps of the car at approximately 10 feet from plaintiff. His hips protruded into the loading zone and as the rear of the car passed, plaintiff was struck by the protruding hips and was knocked down. The conductor of the street car had signaled to the motorman to proceed after observing that the steps were clear. The motorman had observed through his rear window that the rear steps were clear when he started the car.

Plaintiff now contends that the court erred in giving to the jury the following instruction: "I instruct you that at the time of the happening of this accident Section 80.46 of the Los Angeles Municipal Code, as found in Ordinance No. 77,000, provided as follows: 'No person shall board or alight from any street car or vehicle while such street car or vehicle is in motion.' I further instruct you that a violation of the section which I have just read to you is negligence as a matter of law. If you find from the evidence in this case that after the street car from which plaintiff had previously alighted had started and was in motion and while in motion a person attempted to board the steps at the rear end thereof and that in so doing his body projected out into the loading zone and struck plaintiff as the car was passing her position, and if you further find that such was the sole, proximate cause of the injuries sustained by plaintiff, then I instruct you that there can be no recovery by plaintiff in this case and your verdict must be against the plaintiff and in favor of the defendant."

[1, 2] The foregoing instruction is a clear statement of the rule applicable to the facts of the present case. In arguing that the court should not have given this instruction plaintiff asserts that she was not among the class of persons for whose benefit the ordinance was enacted. We find no merit in this contention. The ordinance was enacted for the benefit of the public generally. King v. San Diego Electric R. Co., 176 Cal. 266, 168 P. 131.

Plaintiff complains of the refusal of the court to give to the jury the following instruction: "If you find from the evidence that the defendant in the exercise of its duty to passengers as defined in the instruction just given, could have adopted some means of preventing passengers from boarding or attempting to board the street car involved in the accident while the same was in motion, and that the adoption of such equipment would have prevented Edward Ward from attempting to board said street car and from standing on the steps thereof while in motion, then the failure to provide such equipment would be negligence."

[3-6] We find no error on the part of the court in rejecting this instruction. It was not shown in evidence that Ward was standing on the steps of the car, nor was it shown that plaintiff was at the time of the accident a passenger to whom defendant owed a duty as such. The relation of passenger and carrier terminates when a passenger alights upon a public street and clears the car from which he alights. Choquette v. Key System Transit Co.,.118 Cal. App. 643, 652, 5 P.2d 921. In this case plaintiff had not only alighted from the car but had walked a distance of about 50 feet along the safety zone. Moreover the instruction would have told the jury, in effect, that the carrier would be liable if it had been *possible* to adopt means of preventing passengers from boarding a car in motion. The court did in fact properly instruct the jury that it was defendant's duty to keep pace with science, art and modern improvements, and that it must exercise the highest degree of care towards its passengers, but plaintiff could not demand that the court instruct the jury that defendant was bound to provide "every possible preventive which the highest scientific skill might suggest." Treadwell v. Whittier, 80 Cal. 574, 593, 22 P. 266, 272, 5 L.R.A. 498, 13 Am. St.Rep. 175.

Complaint is made by plaintiff of the refusal of the court to give the following instruction: "I instruct you that the law of this state requires a carrier of passengers for reward to use the utmost care and diligence for their safe carriage, and if you find from the evidence submitted in this case that the plaintiff was a passenger upon one of the defendant's cars, and that before she had a reasonable opportunity to reach a place of safety upon alighting from said car she was struck by an obstruction attached to the car from which she had alighted, then the burden is cast upon the defendant to prove that the injury was occasioned by an inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff."

[7, 8] The court ruled correctly in refusing to give this instruction. There is no evidence that plaintiff was struck by an "obstruction attached to the car" and, as we have seen, plaintiff had ceased to be a pas-

senger when she was struck by Ward's protruding body. The instruction in effect attempts to eject into the case the doctrine of res ipsa loquitur, a doctrine which clearly is inapplicable.

The judgment is affirmed.

MOORE, P.J., and McCOMB, J., concur.

PEARSON CANDY CO., Limited, v. WAITS et al.

Civ. 14627.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1944.

Rehearing Denied Jan. 11, 1945.

Hearing Granted Feb. 19, 1945.

Action 🔑6

Under the Declaratory Judgment Act, the superior court had jurisdiction of employer's action against labor union and officers to determine rights of the parties under a closed shop contract, which employer was allegedly forced to execute by threats, where the regional war labor board had concluded that the legality of the contract should be determined by the National Labor Relations Board, or other tribunal of competent authority, and the National War Labor Board had refused to review the regional board's order. Code Civ.Proc. § 1060; National Labor Relations Act, 29 U.S.C.A. § 151 et seq.; Const. art. 6, § 5.

MOORE, P. J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Henry M. Willis, Judge.

Action by Pearson Candy Company, Limited, against E. R. Waits, individually and as a member of, and representative of, Bakery and Confectionery Workers' International Union of America, Local 417, and others, for declaratory judgment as to the rights of the parties under a closed shop agreement, wherein defendants filed cross-complaint. From a judgment dismissing the complaint and the cross-complaint on ground that court was without jurisdiction to grant the relief sought, plaintiff appeals.

Reversed.

Joseph L. Fainer and Russell E. Parsons, both of Los Angeles, for appellant.

David Sokol, of Los Angeles, for respondents.

McCOMB, Justice.

This is an appeal from a judgment dismissing plaintiff's complaint and defendants' cross-complaint on the ground that the superior court was without jurisdiction to grant the declaratory relief sought by plaintiff.

The findings of the trial court supported by substantial evidence disclose the following facts:

1) That plaintiff was a corporation organized under the laws of the state of Nevada, engaged in the business of manufacturing candy.

2) That plaintiff's principal factory was located in Los Angeles, and that plaintiff obtained its raw material from Iowa, Michigan and other states of the Union, selling the finished product in the states of Arizona, California, Nevada, Oregon and Washington.

3) That defendant E. R. Waits, was the business agent of his co-defendant; that defendant Bakery and Confectionery Workers' International Union of America, Local 417, was a labor union affiliated with the American Federation of Labor.

4) That within a day or two prior to November 1, 1941, one Clay C. Rittenhouse, who was then and there a business agent of the Bakery and Confectionery Workers' International Union of America, Local No. 417, together with another employee and business agent of the said union, came to the office of the plaintiff and stated to representatives of the plaintiff and to the plaintiff: "We have followed one of your trucks and observed that it passed through a picket line and we have followed it from that picket line to your place of business, and just for that we are going to make you sign a contract with us," and thereupon produced a form of contract similar to the agreement attached to plaintiff's complaint herein and marked Exhibit "A,"[1] and stated: "We will give you a day or two

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[1] The contract was the usual form of Closed Shop Agreement.

to sign this agreement and if you don't sign it we will see to it that no trucks enter your establishments or deliver goods to you; we will see to it that no trucks are able to leave your plant; we will go to the railroads and see to it that they refuse to deliver merchandise to you or to accept merchandise from you; we will put a picket line around your place of business; we will picket your customers, and we will pursue a course of conduct that will put you out of business, and unless you sign this contract we will do whatever is necessary to put you out of business. We have practically broken the Hoffman Candy Company and you'd better get smart, or else"; and thereupon a representative of the plaintiff replied, "Well, we have no quarrel with your union. If one of our drivers went through a picket line, we did not know anything about it. We have instructed them not to do so. And another thing, none of our employees belong to your union, so far as we know, and if you men want to go ahead and solicit their membership, go to it. We are strictly neutral but you are welcome to go ahead and solicit our employees and if they want to join your union it is all right with us. That is their privilege." Thereupon a representative of the said union replied, "Sure. We haven't any members in your plant, but you are going to sign a Closed Shop Agreement, and you are going to make your people join 'or else. Why should we bother chasing these people up? You can sign the contract or we will put you out of business. It is up to you to see that these people join the union." Whereupon a representative of the plaintiff replied, "Well, the Christmas trade is coming, and we have almost Ten Thousand Dollars ($10,000.00) tied up in holiday candy, and we want no trouble. Why don't you go ahead and talk to our workers? If they want to join it is perfectly all right with us." Whereupon the representative of the union replied, "That is your hard luck. We know you have got your money all tied up, and unless you come through and sign this agreement right now, we will put you out of business. We'll break you—we'll teach you a lesson." In fear, and believing that the said defendant union and its members and business agents would use force and violence, or whatever means they thought were necessary to compel this plaintiff to sign this agreement, the plaintiff, before it was able to call a meeting of its board of directors, did sign the agreement and thereafter, in good faith, posted all notices of union meetings, and in good faith called upon the union to supply it with help from time to time; and only on one occasion did the union ever send help, and the plaintiff has been forced to hire labor wherever it was able to obtain it.

5) That plaintiff was engaged in interstate commerce and that when the contract above referred to was executed defendant union did not represent for bargaining purposes the majority of the employees of plaintiff.

6) That in January, 1943, the defendant union filed with and submitted to the National War Labor Board the issue whether or not the plaintiff company was bound by the contract in question. After a hearing by the Tenth Regional Board of the National War Labor Board, the Regional War Labor Board on May 25, 1943, issued its directive order in effect ordering the plaintiff to perform the contract in question "until such time as it should have been terminated in accordance with its provisions, or by agreement of the parties, or until the contract shall have been held invalid by the final decision of a competent tribunal." The directive then proceeds as follows: "This Board, while not expressly deciding that it is without jurisdiction to determine the legality of the contract, concludes, for reasons of policy, that the determination of legality should be made by the National Labor Relations Board or other tribunal of competent authority, the issues in dispute being meanwhile resolved through the Board's direction that the contract be observed."

Plaintiff sought a review of the order by the National War Labor Board, but it was denied on July 16, 1943.

This is the sole question presented for our determination:

Did the superior court have jurisdiction to determine the respective rights of the parties under the contract they had entered into?

This question must be answered in the affirmative. Section 1060, Code of Civil Procedure provides in part as follows: "Any person interested under * * * a contract * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such * * * contract." This section has been held constitutional by our Supreme Court in the case of Blakeslee v. Wilson, 190 Cal. 479, 482 et seq., 213 P. 495.

Clearly under the wording of section 1060, Code of Civil Procedure, the superior court had jurisdiction of the action now before us unless there is some paramount act of the federal government which deprives the court of its power to act. No such act has been called to our attention. There is nothing in the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., nor in the act creating the National War Labor Board which would deprive the superior court of jurisdiction in a case like the one here presented. This construction appears to have been recognized by the Tenth Regional Board of the National War Labor Board when it made its order relative to the present controversy: "This Board, while not expressly deciding that it is without jurisdiction to determine the legality of the contract, concludes, for reasons of policy, that the determination of legality should be made by the National Labor Relations Board or *other tribunal of competent authority*. * * *"[2]

It has been the established policy of the state of California to make its courts open and available to its citizens at all times. This policy has been embodied in the organic law of our state. Article VI, section 5 of the state constitution contains this mandate: "Superior courts, municipal courts and justices' courts in cities having a population of more than forty thousand inhabitants shall always be open, legal holidays and nonjudicial days excepted." Should a different conclusion be reached we would find our citizens in the anomalous position of the plaintiff in the instant case, who to date has been without recourse in any tribunal. In the present case the National War Labor Board has refused to accept jurisdiction, and so has the superior court.

It is to be borne in mind that we are considering solely the question of the jurisdiction of the court to entertain the action. The absurdity of the position assumed by defendants in contending that the trial court's ruling is correct is illustrated by a hypothetical case: Let us assume that defendants had placed a gun against the head of plaintiff's president and forced him under threat of death to execute a contract. If the ruling of the trial court is to stand, the plaintiff would be without recourse and bound to follow the terms of the contract no matter what provisions it contained. This situation, of course, would not be indorsed by even the most biased and prejudiced citizen. The principle involved in our illustration is identical with the principle involved in the present action. Justice and orderly procedure require the superior court to accept jurisdiction, and after a fair trial render its findings and judgment which will then be subject to review by this court, the Supreme Court of the state of California and, in a proper case, the Supreme Court of the United States.

Certainly no fair, honest, intelligent citizen can find any valid objection to such procedure. The contrary course would commit us to a policy of overriding the express will of a democratic people whose desires have been expressed through their constitution, both federal and state, and align us with those peoples of the world who believe that the people are incapable of governing themselves through their duly constituted authorities.

For the foregoing reasons the judgment is reversed.

W. J. WOOD J., concurs.

MOORE, Presiding Justice (dissenting).

I dissent.

The question for decision is whether the superior court has jurisdiction to determine a labor controversy between an employer and a labor union where the National War Labor Board has assumed jurisdiction over the dispute affecting interstate commerce and has decided that the terms and conditions of employment contained in the contract between the employer and the labor union shall govern their relations.

Plaintiff having executed a closed shop agreement October 27, 1941, with the Bakery and Confectionery Workers' International Union of America, Local 417, sought by this action to obtain (1) a declaration of the rights and duties of the signatory parties, (2) an annulment of the instrument and (3) an injunction against defendants to forbid their compelling plaintiff to abide by the contract.

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[2] Italics added.

On this appeal plaintiff contends that (1) the contract was void from its inception; (2) that the rider to the Appropriations Act, Public Law 135, 57 Stat. 515, does not bar the superior court from entertaining jurisdiction of the controversy. The trial court found the facts substantially as alleged by plaintiff, towit: (1) Plaintiff is engaged in the candy manufacturing business which it extends through interstate commerce. The defendant, Local 417, is an association of workers allied with the American Federation of Labor. The defendant Waits is a member of Local 417 and is now its business representative. All are located in Los Angeles County where plaintiff's business is conducted. (2) On October 27, 1941, by the use of divers and sundry threats on the part of one Rittenhouse, then the representative of the union, that it would wreck the business of plaintiff if it should refuse to sign a closed shop contract with Local 417, plaintiff was induced to execute an agreement whereby plaintiff recognized the union as the exclusive bargaining agency for all employees coming under the jurisdiction of the agreement. (3) The agreement was to remain in full force from November 1, 1941, to April 30, 1942, and from year to year thereafter until terminated by either party upon thirty days' written notice prior to the termination date of such year. No notice of termination was ever given. By its terms plaintiff was required to hire members of the union through its office to do the work in plaintiff's factory and it contained other provisions controlling the relations of plaintiff and the union. (4) At the time of executing the agreement, defendants knew that, under National Labor Relations Act (Wagner Act), plaintiff as an employer was required to remain neutral with respect to the affiliation of its workers with any labor union as provided by the Wagner Act, and was forbidden to enter into a closed shop contract with a union which did not represent a majority of its employees at that time. None of its employees held membership in Local 417 on October 27, 1941, but after that date all employees of plaintiff except one joined the local and paid dues until June 1942. New employees of plaintiff hired subsequent to November 1, 1941, did not apply for membership in defendant Local 417. (5) In October 1942 plaintiff rejected the union's demand that plaintiff discharge nine employees who were not members in good standing of the union and refused to arbitrate the issue as provided by the bargaining agency agreement. Subsequently, in January 1943, the union petitioned the National War Labor Board to determine whether plaintiff was bound by the contract. In the interim the second term of the agreement expired on April 30, 1943. (6) On May 25, 1943, the Tenth Regional War Labor Board, after a trial, by unanimous concurrence issued its directive order requiring plaintiff to perform its contract with the union. Also, it concluded that, for reasons of policy, the determination of the legality of the exclusive bargaining agency agreement should be made "by the National Labor Relations Board or other tribunal of competent authority." (7) Thereafter plaintiff applied to the National War Labor Board for a review of such directive order which appeal was denied on July 16, 1943. On September 9, the National War Labor Board assumed jurisdiction over the dispute, as provided by Section 7 of the War Labor Disputes Act of June 25, 1943, 50 U.S.C.A. Appendix § 1501 et seq., made a finding that plaintiff had failed to comply with the directive order of May 25, and determined that the labor dispute between plaintiff and the union had become so serious as possibly to lead to a substantial interference with the war effort. (8) The Board summoned the parties to a public hearing before a division of the National War Labor Board in Los Angeles on September 13, 1943, to show cause why plaintiff should not comply with the directive order of the Tenth Regional War Labor Board.

Six months after the appeal had been lodged here the National War Labor Board made its decision on September 8, 1944. After reciting the vicissitudes of the controversy from the occasion of its certification by the Secretary of Labor the Board confirmed the directive order of the Tenth Regional Board and ordered that the terms and conditions of employment which are to govern the relations between the parties shall be those set forth in their collective bargaining agreement.

Plaintiff contends that because it is engaged in interstate commerce its agreement with defendant Local was void as being in violation of Section 8(3) of the Wagner Act, 29 U.S.C.A. § 158(3) which forbids one engaged in interstate commerce to sign a closed shop agreement with a union not designated by a majority of the employees of the shop. It insists that the superior court should determine whether section 8 had been violated. There are three answers to this contention. (1) Section 10(a) of the Wagner Act, 29 U.S.C.A. § 160(a), vests the National Labor Relations Board with exclusive jurisdiction "to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce." But before that board may assume jurisdiction it must ascertain the existence of certain prescribed facts. See Secs. 9(a), (b), (c), 29 U.S.C.A. § 159(a–c); American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 405, 60 S. Ct. 300, 84 L.Ed. 347. (2) However, under circumstances such as are presented by the instant case, the National Labor Relations Board is divested of power to entertain jurisdiction and to decide the dispute by reason of the rider to the Appropriations Act Limiting the National Labor Relations Board. Such rider provides that the funds of the Board cannot be used to invalidate a collective bargaining agreement. If the National Labor Relations Board cannot decide the issue, no method of reasoning is proposed whereby it may be held that a state court is clothed with such power, in view of the cited acts and the war powers vested in the central government by the federal constitution. (3) But finality for plaintiff's demand that the superior court assume jurisdiction to determine the dispute as to the legality of the collective bargaining agreement is spelled by the fact that the National War Labor Board has already exercised jurisdiction over the matter and has made directive orders that the agreement govern the relations of the parties. In so acting that board fulfilled its duty under the War Labor Disputes Act which forbids the continuance of a labor dispute that may substantially interfere with the war effort.

On no rational basis could the superior court enter a valid judgment settling the controversy. The War Labor Disputes Act provides that the War Labor Board shall have power to decide disputes between employers and employees and to "provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) covering the relations between parties, which shall be in effect until further order of the Board." Public Law 89, 78th Congress, paragraph 7(a) (2) (9 War Lab. Rep. VII.[1]) The last mentioned Act supervenes all statutes in conferring jurisdiction of disputes affecting the conduct of a war. It was created by Congress in the exercise of the war powers conferred by Article I, Section 8, of the Constitution. It declares on its face that it was enacted as a war measure. Its duration is expressly limited to a period not to exceed six months following the termination of the current war. Under section 7(a) of Public Law 89 and the decisions which have interpreted it the authority of the United States is paramount when exerted as to subjects concerning which it has the power to control. Lajoie v. Milliken, 1922, 242 Mass. 508, 136 N.E. 419, 423; Hamilton v. Kentucky Distilleries & Warehouse Co., 1919, 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194; Northern Pac. R. Co. v. North Dakota, 1919, 250 U.S. 135, 150, 39 S.Ct. 502, 63 L.Ed. 897; Dakota Cent. Tel. Co. v. South Dakota, 1919, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623; McKinley v. United States, 1919, 249 U.S. 397, 39 S.Ct. 324, 63 L.Ed. 668; Tarble's case, 1871, 13 Wall. 397, 406, 409, 20 L.Ed. 597; State ex rel. Watson v. City of Miami, 1943, 153 Fla. 660, 15 So.2d 481, 485.

These cases hold that a federal statute which discloses on its face that it is based upon the war power of Congress exceeds the force of a state law because the authority it gives arises "only because of the existence of war, and the right to exert such authority was to cease upon the war's termination." Northern Pacific R. Co. v. North Dakota, supra [250 U.S. 135, 39 S.Ct.

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[1] Section 7(a) of the War Labor Disputes Act vests the National War Labor Board with power: (2) "To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing * * * which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employer under all the circumstances of the case." (War Labor Reports, Vol. 9, p. IX.)

505]. Whether a contract involving the manufacturer of materials necessary to the war effort is helpful or harmful thereto is a question over which state courts have no inherent jurisdiction. The vast power vested in the President and the Congress to declare and wage war, carries with it all of those implied powers necessary to effectuate the express power. Such power is exclusive and extends to every matter and activity related to the war. Inasmuch as the War Labor Disputes Act is founded upon the war powers of Congress it must follow that the Act is valid and that when the War Labor Relations Board assumed jurisdiction over the instant controversy all other tribunals were thereby shorn of power to settle a labor dispute related to the war effort because that Board was vested with full authority to dispose of all such labor disputes. State ex rel. Watson, v. City of Miami, supra.

The facts that plaintiff was engaged in interstate commerce, that its security was threatened by the defendants and that it did not have a majority of its employees in the membership of Local 417 are not sufficient to override the paramountcy of the organic law and to authorize a state court to supersede a tribunal established to determine the issue at hand. The National War Labor Board having assumed jurisdiction and rendered a decision, both parties participating, the superior court of California has no power now to interfere. Harrington v. Superior Court, 194 Cal. 185, 228 P. 15; De Brincat v. Mogan, 1 Cal.App.2d 7, 36 P.2d 245.

The case of Park & Tilford I. Corp. v. International Brotherhood, Cal.App., 139 P.2d 963, is not applicable. We there held that jurisdiction was properly exercised to prevent the immediate, unlawful, and destructive acts involved in interstate commerce because no federal tribunal had theretofore assumed jurisdiction.

The judgment should be affirmed.

On Rehearing.

Rehearing denied.

MOORE, Presiding Justice (dissenting).

I earnestly dissent from the denial of a rehearing. All existing constitutional provisions are set at naught by such order. It ignores the duality of our form of government. It would erase from the federal constitution the power exclusively granted to the President and the Congress to wage war. It would nullify that belated but inviolable Article VI which declares that "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land."

The vestiture of power in the President and the Congress to wage war carries with it all such powers as may reasonably be inferred from the grant to be necessary to effectuate the purpose of the power. McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579. Such power is necessarily exclusive and it "extends to every matter and activity so related to war as substantially to affect its conduct and progress." Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774. The judgment of this court repudiates the learned and exhaustive decision of the appellate court of Illinois and cited authorities which hold that as to such labor disputes the Federal War Labor Disputes Act, 50 U.S.C.A. Appendix § 1501 et seq. supersedes all state statutes. Appeal of Frank Foundries Corporation (In re Creager), 323 Ill.App. 594, 56 N.E.2d 649. It scorns the decision of the Supreme Court of Wisconsin which holds that an order of the War Labor Board "issued in the exercise of the war powers of the Executive in time of war supplants and operates to suspend state action in regard to the same subject matter." International Brotherhood of Paper Makers, Local No. 66, A. F. of L., v. Wisconsin Employment Relations Board, 245 Wis. 541, 15 N.W.2d 806, 807.

In view of the establishment of the War Labor Board, pursuant to an agreement of representatives of labor and capital that there would be no strikes or lockouts for the duration of the war and that all labor disputes should be settled by peaceful means, Executive Order 9017, 50 U.S.C.A. Appendix § 1507 note, it would not be in keeping with the comity heretofore preserved between the states and the central government for the Superior Court of California to maintain jurisdiction over a labor dispute which affects the war effort and especially one over which a federal tribunal has already exercised jurisdiction and pronounced final judgment.

A rehearing should be granted.

67 Cal.App.2d 596

LYTLE v. KROENKE et al.

Civ. 3289.

District Court of Appeal, Fourth District, California.

Jan. 18, 1945.

1. Appeal and error ⚷1009(3)

There being a sharp conflict in the evidence as to existence of a partnership claimed by plaintiff, the trial court's findings in favor of plaintiff settle the question as far as the Court of Appeal is concerned.

2. Husband and wife ⚷25(2)

In a contractor's action against a husband and wife on the theory that the parties were partners in building houses for sale, where the husband testified that he had full authority to represent the wife, a judgment against her was proper, though she did not personally consent to formation of the partnership, since such consent may be given by an agent. Civ.Code, § 2412(g).

3. Trial ⚷396(3)

No fatal variance existed between a complaint alleging formation of a partnership and findings which, though not specifically finding existence thereof, found facts showing its formation and drew the proper conclusion and determined partners' rights in assets.

4. Partnership ⚷262

A partnership may be dissolved by partners' mutual consent. Civ.Code, § 2425.

5. Partnership ⚷344

A judgment distributing partnership assets on the theory that a contractor and defendants were partners in building houses for sale was not insufficient because not decreeing dissolution of the partnership, in view of undisputed evidence that it was dissolved by mutual consent. Civ. Code, § 2425.

◆

Appeal from Superior Court, Orange County; Albert F. Ross, Judge.

Action by Howard E. Lytle against G. C. Kroenke and wife, with a cross-complaint by the named defendant, involving the profits of an alleged partnership between the parties. From a judgment striking a balance of accounts and awarding plaintiff judgment for amounts to become due, defendants appeal.

Affirmed.

John R. Barta, of Los Angeles, and Harvey, Rimel & Harvey, of Santa Ana, for appellants.

Roland Thompson and George E. Bradley, both of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from a judgment striking a balance of accounts between plaintiff and defendants and awarding plaintiff judgment for the amounts to become due him.

Plaintiff was a general contractor duly licensed in California. Defendants were husband and wife and had been engaged in the business of erecting houses for sale in San Bernardino and elsewhere. They owned, or acquired, as joint tenants, lots in Orange and Los Angeles Counties upon which they proposed to continue that business.

Plaintiff and Mr. Kroenke first met in the fall of 1941. At that time plaintiff was doing business as a cement contractor. He learned that Mr. Kroenke proposed to build a number of houses in Santa Ana and saw him at his home in Los Angeles in an endeavor to secure the contract for the cement work. According to plaintiff, Kroenke proposed that they enter into a partnership for the purpose of erecting houses for sale, dividing the net profits equally.

Kroenke was completing a number of houses in Santa Ana and employed plaintiff to finish the cement work which had been abandoned by the original sub-contractor. The two men had various conversations concerning the proposed partnership which, according to plaintiff, resulted in an oral agreement between them. According to its terms Kroenke was to obtain the lots on which to build, together with the building loans, attend to the necessary financing, obtain the building permits, contract for the materials, let the sub-contracts, keep the accounts, pay the majority of the bills and supervise the selling. Plaintiff was to furnish tools, his truck and machinery, supervise construction and work on the jobs. The net profits were to be divided equally. This was modified by a later agreement whereby plaintiff was to receive one-third of the net profits from building operations in Los Angeles County.

Defendants owned five lots in or near Hawthorne in Los Angeles County which were valued at $150 each. To keep the workmen in the employ of plaintiff busy it was decided to build on those lots. Construction started about February 20, 1942, plaintiff and Kroenke each performing the respective duties imposed by their agreement.

The building permits were issued in the names of Kroenke as owner, and Fred A. Chapin as contractor. Plaintiff questioned this use of Chapin's name as contractor as soon as he learned of it. He was told by Kroenke that Chapin was the owner of lumber yards and a licensed contractor with good financial rating; that he could secure more liberal loans from corporations financing the work by the use of the name of a contractor such as Chapin. This seemed to satisfy plaintiff who made no further complaint concerning the form of the future building permits.

Chapin testified that he received $25 on each house built; that he visited the scenes of construction a few times; that he paid the unemployment insurance and social security on payrolls furnished by Kroenke who advanced the charges at the time he submitted the payrolls.

By mutual consent plaintiff was given a drawing account of about $30 a week to pay his living expenses. A bank account was opened on which both plaintiff and Kroenke could draw checks. This account had an average balance of about $300 and only the smaller bills were paid from it. The larger bills were paid by Kroenke by checks drawn on another account.

Kroenke purchased thirteen lots in Corona del Mar in the city of Newport Beach in Orange County at the average cost of $200 each. Before the Hawthorne houses were entirely completed construction was started at Corona del Mar and nine houses were completed there before August 1, 1942. Because of the difficulty in obtaining priorities no further building was undertaken and plaintiff testified that the partnership was discontinued by mutual consent.

All of the houses in both locations were sold at a profit and sometime in August, 1942, plaintiff requested an accounting. He described his conversation in San Bernardino with Kroenke on about August 8, 1942, as follows: "I asked Kroenke in what shape the papers were in regard to our Hawthorne job and he said, 'Why?' I said, 'It must be settled by now and I have some paper coming. If we can get an accounting I can go back to work and get into defense work or something.' He said, 'You don't have any money coming.' I thought he was joking. I said, 'What do you mean, Mr. Kroenke, I don't have any money coming?' He said, 'Howard, you know the only money you were supposed to get was what you could save between the cost of the houses and the loans, if you could build the houses cheaper than what the loans was you would get the difference.' I still thought he was joking. I said, 'Kroenke, you don't mean that, you know better, you know me better than that. You couldn't expect me, knowing what I do about building to enter into such a contract. It would be ridiculous, and considering that you knew about the building I had done before in my own right, you know such an idea was not only not ever spoken of, but impossible.' We discussed it for about half an hour. He said, 'Well, Howard, if you feel that way about it, I guess you are right and we will settle up the way you say.' He said it would take him probably a week to get the books up to date and he would let me know and share the profits with me on the sale of the houses."

There is some corroboration of this in the testimony of another witness concerning a later conference between plaintiff and Kroenke relating to an accounting in which the following appears: "He (plaintiff) said, 'You told me in San Bernardino you would settle up as we originally said.' He (Kroenke) said, 'I have changed my mind on that, you can sue me if you want to.'"

As Kroenke had repudiated the partnership agreement plaintiff brought this action naming Kroenke as the sole defendant. Kroenke's deposition was taken and it then appeared that Mrs. Kroenke was his partner in all business transactions including all building operations. An amended complaint was filed joining her as a defendant.

Kroenke testified during the trial that he was fully authorized to represent his wife in all business transactions; that she knew of the building operations here involved. She signed deeds of trust on the fourteen lots to secure money with which to finance building the houses. Title to the lots was taken in the names of both defendants as joint tenants.

Kroenke flatly denied the testimony of plaintiff as to the formation of the partnership and the proposed division of the profits. He further testified that the compensation promised plaintiff for the use of his truck, cement mixer, tools, and for his labor and services was the saving, if any, between the amount loaned by the building and loan association and the cost of the completed house. He also testified there was no such saving, as the cost of the house, lot, and incidental expenses in each instance exceeded the amount of the loan.

The trial court found all facts in favor of plaintiff and gave him judgment for one-third of the nets profits from the Hawthorne houses, and one-half of the net profits from the Corona del Mar houses, to be paid when those profits accrue.

Defendants urge that the evidence is insufficient to establish either an agreement of partnership or joint enterprise between plaintiff and defendants under which plaintiff would be entitled to receive any portion of the profits from the sale of the houses. They cite cases from other jurisdictions in support of the rule which they state as follows: "In the absence of a written agreement a person who alleges a partnership between himself and another is bound to establish its existence by clear proof."

Plaintiff and Kroenke were the only witnesses who claimed to have any direct knowledge of the agreement between them. We have studied their evidence and agree with the following comments of the trial judge on their credibility and the weight to be given their testimony: "And from the very first I was impressed with the fact that the plaintiff was telling the truth, * * *. Reading between the lines, you could see that this plaintiff was, at least, thoroughly convinced that he had had a conversation with Mr. Kroenke and that it was understood that he was to get one-third of the profits off the job in Lawndale and one-half of the profits of the Corona del Mar job, and would be ridiculous otherwise to me. I may not have a very good idea of Southern California finance and the way of the money changers in the temple here, but to say a man was doing all he did just to get the questionable possibility of the difference between what financial institutions like these in Southern California would loan on a place and the cost of construction, I can't understand that. It might be done in Southern California, and there might be a little difference, but a man of the intelligence and apparent ability of this plaintiff certainly wouldn't get into a ridiculous proposition like that, but I kept my mind open until I heard the testimony of Mr. Kroenke. I am not saying that he falsified his testimony, but it certainly is full of contradictions, and the more he testified, the more I became convinced that I was right."

[1] We have here the familiar situations of a sharp conflict in the evidence which the trial court has resolved in favor of plaintiff. Under such circumstances the findings settle the question as far as this court is concerned. Wine Packing Corp. v. Voss, 37 Cal.App.2d 528, 100 P.2d 325.

[2] It is next urged that the judgment against Mrs. Kroenke cannot be supported because she did not know of the partnership and did not personally consent to its formation, citing subdivision (g), section 2412, Civil Code, and 47 Corpus Juris, sections 45 and 569.

It is true that the evidence fails to show that Mrs. Kroenke personally and individually gave her consent to the formation of the partnership with plaintiff. However, the testimony of Mr. Kroenke to the effect that he had full authority to represent Mrs. Kroenke in all business transactions affecting her stands uncontradicted. We can see no reason why the consent of a person to the formation of a partnership may not be given by a duly authorized agent.

[3] Defendants argue that there is a fatal variance between the allegations of the amended complaint, which alleges the formation of a partnership, and the findings, which did not specifically and by that name find the formation and existence of such a partnership. However, the trial court did find in considerable detail the facts showing the formation of a partnership and drew the proper conclusion from the facts found, determining and settling the rights of the partners in its assets. We can find no sufficient variance between the pleadings and findings to justify a reversal of the judgment.

[4, 5] Lastly it is urged that the judgment is insufficient because it does not decree a dissolution of the partnership.

A partnership may be dissolved by the mutual consent of the partners. Sec. 2425, Civil Code; Shuken v. Cohen, 179 Cal. 279, 176 P. 447. The undisputed evidence shows that the partnership was dissolved by mutual consent about August 1, 1942. This being true all the trial court was required to do was to distribute its assets. This was done by the judgment in which we find no reversible error.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

67 Cal.App.2d 629

FREEDMAN v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 7115.

District Court of Appeal, Third District, California.

Jan. 23, 1945.

Hearing Denied March 22, 1945.

1. Joint adventures 🔑1

A "joint adventure" is created where two or more persons combine their money, property, or time in conduct of some particular line of trade or for some particular business agreeing to share jointly or in proportion to capital contributed in profits and losses, and to mutually control the enterprise.

See Words and Phrases, Permanent Edition, for all other definitions of "Joint Adventure".

2. Joint adventures 🔑1

The relation of joint adventure is controlled largely by principles or rules applicable to partnerships, though joint adventures are usually confined to a single transaction.

3. Joint adventures 🔑1

Where a person agreed to secure a gang of pickers for grape vineyard operator who agreed to pay 13 cents per box for grapes picked, and $1 per ton to the person for hiring the gang, and there was no agreement to share in profits or losses or in management, the operator and such person were not engaged in a "joint adventure" so as to render them jointly liable for injuries incurred by a picker.

4. Workmen's compensation 🔑1939

Where vineyard operator and person who secured a gang of grape pickers were not engaged in joint adventure, whether the operator or such person was the employer of a picker who was injured in course of employment was for the Industrial Accident Commission.

THOMPSON, J., dissenting.

Proceeding under the Workmen's Compensation Act by John Ross, employee, opposed by M. J. Freedman and Ed Hasson. To review an award made by the Industrial Accident Commission of the State of California in favor of the employee, M. J. Freedman filed a petition for review.

Award annulled and cause remanded with instructions.

Arthur R. Friedman, of Modesto, for petitioner.

Everett A. Corten and Dan Murphy, both of San Francisco, for respondent.

ADAMS, Presiding Justice.

In this proceeding the Industrial Accident Commission made a finding that "John Ross, applicant, while employed as a grape picker, on September 22, 1943, near Modesto, California, by M. J. Freedman and Ed Hasson, then and there engaged in a joint enterprise to their mutual advantage and profit, to wit: the harvesting of grapes on the ranch of and owned by defendant M. J. Freedman; sustained injury occurring in the course of and arising out of his employment * * *," and held that Hasson and Freedman were jointly and severally liable for an award in favor of John Ross. Freedman has sought a review by this court contending that the Commission erred in finding that he and Hasson were engaged in a joint enterprise. He also contends that the evidence before the Commission shows that Ross was not an employee of petitioner but was an employee of Hasson, acting as an independent contractor, and that petitioner is not liable for the award made to Ross.

As we construe the findings of the Commission, the award is based upon the proposition that Hasson and Freedman were engaged in a joint enterprise, and that the liability of both Hasson and Freedman flows from this fact. Our first inquiry is, then, whether the testimony before the Commission is sufficient to support a finding that Hasson and Freedman were engaged in such an enterprise or adventure.

[1] In 30 Am.Jur. 681, sec. 7, the relation of joint adventurers is said to be created where two or more persons combine their money, property or time in the conduct of some particular line of trade, or for some particular business deal, agreeing to share jointly, or in proportion to the capital contributed, in the profits and losses, assuming that the circumstances do not establish a technical partnership. Also (p. 682, sec. 11) that a joint proprietary interest and a right of mutual control over the subject matter of the enterprise or over the property engaged therein is essential to a joint adventure.

[2] In Beck v. Cagle, 46 Cal.App.2d 152, 161, 115 P.2d 613, the court held that to constitute a joint enterprise the parties must have a community of interest in the purposes of the undertaking and equal authority or right to direct the movements and conduct of each other in connection therewith; they must share in the losses, if any, and there must be a close and even fiduciary relationship between them. In Stoddard v. Goldenberg, 48 Cal.App.2d 319, 324, 119 P.2d 800, it was said that an indispensable feature of a joint venture is an agreement by the parties to it to share jointly in the profits and losses. Also see Enos v. Picacho Gold Min. Co., 56 Cal.App.2d 765, 771, 133 P.2d 663, 664. In Quinn v. Recreation Park Association, 3 Cal.2d 725, 728, 46 P.2d 144, the court said that in order to establish the existence of a joint adventure there must be proof of a community interest, and a sharing of profits. Citing 14 Cal.Jur. 761; Dempsey-Kearns Theatrical, etc., Enterprises v. Pantages, 91 Cal.App. 677, 267 P. 550. In United Farmers Association v. Sakiota, 7 Cal.App.2d 559, 560, 46 P.2d 770, it is stated that the relationship of joint adventurers is similar to that of partners in that an essential element is that the parties share in the profits and losses. In Spier v. Lang, 4 Cal.2d 711, 715, 53 P.2d 138, it is said that joint participation in the control and management of a business is one of the indicia of a joint adventure; that the usual test of a partnership between the parties to a joint adventure is their intent to become partners. The relation of joint adventurers is controlled largely by the principles or rules applicable to partnerships, though joint adventurers are usually confined to a single transaction.

Also see 48 A.L.R. 1055, as to what amounts to a joint adventure.

The evidence in the proceeding, which is contained in the return filed by respondents, shows that Freedman was operating a vineyard, and, desiring to harvest the grapes growing upon a 30 acre portion of same, approached Hasson and asked him if he could secure a gang of pickers. Hasson replied that he could and asked what Freedman would pay. The latter agreed to pay 13¢ per box for the grapes picked, and to pay $1.00 per ton to Hasson for his trouble in hiring the gang. Hasson hired the pickers including Ross. The latter had been working but three hours when he was struck in the eye by a vine, thus sustaining the injury for which award was made. Ross testified that at the time of the injury he called Hasson; that Freedman was on the premises and that Hasson told Freedman to take him (Ross) to a doctor and that Freedman took him to a doctor at Turlock and paid the bill; that Hasson had hired him, and told him he would get 13¢ per box, and that Hasson paid him $5.25 for the three hours' work he had done. When asked if Freedman came around to see how he picked—whether he picked too many leaves—he stated that he saw him there one time, but that Freedmon did not say anything to him. He also testified that Hasson had taken him out to Freedman's place and had shown him the row to pick on; that at the time he started to work he did not see Freedman.

Hasson testified that Freedman asked him to get a gang of men to pick grapes, and said he would pay 13¢ per box, and pay him $1 per ton for his trouble to hire the gang; that he hired men, Ross among them, and told them they were to work for Freedman; that when he arrived at the vineyard with the men Freedman showed him what to do, showed him the boxes; that when he brought Ross out he did not take him to Freedman; that Freedman told him to check the boxes and "look at the men to clean the grapes as a foreman, to look after the job"; that Freedman gave him the money for the total number of boxes picked each week; that after getting tab from the winery Freedman gave him a check for his $1 per ton, and that he averaged $12 or $14 or $15 per day on the $1 per ton; that the men struck and wanted to quit and Freedman told him to give them more money; that the men went to Freedman who agreed to pay 14¢; that when Ross got hurt and came to him, he called Freedman and asked what he should do, and that Freedman took Ross to a doctor. When asked if he took out insurance he replied that he was not a contractor, but a foreman. He testified, however, that at the same time he had a gang on another ranch; that he then put another man in his place as foreman at Freedman's, and paid such man himself, after collecting from Freedman; that he continued to go up to Freedman's two or three hours a week, and on Saturdays got the book from the man he had put in his place, and turned the book in to Freedman.

Freedman testified that when he was looking for a grape crew Hasson was pointed out to him as a man who had one; that he talked to Hasson; that Hasson wanted 13¢ per box plus $1 a ton for himself, and he agreed to that; that Hasson brought the crew to the ranch; that he did not talk to the crew, as he had told Hasson he (Hasson) was to run them and that when he (Freedman) had any complaints he would tell Hasson; that he walked through the field occasionally to find how the boxes were being filled and whether all grapes were being picked off the vines; that when Ross was hurt Hasson called him and asked if he would take Ross to a doctor; that all moneys were paid to Hasson for picking the grapes; that he never paid him more than 13¢ a box plus the $1 per ton, and that none of Hasson's employees came to him to ask for money while they were working for him; that when his job was finished his brother wanted the crew, but when they went to the brother's place and found a crew across the road were getting more they went on strike, and he telephoned his brother who authorized the payment of an extra cent per box; but that was not while they were working for Freedman himself; that after Hasson left he still continued to get the checks every week.

[3] It seems obvious from the foregoing that Hasson and Freedman were not engaged in a joint adventure within the import of the above cited decisions as to what constitutes such a relationship; no community of interest in the object of the undertaking, no equality of right to govern the conduct of each other with respect thereto, and no agreement to share profits or losses appear, and there is no evidence of an intention on the part of either that they were to become partners. It therefore follows that there is no basis for a finding of joint liability for the injury incurred by Ross; and that if both are individually liable, such liability must be premised upon the ground that Ross was either an employee of both Hasson and Freedman as individual employers, or an employee of one or the other.

[4] Respondents in their answer in effect admit that this is so, but they say that there is sufficient evidence to show that Freedman was individually liable as the employer of Ross, and that "if there was any error in the Commission's award, it was in holding the other defendant (Hasson) jointly and severally liable with him." They then argue that since Hasson has not contested this feature of the award it should be affirmed as against Freedman. But this argument defeats itself, for the Commission has not found that Ross was the employee of Freeman, but that he was an employee of the partnership, or joint adventureship if it may be so called. Presumably it found them severally as well as jointly liable because of its conclusion that they were engaged in a joint adventure, and that such joint and several liability flowed from that relationship; and this court cannot say that had the Commission not found that there was a joint adventure it would have found that Freedman rather than Hasson was the employer. There is evidence in the record from which the Commission might have found that Hasson was an independent contractor, and that, as such, he and not Freedman was the employer of Ross. See Winther v. Industrial Accident Commission, 16 Cal.App.2d 131, 60 P.2d 342; State Compensation Insurance Fund v. Industrial Accident Commission, 46 Cal.App.2d 526, 116 P.2d 173. At any event, whichever was the employer is a question of fact peculiarly within the province of the Commission, and it is not one for this court to determine from the evidence adduced.

The finding upon which the award was based, to wit, the liability of a partnership in the nature of a joint adventure, being without support, the award falls with it. The award is therefore annulled and the cause is sent back to the Commission with instructions to find from the evidence already presented and such further evidence, if any, as may be presented to it, who was the actual employer of Ross.

PEEK, J., concurs.

THOMPSON, Justice (dissenting).

I dissent.

The majority opinion appears to me to be contrary to law. It fails to apply the uniform rule that a separate and several liability exists against each employer regardless of whether he is a coemployer or a member of a joint enterprise. The liability of joint adventurers is the same as that of partners. The finding that Freedman and Hasson were engaged in a joint enterprise is therefore immaterial and may be disregarded as surplusage. Even though the evidence may not support the finding of a joint adventure, it seems to me to be neither necessary nor proper to reverse the award.

The Commission found that M. J. Freedman and Ed Hasson employed the workman, John Ross. It also rendered a several award against both employers. There is ample evidence to support that finding against Freedman. The findings and the Workmen's Compensation Act should be liberally construed for the benefit of an injured workman. Sec. 3202, Labor Code, St.1937, p. 265; 24 Cal.Jur. 1007, secs. 229 and 230. The finding that Freedman and Hasson employed Ross refutes the theory that Hasson was an independent contractor. He testified that he was not "the boss", but that he was merely acting as "foreman." That is in accordance with the record as a whole which indicates that Hasson secured the workmen and acted as foreman as the *agent* of Freedman, and not otherwise. Hasson had no authority to fire the workmen, nor to fix their wages, nor to direct and control the enterprise of picking the crop of grapes. When the workmen asked for an increase of wages Hasson sent them to Freedman saying he was not the boss and that he had no authority to raise their pay. When Ross was injured Hasson told Freedman, "It [the responsibility] is up to you if you want to take him to a doctor." Freedman assumed that liability by taking the injured man to a physician for treatment. The burden was on the petitioner, Freedman, to prove that Hasson was an independent contractor. He failed to do so. When the evidence adduced, together with the reasonable inferences to be drawn therefrom, indicate that the owner of a business has the right to discharge workmen, fix their wages and control and manage their operations, he may be deemed to be the employer regardless of the manner in which they are paid or the method of their selection. Riskin v. Ind. Acc. Comm., 23 Cal.2d 248, 144 P.2d 16. Where there is a substantial conflict of evidence regarding the relationship of employer and employee, the findings of the Commission may not be disturbed. S. A. Gerrard Co. v. Ind. Acc. Comm., 17 Cal.2d 411, 110 P.2d 377.

Since Freedman was found by the Commission to be an employer of Ross, and a separate award was rendered against him, it is immaterial whether Freedman was the sole employer or merely a coemployer of the workman. In either event he would be liable for the full amount of the award. Pacific Employers Ins. Co. v. Ind. Acc. Comm., 58 Cal.App.2d 262, 269, 136 P.2d 633; Standard Accident Ins. Co. v. Ind. Acc. Comm., 123 Cal.App. 443, 11 P.2d 401. Even though a joint enterprise was contemplated by the employers, and it failed for some reason, each member may nevertheless become severally liable for the full amount of the award. 1 Campbell on Workmen's Compensation, p. 406, sec. 452; New York Indemnity Co. v. Ind. Acc. Comm., 126 Cal.App. 37, 41, 14 P.2d 160. A joint and several award against coemployers, whether they are members of a joint enterprise or not may be binding on one employer, even though it is void as to the other party. Standard Accident Ins. Co. v. Ind. Acc. Comm., supra. In the case last cited it was held, on certiorari, that the petitioner was liable for the full amount of the award, notwithstanding the fact that the judgment against the other coemployer, the William Powell Company, may have been void because the Commission lacked jurisdiction of the last named company for defect of substituted service of process.

It follows that since the Commission found that both Freedman and Hasson were employers of Ross, and rendered a joint and several award against them, Freedman would be liable for the full amount of the award, even though the award may be void as to Hasson. Hasson is not a petitioner in this proceeding. He failed to appeal.

For the foregoing reasons I am convinced the award against M. J. Freedman should be affirmed.

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67 Cal.App.2d 581

TAYLOR v. J. B. HILL CO.

Civ. 14614.

District Court of Appeal, Second District, Division 1, California.

Jan. 18, 1945.

Hearing Denied March 15, 1945.

1. Corporations 🔑**503(2)**

A corporation could be sued on contract of purchase and sale of barley in county where contract was made. Const. art. 12, § 16.

2. Frauds, statute of 🔑**125(3)**

An oral contract of sale of barley, lacking written confirmation, was voidable only and not void.

3. Corporations 🔑**503(2)**
Frauds, statute of 🔑**125(3)**

Where plaintiff and corporate defendant's agent entered into oral contract of sale of barley in Los Angeles county, contract was valid without written confirmation mailed by corporate defendant from place of business in Fresno county, and, hence, plaintiff having elected to file his action on contract in Los Angeles county, the place of trial was Los Angeles county. Const. art. 12, § 16.

4. Corporations 🔑**503(2)**

An action against defendant corporation on oral contract of sale of barley was not required to be tried in county in which defendant corporation's principal place of business was located on ground that action was one for money only. Const. art. 12, § 16.

Appeal from Superior Court, Los Angeles County; Alfred E. Paonecsa, Judge.

Action by D. L. Taylor against J. B. Hill Company on a contract of purchase and sale of barley. From an order granting defendant's motion for a change of venue, the plaintiff appeals.

Reversed.

Ogden, Crocker & Steelman, of Los Angeles, for appellant.

Clyde E. Cate, of Fresno, for respondent.

DRAPEAU, Justice pro tem.

Plaintiff and defendant's agent entered into an oral contract of purchase and sale of barley. This agreement was made in Los Angeles. The defendant is a corporation with its principal place of business in Fresno. Being advised of the contract by telephone, the defendant in writing confirmed the sale on the same day. This confirmation was made at Fresno, and mailed to the plaintiff at Los Angeles. Likewise, on the same day, the plaintiff made a writing confirming the sale. This confirmation was executed in Los Angeles and mailed to the defendant at Fresno.

The superior court made its order changing place of trial to Fresno County. From this order plaintiff appeals.

[1] Being a corporation, the defendant may be sued in the county where the contract was made. Const. Art. XII, Sec. 16; Hiett v. Inland Finance Corp., 204 Cal. 195, 267 P. 320; Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273; El Claro Oil & Gas Co. v. Bank of Corning, 7 Cal. App.2d 670, 46 P.2d 977; Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 99 P.2d 678.

The case has been briefed apparently on the theory that the two instruments of confirmation are part of the contract. Defendant argues that the written confirmation by the defendant at Fresno was the last act necessary for the formation of the contract, the place where the final act was done (Restatement of the Law of Contracts, Sec. 74, p. 80); therefore the contract was made in Fresno, and the place of trial of the action to enforce it is in that county. Parker Co., Inc. v. Exeter Refining Co., 26 Cal.App.2d 610, 79 P.2d 1114. On the contrary, the plaintiff argues that the confirmation by him was an acceptance of the confirmation by the defendant, and that this instrument having been executed in Los Angeles County and mailed to Fresno was the last act in the making of the contract, and the place of trial must be in Los Angeles County.

[2, 3] However, both confirmations were made to comply with the statute of frauds. The oral contract was valid at all times. Lacking written confirmation, it was unenforceable only. Such oral contracts in California are voidable and not void. 37 C.J.S., Frauds, Statute of, § 223, p. 721; O'Brien v. O'Brien, 197 Cal. 577, 241 P. 861, 864; Salomon v. Ellis, 34 Cal.App.2d 672, 94 P. 2d 393. Therefore, the contract having been made in Los Angeles County by a corporate defendant, and the plaintiff having elected to file his action in that county, under our Constitution the place of trial is Los Angeles County.

[4] Only one further matter needs consideration and that is the suggestion by the defendant corporation that the action being for money only, the place of trial is Fresno County. This has been decided adversely to the defendant in Hammond v. Ocean Shore Dev. Co., 22 Cal.App. 167, 133 P. 978, and Lakeside Ditch Co. v. Packwood Canal Co., 50 Cal.App. 296, 195 P. 284.

The order changing place of trial is reversed.

YORK, P. J., and WHITE, J., concur.

67 Cal.App.2d 507

MIKESELL v. GOMEZ.

Civ. 3295.

District Court of Appeal, Fourth District, California.

Jan. 11, 1945.

1. Executors and administrators ⇨221(5)

Evidence justified the inference that it was the intention of the parties that services rendered by plaintiff to defendant's decedent were to be rewarded at their termination.

2. Executors and administrators ⇨434(7)

In action against administratrix for services rendered to deceased, cross-complaint seeking to recover possession of premises which plaintiff wrongfully refused to surrender was proper. Code Civ.Proc. § 442.

3. Executors and administrators ⇨130(2)

Where plaintiff sought to establish an agreement by which deceased agreed to give plaintiff property for services rendered, but it developed that plaintiff was only entitled to a money judgment for services rendered, denial of relief to administratrix on counterclaim seeking to recover possession of premises which plaintiff wrongfully refused to surrender was error.

4. Executors and administrators ⇨130(2)

Provision of California statute and of Emergency Price Control Act relative to service of a notice to terminate tenancy had no application to proceeding by administratrix to recover possession of premises in possession of one who was an employee of deceased and not a tenant. Civ.Code, §§ 789, 790.

◆

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Action by Catherine Mikesell against Longinia Gomez, as administratrix of the estate of Edward Gomez, deceased, for services alleged to have been performed for deceased, wherein defendant filed a cross-complaint to recover possession of premises in plaintiff's possession. From a judgment awarding plaintiff a money judgment and denying any relief on cross-complaint, defendant appeals.

Affirmed in part and reversed in part with directions.

O. T. Cailor, of Los Angeles, and N. D. Meyer, of Santa Ana, for appellant.

Wm. P. Webb, of Anaheim, for respondent.

BARNARD, Presiding Justice.

This is an action to recover for services alleged to have been performed for the deceased, a claim therefor having been rejected by the administratrix of his estate.

It appears, without question, that the plaintiff kept house for the deceased from July, 1929, until he died on December 28, 1943. The complaint alleged that on July 1, 1929, these parties entered into an oral agreement whereby the plaintiff agreed to act as housekeeper for the decedent and he agreed to transfer or cause to be transferred to her upon his death his home, which is described, together with his household furniture and belongings in addition to furnishing her certain board, lodging and incidentals. A second cause of action alleges the performance of housekeeping services continuously from July, 1929 to December, 1943, and that these services were reasonably worth $50 a month, or a total of $8,700. The defendant filed an answer denying the material allegations of the complaint and pleading the statute of frauds in that the agreement alleged was not to be performed during the lifetime of the promisor. No statute of limitation was pleaded. The defendant also filed a cross-complaint alleging that the deceased, at the time of his death, was the sole owner of the house and lot described in the complaint; that prior to his death the deceased and the plaintiff had occupied these premises under an agreement whereby the deceased furnished the plaintiff with food, clothing and shelter in consideration of her services as housekeeper; that this contractual relationship and the right of the plaintiff to occupy the property had terminated upon his death; and that after demand made the plaintiff had refused to surrender possession of the premises to the defendant as administratrix of his estate. The cross-complaint prayed for a judgment awarding the defendant, as administratrix, the possession of said premises.

The court found in favor of the plaintiff finding, among other things, that for 14 years prior to December 28, 1943, the plaintiff at the request of the decedent had rendered him continuous service as a housekeeper; that all of said services were rendered with the understanding and agreement that the deceased would pay their reasonable value in excess of the reasonable value of the board, lodging and incidentals furnished; that the services were not terminated before the death of the deceased; that the reasonable value of these services is $4,720 in excess of the board, lodging and incidentals furnished; that of this amount the deceased had paid to the plaintiff the sum of $1,798.61; and that there is now due and owing to the plaintiff the sum of $2,921.39. A judgment was entered awarding that amount to the plaintiff and denying the defendant any relief on her cross-complaint. From this judgment the defendant has appealed.

It is first contended that the finding that $2,921.39 is due to the respondent is without evidentiary support because there is no evidence to prove, or from which it can be inferred, that the deceased intended or expected to compensate the respondent for her services at his death. It is appellant's contention that these parties lived together as husband and wife for at least 14 years, although not legally married, and portions of the evidence are set forth in appellant's brief which tend to support that conclusion. On the other hand, the testimony of the respondent and several other witnesses is to a contrary effect. There is much evidence tending to show that at the beginning of the arrangement the deceased agreed to compensate the respondent for her services, in addition to the board and lodging furnished; that he paid her small amounts from time to time; that she consented at various times to a deferment of the payments due to her; that in 1935, the deceased acquired the house described in the complaint which was in a dilapidated condition; that he proposed to the respondent that if she would move with him to the house and continue to do the house work and help him fix up the place, and allow wages owing to her to go into the place, he would give it to her, with all of his belongings, at the time of his death in payment of what he owed her; that they moved into the house and the respondent not only did the house work but assisted in making improvements on the house; that three days before Gomez died he sent for a priest and informed the priest that he wanted him to marry them so that the respondent would be sure to get all of his property in payment of what he owed her; that the priest informed him he could not perform the marriage ceremony without a license; and that the decedent became worse the next day and died before anything was done. The essential facts are supported not only by the testimony of the respondent but by that of some half dozen other witnesses.

[1] While the evidence is conflicting, there is ample evidence to justify the inference that it was the intention and expectation of the parties that the services rendered by the respondent were to be rewarded at their termination. See Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146, and the cases there cited. It follows that the findings complained of by the appellant are sufficiently supported by the evidence.

[2-4] The only other point raised is that the appellant was entitled to a judgment for the possession of the house and lot in

question, which was owned by the deceased and which is still occupied by the respondent. The cross-complaint alleged that the respondent's right to occupy these premises terminated at the time of the death of the decedent and the court found that this was not true. This is obviously incorrect, although the supposed finding of fact is actually a conclusion of law. The respondent argues that the court's decision in this respect was correct because the appellant could not file a cross-complaint here because the matter of occupancy of the premises was not sufficiently related to the "transaction, matter, happening or accident upon which the action is brought, or affecting the property to which the action relates" within the meaning of section 442 of the Code of Civil Procedure. This contention cannot be sustained. In her complaint the respondent alleged an agreement with the deceased under which she was to have the house at his death. She also alleged another agreement under which she came in possession of the house. While she was forced to rely on quantum meruit, the entire matter was sufficiently related to justify the filing of a cross-complaint to recover the possession of the house when demand therefor had been refused. As it developed at the trial, the respondent was entitled only to a money judgment covering compensation for the services she had rendered to the deceased. She had no interest in the house which belonged to the deceased and the denial of relief to the appellant, in connection with the possession of the premises, is without support either in the evidence or in the law. The respondent further argues that the court correctly denied any relief under the cross-complaint for the reason that a proper notice terminating the respondent's tenancy had not been served as required by sections 789 and 790 of the Civil Code and by section 1388.286dl of the Regulations under the Emergency Price Control Act of 1942. The respondent was not a tenant of the deceased but, as found by the court, she was his employee and none of these sections are here applicable.

For the reasons given, the judgment in favor of the respondent for $2921.39 is affirmed but otherwise the judgment is reversed with directions to enter judgment in favor of the appellant on her cross-complaint awarding her the possession of the property. Each party to pay her own costs.

MARKS and GRIFFIN, JJ., concur.

BLISS et al. v. CALIFORNIA CO-OP. PRODUCERS et al.

Civ. 7029.

District Court of Appeal, Third District, California.

Jan. 10, 1945.

Rehearing Denied and Opinion Modified Feb. 9, 1945.

See 156 P.2d 259.

1. Appeal and error 🔑1071(1)

In action on fruit growers' installment notes, pledged to plaintiffs by payee cooperative corporation as security for its note to plaintiffs, where court found that plaintiffs purchased pledged notes in good faith for value, without notice of any equity or defense in defendants' favor, at time when payee held sufficient proceeds from sales of defendants' fruit to pay installments due, as required by marketing agreement, court's inadvertent statement in same finding that plaintiffs were not holders of pledged notes in due course was harmless. Civ.Code, §§ 653a, 3133.

2. Bills and notes 🔑525

In action on fruit growers' installment notes, pledged to plaintiffs by payee cooperative corporation as security for its note to plaintiffs, evidence established that plaintiffs purchased and held notes in due course. Civ.Code, §§ 3133, 3140, 3529.

3. Bills and notes 🔑370, 373

In action on notes held by plaintiffs in due course, defenses of payee's fraud and failure of consideration were unavailable to defendant makers. Civ.Code, §§ 3109, 3138.

4. Bills and notes 🔑497(2)

As against holder of negotiable instrument in due course, burden is on person claiming lack of title to or other defect in instrument to prove that it was acquired by such holder with notice of defect. Civ. Code, § 3140.

5. Bills and notes 🔑369

Delivery of notes to payee co-operative corporation on condition that they be held only as security for makers' faithful performance of their agreement to deliver products of their farms to corporation for processing and marketing was unavailable to makers as defense in action on notes by persons to whom corporation pledged them as security for its note to pledgees, in absence of proof that pledgees knew of such conditional delivery. Civ.Code, § 3097.

6. Appeal and error 🔑1047(3)

In action on fruit growers' installment notes, pledged to plaintiffs by payee cooperative corporation as security for its note to plaintiffs, defendants were not prejudiced by ruling striking out bank president's testimony that bank, on date of corporation's note, loaned corporation same amount for which it gave note to bank, that corporation promoters wanted to raise specified sum to start a cannery, and that witness told one of plaintiffs that bank had agreed to make such loan.

7. Appeal and error 🔑970(2)

Where parties to action agreed, during absence of stenographic reporter, that record of minutes of corporation's board of directors might be received in evidence and that court would enter minute order to that effect, which would appear in reporter's record, appellate court must assume that trial court did not refuse to admit such minutes in evidence.

8. Limitation of actions 🔑184

In action on installment notes, denying defendants' motion to amend answer at close of trial, so as to set up statute of limitations with respect to certain installments, was not an abuse of discretion, in absence of showing that amendment would further justice. Civ.Code, § 2911.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action on notes by Charles A. Bliss and others against the California Cooperative Producers, a cooperative business corporation, I. C. Shidler, Helen A. Winchester, B. J. Galbreath and others. From a judgment against defendants Shidler, Winchester, and Galbreath, they appeal.

Affirmed.

B. J. Galbreath, of Marysville, and Muldary & Elkington, of San Francisco, for appellants.

Charles A. Bliss and Irvin C. Ford, both of Sacramento, for respondents.

THOMPSON, Justice.

Three defendants only, members of the California Cooperative Producers, and makers of separate promissory notes payable to plaintiffs in specified installments, as pledges to secure a note for $5,000, dated April 17, 1928, for money borrowed from plaintiffs, have appealed from a judgment which was rendered against said defendants for the unpaid amounts of their respective notes together with interest.

The appellants contend that the findings and judgment are not supported by the evidence; that plaintiffs are not holders of the notes in due course: that there was a failure of consideration for the notes; that the notes were delivered to plaintiffs conditionally and not otherwise; that the notes were procured by fraud; that the court erred in refusing to permit the defendant Shidler to prove that he was released from his obligation by full performance of the condition upon which his note became effective; that the court erred in denying the defendants' leave to amend their answer to set up the statute of limitations, and in other rulings upon the introduction of evidence at the trial.

California Cooperative Producers, a cooperative business corporation, was organized prior to April 17, 1928, pursuant to the statutes of California of 1905, p. 594, Division I, Part 4, Title 19, Civil Code, § 653a, to process and can fruits produced by growers who were members of the organization. The appellants were producers of fruit and members of the corporation. As a consideration for processing and marketing their fruit by the corporation the appellants signed written agreements to extend their credit to the corporation by the execution of their promissory notes in amounts to be determined by the tonnage of fruit delivered. April 17, 1928, the corporation borrowed from plaintiffs the sum of $5,000, payable in specified installments on or before April 17, 1931, for which it executed and delivered to plaintiffs its promissory note. That note provided:

"This note is secured by pledge of the following installment notes, payable to the order of the maker hereof:

Name of Maker	Date of Note	Amount
1. I. C. Shidler	May 23, 1927	$1,050.00
* * * *		
5. Helen A. Winchester	May 25, 1927	3,750.00
* * * *		
7. B. J. Galbreath	May 6, 1927	1,500.00"

The foregoing members, who are the only appellants, executed and delivered to the corporation their said notes, payable in installments, upon the respective dates mentioned. The notes were executed and held as pledges to secure the payment of said $5,000 note. The corporation defaulted in payments of its said $5,000 note, and in 1930 it filed a petition in voluntary bankruptcy. Each of the makers of said security notes was in default of payments as required therein. December 29, 1933, plaintiffs brought this suit upon all of said notes for the unpaid portions thereof. The court adopted findings against the defendants upon all essential issues, and rendered judgment against these appellants for the unpaid principal and interest of their surety notes as follows: Shidler for the sum of $820.57; Winchester for the sum of $6,253.31 and Galbreath for the sum of $1,995.50. From that portion of the judgment said defendants have appealed.

[1] It is harmless that the court, in Finding XVII, inadvertently stated that "plaintiffs are not holders in due course of said collateral notes," since in the same finding the court determined that plaintiffs purchased and held the notes "in good faith and for value and without notice of any equity or defense in favor of defendants," and that, at the time plaintiffs acquired the notes, the payee corporation held proceeds from sales of fruit belonging to each defendant, sufficient to pay the installments then due, which proceeds the corporation was required, under its marketing agreement with defendants, to credit to the payment of such installments. Since the judgment and the findings as a whole were favorable to the plaintiffs, the preceding finding should be construed to determine that plaintiffs held the notes in due course free from any defect of title of prior parties, and free from defenses available to prior parties among themselves. In other language, the effect of the preceding finding is that the court determined that the installments which were due before plaintiffs purchased the notes had been fully paid, according to agreement, from the proceeds of fruit delivered by the defendants to the corporation. As so construed, the finding is adequately supported by the evidence.

The plaintiffs were holders of the notes in due course.

Section 3133 of the Civil Code provides in part:

"A holder in due course is a holder who has taken the instrument under the following conditions:

* * * * *

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

[2] The court specifically found that plaintiffs took the instruments in good faith for valuable consideration, and without notice of any alleged infirmity or defect of title or otherwise. That finding is supported by the evidence.

The notes of appellants were dated in May, 1927, and payable in annual specified installments. No defect or infirmity appeared on the face of any of said notes. They were sold and transferred to plaintiffs for valuable consideration, without notice of alleged infirmity or defect, on April 17, 1928. Every holder of a note is deemed prima facie to be a holder in due course. Sec. 3140, Civ.Code. The evidence shows, as the court found, that plaintiffs owned and held each note "before it was overdue", and before any installment thereof was overdue. In their second amended answer the defendants alleged that "the entire amounts, * * * due as principal and interest * * * have been and are fully paid." No installment on any note was due until January 2, 1928. No installment on any such note exceeded the sum of $500. Prior to that date, appellants delivered to the corporation, pursuant to their agreements, their crops for 1927, for which each was credited an amount in excess of the installment due in January, 1928. The evidence shows and the court found that said sums were to be applied and credited upon installments which became due, in full satisfaction thereof. In support of that finding, Ralph G. Spencer, employed by the growers as Director of Agricultural Relations, testified:

"The title to the fruit itself had passed [to the corporation] with the delivery. Their contract.

"Q. That was my understanding. A. Yes, by contract. * * *

"The Court: But at the same time he [it] gave them credit for it as though it were cash? A. Yes, we had to."

We conclude from the record that the corporation credited the makers of the notes with payments in full of the installments which became due January 2, 1928, by application of the funds in its hands according to agreement, and that no installment was overdue on April 17, 1928, when the notes were transferred to plaintiffs. As a maxim it is declared in Section 3529 of the Civil Code, "That which ought to have been done is to be regarded as done." The plaintiffs therefore purchased and held the notes "in due course."

[3] Assuming, as we have previously determined, that the plaintiffs held the notes in due course, these defenses relied upon by the appellants were ineffectual. Although the court adopted findings against the appellants upon the issue of fraud and several other defenses, it will be unnecessary for us to determine whether such findings are adequately supported by the evidence, although they appear to be so supported.

The defenses of fraud and failure of consideration on the part of the corporation were not available to the defendants since the plaintiffs were holders of the notes in due course. Section 3138 of the Civil Code provides that:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

[4] Against one who holds a negotiable instrument in due course, the burden is on the person who claims a lack of title or other defect to prove that it was acquired with notice of the defect. Allenberg v. Rapken & Co., Ltd., 108 Cal.App. 99, 291 P. 281; Sec. 3140, C.C.; 19 Cal.Jur. 1038, Sec. 176.

Fraud is not a valid defense to a suit on a promissory note by the bona fide holder thereof in due course. American National Bank of San Francisco v. Wheeler, 45 Cal. App. 118, 187 P. 128; 10 C.J.S., Bills and Notes, p. 1097, § 499.

Failure of consideration is no defense against the holder of a promissory note in due course. Robb v. Cardoza, 127 Cal. App. 588, 592, 16 P.2d 325; Sec. 3109, C. C.; 10 C.J.S., Bills and Notes, p. 1146, § 520.

[5] A valid delivery of a note in the hands of a holder thereof in due course is conclusively presumed. Sec. 3097, Civ. Code; Baker v. Butcher, 106 Cal.App. 358, 367, 289 P. 236. The alleged conditional delivery of the notes to the effect that they were to be held by the corporation only as security for the faithful performance by defendants of their agreement to deliver the produce of their farms to the corporation for processing and marketing, is not available as a defense in this action in the absence of proof that plaintiffs had knowledge of that fact, even if it be true. Tischhauser v. Prentice, 30 Cal.App. 699, 159 P. 226; 10 C.J.S., Bills and Notes, p. 518, § 79. In the present case the issue regarding a conditional delivery or validity of the notes was determined against the appellants. That finding is adequately supported by the evidence.

[6] The appellants were not prejudiced by striking out the testimony of Alden Anderson, President of the Capital National Bank. Mr. Anderson testified that the bank loaned the corporation $5,000 April 17, 1928, for which its note was given. He said "The bank loaned it." He said it was loaned on the recommendation of Mr. Peltier, who personally investigated the application for a loan. Anderson said that he did attend one meeting when Mr. Campbell was present. All that Anderson recalled regarding that meeting was that the promoters of the corporation wanted to raise $50,000, "to start a new big cannery here" [in Sacramento]. He said he met Mr. Bliss later and told him the bank had agreed to loan the $5,000. Anderson said he did not recall "the gist of any other conversation * * * with Mr. Bliss." He testified that "I don't remember * * * any of the conversations * * * had with either Mrs. Hawley or Mrs. Hall with regard to this." Bliss and Hawley and Hall were among the payees named in the $5,000 note. It does not appear that the growers' notes, which are the subject of this litigation, were mentioned at the meeting attended by Mr. Anderson, or that he knew anything about those security notes.

The appellants contend that the evidence of Mr. Anderson was competent to show that Anderson was the agent of plaintiffs, who are bound by his knowledge of the alleged conditional character of the growers' notes. Anderson's evidence does not tend to show such agency. It shows just the contrary. It appears to be of no value on that issue. In fact, it appears to have little value on any issue involved in this action.

If it had any value, it appears to have been favorable to the plaintiffs. The appellants therefore may not complain of striking out Anderson's evidence.

[7] The appellants contend that the court erred in refusing to admit in evidence page 103 of the minutes of the Board of California Cooperative Producers, marked Exhibit "N" for identification, claiming that it tends to show that the defendant Shidler performed his contract and was not required to deliver fruit in 1930. The court did not refuse to admit said record of board minutes. When it was finally offered by appellants, in the absence of the stenographic reporter, the respective parties agreed that it might be received and that the court would enter a minute order to that effect which would appear in the "reporter's record." The following colloquy occurred in that regard:

"Mr. St. Clair: A minute order will satisfy me. Is that correct?

"Mr. Ford: Yes, as long as the minute order will appear in any transcript. * * *

"Mr. Bliss: It seems to me it would be better to have it go into the reporter's record.

"The Court: Well, I can call the reporter down and put it in his notes."

We must assume from the foregoing that the court did not refuse to admit in evidence the minutes of the board referred to. On the contrary, we assume those minutes were admitted in evidence.

[8] The court did not abuse its discretion in refusing to permit defendants to amend their answer, after the trial had been completed, to permit them to set up the statute of limitations with respect to certain installments of the growers' notes. The only reason assigned by appellants in their opening brief for failure to plead the statute of limitations in their second amended answer is that the omission to plead it "was overlooked by counsel in preparing an answer for all of the defendants." It may not be said as a matter of law that the court abused its discretion in denying defendants' motion to amend their answer in that respect after the evidence had been adduced, merely to enable counsel to correct their oversight or omission to plead the statute. It is not suggested how that amendment would further justice under the circumstances of this case. It has been definitely held that the discretion of the court in refusing to permit an answer to be amended to set up the statute of limitations may not be interfered with on appeal, merely to enable counsel to correct their inadvertence, unless it clearly appears that such amendment is in furtherance of justice. Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L.R.A.,N.S., 134, 20 Ann.Cas. 124; Overton v. White, 18 Cal.App.2d 567, 574, 64 P.2d 758, 65 P.2d 99.

For the reasons previously assigned, we may not hold that the court abused its discretion in refusing to permit defendants to amend their answer at the close of the trial to set up the statute of limitations provided for in Section 2911 of the Civil Code.

We have critically examined the record with respect to the assignments of alleged errors in rulings of the court with respect to the introduction of evidence at the trial, and find no substantial merit in any of them. Certainly the court committed no reversible error in any of such rulings.

Nor do we believe that the findings of the court are irreconcilably conflicting in any respect. The findings are lengthy and they unnecessarily contain many evidentiary facts which are harmless. They appear to be in accordance with the court's determination that plaintiffs were the owners and holders of the security notes in good faith for a valuable consideration without notice of any defect or equitable defense which the makers may have had as between themselves and the corporation, and that plaintiffs were therefore entitled to recover judgment for the unpaid portions thereof.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

67 Cal.App.2d 499

KERSCH v. TABER et al.

Civ. 7100.

District Court of Appeal, Third District,
California.
Jan. 11, 1945.

1. Mines and minerals 🔑97

Provision of written contract under which money was advanced to purchase mining claim, that as soon as mine was acquired party advancing money should immediately own a vested interest in mine and be entitled to one-third of net profits from mining operations disclosed that a partnership in mining enterprise was not contemplated until after title to mining claim had been acquired. Civ.Code, § 2400.

2. Partnership 🔑17

Existence of a partnership should be determined primarily by ascertaining the intention of the parties in such regard. Civ.Code, § 2400.

3. Partnership 🔑17

Whether parties to written agreement intended thereby to create a partnership should be determined chiefly from the terms of the writing. Civ.Code, § 2400.

4. Partnership 🔑1

A "partnership" is an association of two or more persons to carry on as co-owners a business for profit. Civ.Code, § 2400.

See Words and Phrases, Permanent Edition, for all other definitions of "Partnership".

5. Partnership 🔑5, 14

Ordinarily, existence of a partnership is evidenced by right of respective parties to participate in profits and losses and in the management and control of the business. Civ.Code, § 2400.

6. Appeal and error 🔑1010(1)
Partnership 🔑122

The existence of a partnership is a question to be determined by trial court from the facts and inferences adduced at trial, and trial court's conclusion in such regard will not be disturbed on appeal if its findings are supported by substantial evidence.

7. Mines and minerals 🔑97

Statute declaring existence of a mining partnership under certain circumstances did not create such a partnership between parties to written agreement under which money was advanced to purchase a mining claim, where parties never actually acquired the mine, and party advancing money did not actually engage in working the claim. St.1939, p. 1085, § 2351.

8. Mines and minerals 🔑97

Evidence sustained finding that parties to written contract which provided for the advance of money to holders of lease and option to be used exclusively in purchasing mining claim and that as soon as mine was acquired party advancing money should own a vested interest therein and be entitled to one-sixth of net profits of mining operations did not intend presently to create a partnership in mining property. Civ.Code, § 2400.

9. Money received 🔑6(6)

Where written contract under which money was advanced to holders of lease and option to be used exclusively in purchasing mining claim did not specify time within which property was to be acquired, 14 months was a reasonable time within which holders of lease and option were authorized to purchase the property, and where they failed to do so or to make any effort to procure title, but instead converted the funds to their own use, party advancing the money was entitled to judgment therefor.

10. Contracts 🔑212(2)

Where time for performance of contract is omitted therefrom, the law implies that a reasonable time for compliance shall be allowed.

11. Contracts 🔑212(1)

The situation of the parties, nature of transaction and circumstances of the particular case should be considered in determining what would be a reasonable time for performance of a contract.

12. Vendor and purchaser 🔑78

Contracts to purchase real property come within an exception to the rule that time is not of the essence of an ordinary contract where the character of the property to be purchased renders it liable to fluctuations in value.

13. Mines and minerals 🔑54(2)

Time is of the essence of a contract for the purchase of mining property, regardless of whether contract so specifies.

14. Action ⚷28

Where goods are taken and wrongfully converted to one's own use, the owner may waive the tort and sue in assumpsit for recovery of the value thereof.

15. Money received ⚷18(3)

Conflicting evidence sustained trial court's finding that plaintiff had not orally agreed to waive provision in written agreement that money advanced by him was to be used exclusively for acquiring title to mining claim.

◆

Appeal from Superior Court, Siskiyou County; James M. Allen, Judge.

Suit in assumpsit by John Kersch against Roy I. Taber and others, to recover money advanced to defendants to be used to purchase from the owners a specified mining claim. Judgment for plaintiff, and named defendant appeals.

Judgment affirmed.

L. N. Lorenzen, of Mt. Shasta, for appellant.

C. J. Luttrell and Floyd Merrill, both of Yreka, for respondent.

THOMPSON, Justice.

The plaintiff brought suit in assumpsit for repayment of $1,500 advanced to defendants upon a written contract to purchase from the owners a specified mining claim in Siskiyou County. The contract provided that said money was to be used for the "purchase of said mine and for no other purpose whatsoever." The contract contained no specific limitation of time within which the mine was to be purchased. After the lapse of nearly fourteen months, during which time the defendants made no effort to acquire title to the mine, and after notice of said breach of contract, this suit was commenced. The defendants answered the complaint, admitting the execution of said written contract and receipt of said sum of $1,500 on February 4, 1942, but alleged that "said agreement * * * was and is a partnership agreement" and that they were not indebted to plaintiff for said sum, or any portion thereof. By leave of court the defendants filed an amendment to their answer alleging by way of estoppel that plaintiff subsequently waived the provision of the contract requiring said sum of money to be used for the purchase of the mine, and asserting that plaintiff requested defendants not to use the money for that purpose. The cause was tried by the court sitting without a jury. Findings were adopted favorable to the plaintiff in every respect. Judgment was rendered accordingly. From that judgment the defendant Taber, only, has appealed.

In his opening brief the appellant concedes "that the $1500.00 was to be used for the full purchase price of the mine"; that "the funds advanced by Mr. Kersch were not used in the purchase of the mine," but "were used for the purpose of paying certain creditors of Major White," the original lessee of the mine. As grounds for reversal of the judgment the appellant contends that since the contract is silent with respect to the time within which the mine was to be purchased the law allows a reasonable time for performance, and that it is unreasonable to hold that the lapse of fourteen months constitutes a breach of the contract. It is also asserted the judgment is not supported by the evidence for the reason that said payment of $1,500 was a contribution to a partnership interest in the mining enterprise, and not a mere advancement of funds for the exclusive purpose of purchasing the mining property.

It appears that Fidelity Metals Corporation, a Nevada corporation, owned the "Schroeder Mine" in Siskiyou County, which, on May 18, 1939, was leased to Major H. A. White for mining purposes, with an option to purchase it for the sum of $75,000. That lease and option was assigned to George C. Phares, one of the defendants in this action, on January 30, 1942. The consideration for that assignment was the agreement to pay to White the sum of $8,000, as follows: $1,150 cash; $500 on February 14, 1942; $1,350 on July 30, 1942; $2,000 on October 30, 1942, and the remaining $3,000 in royalties to be paid monthly at a specified rate. Mr. Phares took possession and operated the mine for a short period of time. Mr. White testified, "They carried on for about three months." February 4, 1942, the defendants, Phares, Denning and Taber, executed with plaintiff the written agreement to purchase the mining claim, in consideration for the advancement of the sum of $1,500, which is the subject of this litigation. We assume that Denning and Taber were jointly interested with Mr. Phares in the assignment of lease from White. The agreement, upon the terms of which plaintiff advanced said $1,500 to the defendants, provides in part:

"Whereas, Roy I. Taber, George C. Phares and Dan C. Denning, parties of the first part, are the purchasers of, *or are about to become the owners of a certain mine,* mining equipment and improvements in that certain mine situated in the County of Siskiyou, State of California, commonly known and designated as the Schroeder Mine.

"And whereas, it is the desire of John Kersch, of Yreka, Siskiyou County, California, party of the second part, to become a co-purchaser in said mine and to participate in the profits to be derived from the operations of said mine,

"Now therefore, in consideration of the sum of $1500.00 Dollars, the receipt whereof is hereby acknowledged, advanced by the party of the second part to the parties of the first part, *it is hereby agreed that said sum of 1500.00 Dollars is to be used for the purpose of acquiring said mine.*

"It is further agreed and understood that as soon as said mine is acquired in the name or names of either or all of them, *the party of the second part is to immediately have and own a vested interest in said mine and shall be entitled * * * to receive henceforth after said purchase one-sixth (1/6) of all net profits from said operations* from whatever source derived and from all ore extracted.

"It is further agreed that an exact and true accounting shall at all times be kept and the profits to which the party of the second part is entitled shall be paid monthly.

"It is further agreed and understood that the money so advanced by the party of the second part shall be used for the said specified purchase of said mine and for no other purposes whatsoever." (Italics added.)

Mr. Phares defaulted in his payments to White according to the terms of his assigned lease. White gave him a thirty day notice to terminate his assigned lease. Labor claims incurred by White prior to his assignment aggregating some $4,500 had not been paid. When the plaintiff paid defendants the $1,500, instead of using it to purchase the mining property according to the terms of the preceding contract, they converted about $1,300 of that amount to payment of the labor claims owed by Mr. White. The defendants abandoned the mining claim. The mine was sold to the State for delinquent taxes. They made no effort to procure title to the mine. After the lapse of about a year this suit in assumpsit was commenced to recover the money advanced with which to purchase the mine.

The findings and judgment are adequately supported by the evidence. The court specifically determined that plaintiff advanced said sum of $1,500 to the defendants "for the purpose of purchasing and acquiring that certain mine * * * designated as the Schroeder Mine, and for no other purpose or purposes whatsoever." While there is conflicting evidence regarding the exclusive purpose for which the money was advanced, the clear language of the written agreement under which the money was advanced supports that finding. The court further finds that the defendants failed to use said sum or any portion thereof to purchase the mine, and upon the contrary that they converted the money and the whole thereof to their own use and benefit and failed to purchase the mine; that said money was not advanced as payment for a partnership interest in the mining enterprise, and that plaintiff is not a partner in that enterprise.

[1-6] It will be observed the language of the agreement clearly provides that "the money so advanced * * * shall be used for the said specified purchase of said mine *and for no other purposes whatsoever."* It further declares that plaintiff shall "own a vested interest in said mine" only *"as soon as said mine is acquired,"* and that plaintiff shall be entitled to "one-sixth (1/6) of all net profits from said operations," only after title to the mine has been acquired. The testimony of the plaintiff corroborates that construction of the agreement. It follows that the money was advanced for the limited specified purpose of purchasing the mine and not otherwise, and that a partnership in the mining enterprise was not contemplated by the parties until after the title had been acquired. Prior to the purchase of the mine and the acquiring of title thereto, the plaintiff had no interest in the property and no right to participate in the management or control of the mining operations, or to participate in the proceeds thereof. The question of the existence of a partnership between the parties thereto should be determined primarily by ascertaining the intention of the parties in that regard. Where the respective parties have entered into a written agreement, the intention of the parties should be determined chiefly from the terms of the writing. De Rigne v. Hart, 94 Cal.App. 209, 270 P. 1013; 20 Cal.Jur. 686, sec. 7. A partnership is an association of two or more persons to carry on as co-owners a business for profit. Sec. 2400, Civil Code. Ordinarily the existence of a partnership is evidenced by the right of the respective parties to participate in profits and losses and in the management and control of the business. Black v. Brundige, 125 Cal.App. 641, 13 P.2d 999; Smith v. Grove, 47 Cal.App.2d 456, 118 P.2d 324; Martin v. Sharp & Fellows Cont. Co., 34 Cal.App. 584, 168 P. 373; 20 Cal.Jur. 689, sec. 9. The plaintiff in this case had no participation nor right to share in the management of the mining operations or the proceeds therefrom until after title to the mine had been procured. The court so found. The question as to whether a partnership exists is a problem for determination of the trial court from the facts and inferences adduced at the trial. Spier v. Lang, 4 Cal.2d 711, 716, 53 P.2d 138; Oscar Krenz Copper & Brass Works, Inc. v. England, 109 Cal.App. 747, 751, 293 P. 689. Its conclusion in that regard will not be interfered with on appeal when there is substantial evidence to support the court's findings. In the Spier case, supra, which was a suit to recover the value of materials furnished defendants under a written contract for use in an oil drilling enterprise, and in which the other defendants paid Lang amounts under the contract ranging from $100 to $15,000 entitling them to receive 16⅔% of the proceeds from the wells, the judgment holding that they were not partners was affirmed on appeal. The Supreme Court said [4 Cal.2d 711, 53 P.2d 140]:

> "The defendants did not participate in the conduct or management of the business of drilling the wells * * *. The court could fairly conclude from the evidence that none of the defendants was ever on the ground for any such purpose and that plaintiffs did not deliver materials on the faith of the defendants' personal credit. The question whether a partnership or the relation of joint adventurers was created was primarily a question for the trial court to determine from the facts and the inferences to be drawn therefrom. * * *
>
> "The main reliance of the plaintiffs is on the provision of the contract that the defendants were to share in a division of the profits. But this feature of the agreement has long been held not to require a conclusion that a partnership relation existed where also there was no joint participation in the management and control of the business, and the proposed profit-sharing was contemplated only as compensation or interest for the use of the money advanced." (Citing authorities.)

In the present case the written agreement refutes the appellants' theory that the money was advanced to purchase a partnership interest in the mining enterprise. The contract provided that plaintiff was entitled to share in the net proceeds only *after title had been acquired.*

[7] In this case the parties did not actually acquire the mining property, nor did the plaintiff "actually engage in working the claim." Section 2351 of the Public Resources Code, St.1939, p. 1085, provides that: "A mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom *actually engage in working the claim.*"

The plaintiff did not participate in working the claim.

[8] We conclude that it was not the intention of the parties presently to create a partnership in the mining property or that the advancing of the $1,500 should create that relationship. The findings and judgment are therefore supported by the evidence in that regard.

The remaining question to be determined, which is chiefly relied upon by the appellant, is whether, in the absence of a specific limitation of time in the written agreement within which the property was to be acquired, the lapse of about fourteen months is an unreasonable limitation of time within which title to the mine should be acquired under the circumstances of this case.

[9] We conclude that fourteen months was a reasonable time within which defendants were authorized to purchase the property; that they breached the contract in that regard and converted the funds to their own use, utterly failing to take steps to procure title to the mining property and that plaintiff is therefore entitled to judgment for recovery of his money.

[10, 11] When the time for performance of a contract is omitted from the contract, the law implies that a reasonable time for compliance shall be allowed. Anderson v. Van Camp Sea Food Co., Inc., 98 Cal. App. 787, 793, 277 P. 1099; 6 Cal.Jur. 346, sec. 207. In determining what period of time would be reasonable, the situation of the parties, the nature of the transaction and the circumstances of the particular case should be taken into consideration. (6 R.C.L. 896, sec. 283.)

[12] In 2 Lindley on Mines, 2d Ed., page 1569, section 859, it is said with relation to what constitutes a reasonable time within which to purchase real property that *an exception to the rule* that time is not of the essence of an ordinary contract "is well recognized where the character of the property renders it liable to fluctuations in value." Quoting with approval from Taylor v. Longworth, 14 Pet. 172, 174, 10 L.Ed. 405, Mr. Lindley says at page 1570: "'In respect to mineral property, it has been said that it requires, and of all properties perhaps the most, the parties interested in it to be vigilant and active in asserting their rights."

The preceding text concludes with the statement that: "The necessity for a strict adherence to the rule that in all contracts for the purchase of mines time is of the essence is apparent."

[13] To the same effect it is said in numerous authorities with respect to agreements for the purchase of mining property that time is of the essence of the contract whether it so specifies or not. Skookum Oil Co. v. Thomas, 162 Cal. 539, 546, 123 P. 363; Grotefend v. May, 33 Cal.App. 321, 328, 165 P. 27. In the case last cited it is said in that regard, quoting with approval from Waterman v. Banks, 144 U.S. 394, 12 S.Ct. 646, 36 L.Ed. 479:

"'Time may become of the essence of a contract for the sale of property, not only by the express stipulation of the parties, but from the very nature of the property itself; mineral property requires the parties interested in it to be vigilant and active in asserting their rights.' * * * The reason of this rule is that mining property is of that peculiar character that it is subject to frequent, sudden, or great fluctuation in value, and to permit an advantage to be gained or great loss to be suffered by long and unreasonable delay in demanding a conveyance or the money stipulated to be paid for such land would constitute the transaction an unconscientious one.

* * * * * *

"If, then, it was his intention or desire to secure the conveyance, he should have been active and vigilant in the matter of the enforcement of his rights thereunder and not have been guilty of that procrastination or inaction or passiveness which will be held to constitute acquiescence in the breach of a contract of this character or to raise the presumption of the abandonment thereof." [33 Cal.App. 321, 165 P. 30.]

[14] In the case of Roberts v. Evans, 43 Cal. 380, it was held that an offer to sell property, in which no time for performance was expressed, must be promptly accepted and that the lapse of one year or even six months must be held, as a matter of law, to be an unreasonable time. In the last-cited case it was also held that when goods are taken and wrongfully converted to one's own use, the owner may waive the tort and sue in assumpsit for recovery of the value thereof.

[15] The question as to whether plaintiff subsequently orally agreed to waive the provision in the written agreement that the money advanced by him was to be used exclusively for the purchasing of title to mining property was determined adversely to the defendants. While there is a conflict of evidence in that regard, there is adequate proof that the plaintiff did not waive that provision. He so testified.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.